IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 082270

KENNETH L. SINGLETON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

On September 12, 2007, attorney Kenneth L. Singleton was held in summary contempt of court, a violation of Virginia Code § 18.2-456, by the Circuit Court for the City of Norfolk. The court imposed a fine of $250.

Singleton appealed the circuit court's judgment to the Court of Appeals of Virginia. In his petition for appeal, Singleton contended that the trial court erred in finding him in summary criminal contempt. The Court of

Appeals granted his petition; on October 7, 2008, the Court issued a published opinion, affirming the judgment of the circuit court. The Court held the evidence was sufficient to prove contemptuous intent. The Court also ruled that Singleton's argument relating to the summary contempt procedure employed by the trial court was procedurally defaulted under Rule 5A:18. Singleton v. Commonwealth, 52 Va. App. 665, 667 S.E.2d 23 (2008).

This Court, by Order dated April 17, 2009, granted Singleton's petition for appeal and denied the Commonwealth's assignments of cross-error.[1]

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED BY HOLDING SINGLETON IN CRIMINAL CONTEMPT OF COURT WHERE THERE WAS NO EVIDENCE OF ANY INTENTION TO OBSTRUCT OR INTERRUPT THE ADMINISTRATION OF JUSTICE.

[1] The Commonwealth assigned cross-error in its brief in opposition filed in this Court on December 10, 2008. The assignments of cross-error were: (1) The Court of Appeals erred when it failed to hold that Singleton had defaulted his challenge to the sufficiency of the evidence under the contemporaneous objection Rule 5A:18 and (2) The Court of Appeals should have held in the alternative that summary contempt was the proper proceeding in this case.

II. THE TRIAL COURT ERRED BY HOLDING SINGLETON IN SUMMARY CONTEMPT FOR CONDUCT THAT DID NOT OCCUR EXCLUSIVELY IN THE PRESENCE OF THE COURT OR SO NEAR THERETO AS TO JUSTIFY INVOCATION OF SUMMARY CONTEMPT.

III. THE COURT OF APPEALS ERRED BY AFFIRMING SINGLETON'S CONVICTION, HOLDING BOTH THAT THE EVIDENCE WAS SUFFICIENT AND THAT SINGLETON FAILED TO PRESERVE HIS DUE PROCESS OBJECTIONS TO THE TRIAL COURT'S FINDING OF SUMMARY CONTEMPT.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY FINDING THE EVIDENCE WAS SUFFICIENT TO PROVE CONTEMPTUOUS INTENT?

II. DID THE COURT OF APPEALS ERR BY FINDING SINGLETON'S ARGUMENT REGARDING SUMMARY CONTEMPT WAS PROCEDURALLY DEFAULTED UNDER RULE 5A:18?

STATEMENT OF FACTS

The "Written Statement of Facts Not Transcribed," agreed to by the parties, states:

> Attorney Kenneth Singleton was retained to represent Darrell Simpson in a driving under the influence appeal in Norfolk Circuit Court. The matter was originally set for trial on August 30, 2007. Mr. Singleton's office contacted Waverly W. Jones, Jr., the prosecutor assigned to the case, in order to obtain a continuance. Mr. Jones agreed to the continuance and prepared a continuance order.

> A new date of September 27, 2007, was agreed upon. Mr. Jones called off his witness in the case. Mr. Singleton met with Mr. Jones on August 28, 2007, and both signed the continuance order. At Mr. Singleton's direction, Mr. Singleton's office then contacted Mr. Simpson by phone and told him that he did not need to appear in court on August 30, 2007.
>
> On August 30, 2007, Mr. Jones appeared in front of Judge Charles D. Griffith, Jr., of the Norfolk Circuit Court. Mr. Jones offered the continuance order to Judge Griffith, who rejected the order in light of the fact that neither Mr. Simpson nor Mr. Singleton was present.
>
> On September 12, 2007, Judge Griffith held Mr. Singleton in contempt of court. (A transcript of the September 12, 2007, hearing has been previously filed with the court.)

(App. 10).

At the hearing on September 12, 2007, Singleton acknowledged to Judge Griffith that he, through his secretary, had informed his client not to appear for the trial on August 30, 2007. (App. 3-4). When the trial court asked Singleton what authority he had to excuse his client from court without a court order, Singleton responded, "None, Your Honor." (App. 3). The trial court then summarily held Singleton in contempt of court and fined him $250. (App. 3). The trial court stated, "To excuse someone from court, . . . you can't just sign off on a piece of paper and not know that a judge

has entered the order, and then not show up or tell your client not to show up. Can I be any clearer than that?" (App. 6).

The trial court entered an order on September 13, 2007, finding Singleton guilty of contempt of court pursuant to Virginia Code § 18.2-456. The order states as its finding:

> Intentional interference with administration of justice by willfully and knowingly failing to appear for a court appearance without prior court approval and further advising his client not to appear resulting in an arrest warrant being issued for the client's arrest.

(App. 9).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE EVIDENCE WAS SUFFICIENT TO PROVE CONTEMPTUOUS INTENT.

Singleton argues that the trial court erred in holding him in criminal contempt of court because there is no evidence that he intended to obstruct or interrupt the administration of justice. The Court of Appeals correctly found, however, that the evidence was sufficient to support the trial court's finding that Singleton was guilty of criminal contempt.

Under the appropriate standard of review, an appellate court should not substitute its judgment for that of the trier of fact when reviewing a sufficiency claim. Cable v. Commonwealth, 243 Va. 236, 239, 415 S.E.2d

218, 220 (1992). This Court must "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom." Parks v. Commonwealth, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980) (emphasis and citation omitted); see also Molina v. Commonwealth, 272 Va. 666, 671, 636 S.E.2d 470, 473 (2006).

Under Virginia law, contempt is defined as "'an act in disrespect of the court or its processes, or which obstructs the administration of justice, or tends to bring the court into disrepute.' 4A Michie's Jurisprudence Contempt § 2 (Repl. Vol. 1983)." Robinson v. Commonwealth, 41 Va. App. 137, 142-43, 583 S.E.2d 60, 63 (2003). A court's inherent power to punish for contempt arises from "'the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Nusbaum v. Berlin, 273 Va. 385, 399, 641 S.E.2d 494, 501 (2007). As the Court of Appeals stated in this case:

> When it sets a trial date, a court implicitly orders counsel of record to appear on the date and at the time scheduled. If the attorney appears late and delays the court's proceedings without a legitimate excuse, the trial court has the discretion to employ its inherent contempt powers to punish the tardiness.

(App. 15).

Here, Singleton ***failed to appear*** and was held in contempt of court in violation of Virginia Code § 18.2-456 for

> [i]ntentional interference with administration of justice by willfully and knowingly failing to appear for a court appearance without prior court approval and further advising his client not to appear resulting in an arrest warrant being issued for the client's arrest.

(App. 9). Singleton argues there is no evidence he possessed the requisite intent to obstruct or interrupt the administration of justice. However, the Court of Appeals correctly found the evidence sufficient.

Singleton knowingly instructed his client not to appear for trial. Additionally, he did not appear himself to present his own continuance motion to the court, nor did he advise the court in advance of his intention. Singleton simply assumed the court would enter the agreed continuance order. The Court of Appeals correctly found that Singleton's "explanation falls short of establishing a 'legitimate reason'" for his conduct. (App. 15).

Whether a continuance should be granted rests within the sound discretion of the trial court. Cardwell v. Commonwealth, 248 Va. 501, 508, 450 S.E.2d 146, 151 (1994). The trial court has the "inherent authority to administer cases on its docket." Yarbrough v. Commonwealth, 258 Va. 347, 361, 519 S.E.2d 602, 608 (1999).

By presuming the trial court would enter an agreed continuance order and telling Simpson he did not need to appear for his trial, Singleton ignored the boundaries of his authority and duties as an officer of the court and impinged upon the court's "opportunity to exercise [its] discretion." (App. 16). In essence, Singleton informed the trial court how it would rule and how it must manage its own docket. Singleton's intent to interfere with the administration of justice may be inferred from his presumptuous, disrespectful behavior. (App. 16).

Singleton's actions in rescheduling a case for trial and instructing his client to not appear, thus ignoring a standing order of the court, obviously were intentional and knowing. Therefore, the trial court did not err in finding Singleton in criminal contempt of court and the Court of Appeals did not err in affirming his conviction.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT SINGLETON'S ARGUMENT REGARDING SUMMARY CONTEMPT WAS PROCEDURALLY DEFAULTED UNDER RULE 5A:18.

Singleton argues the trial court wrongly held him in summary contempt and that the Court of Appeals erred in finding this claim was procedurally barred pursuant to Rule 5A:18. Singleton also urges this

Court to review this issue under the "good cause" or "ends of justice" exceptions to Rule 5:25.

As the Court of Appeals properly found, Rule 5A:18 barred its consideration of the issue of summary contempt. (App. 17-18). The Court of Appeals declined to invoke *sua sponte* either exception to Rule 5A:18 because Singleton had not argued in his brief that an exception applied. See Widdifield v. Commonwealth, 43 Va. App. 559, 562-63, 600 S.E.2d 159, 161-62 (2004) (en banc) (in a revocation proceeding in which the trial court ruled the defendant was not entitled to credit for twelve months she previously served in jail as a condition of the suspension of a two-year prison sentence, during which defense counsel said first, "I understand," and then said, without elaboration, "I'm not sure that's how it works," holding counsel's remarks did not make clear what relief, *if any*, counsel desired and, thus, "[a]ppellant failed to state an objection 'together with the grounds therefor' at the time of the ruling").

The Court of Appeals further rejected Singleton's assertion at oral argument that his failure to object at trial should be excused because he had had no opportunity to object then. Citing Nusbaum, the Court determined the trial court had not "prevented [him] from voicing objections in open court." (App. 18).

Accordingly, Singleton's reliance on Virginia Code § 8.01-384 as authority to excuse his procedural default is misplaced. Because Singleton did not raise at trial the same arguments he made on appeal, his claim that his contempt proceeding should have been characterized as plenary rather than summary is barred by both Rule 5A:18 and Rule 5:25. See Nusbaum, 273 Va. at 403, 641 S.E.2d at 504.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On June 16, 2009, the required number of copies of this brief were hand-delivered to the Clerk of this Court, one electronic copy of the Brief was sent by email to the Clerk at scvbriefs@courts.state.va.us, and three copies were mailed to Thomas B. Shuttleworth, Esquire and Charles B. Lustig, Esquire, Shuttleworth, Ruloff, Swain, Haddad & Morecock, 4525 South Boulevard, Suite 300, Virginia Beach, Virginia 23452, counsel for the appellant.

_____
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