IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090012

GORDON ANDREW ZEDD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

On October 2, 2007, attorney Gordon Andrew Zedd 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 $50.

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

his petition; on December 2, 2008, the Court issued an unpublished opinion, affirming the judgment of the circuit court. The Court held the case was controlled by the holding in Singleton v. Commonwealth, 52 Va. App. 665, 667 S.E.2d 23 (2008), appeal docketed, No. 082270 (Apr. 17, 2009). Pursuant to Singleton, the Court found the evidence was sufficient to prove contemptuous intent. The Court also ruled that Zedd's argument relating to the summary contempt procedure employed by the trial court was procedurally defaulted under Rule 5A:18. (App. 9-11).

This Court, by Order dated May 6, 2009, granted Zedd's petition for appeal and denied the Commonwealth's assignments of cross-error.[1]

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED BY HOLDING ZEDD IN CRIMINAL CONTEMPT OF COURT WHERE THERE WAS INSUFFICIENT 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 January 8, 2009. The assignments of cross-error were: (1) the Court of Appeals erred when it failed to hold that Zedd 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 ZEDD 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 ZEDD'S CONVICTION, HOLDING BOTH THAT THE EVIDENCE WAS SUFFICIENT AND THAT ZEDD 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 ZEDD'S ARGUMENT REGARDING SUMMARY CONTEMPT WAS PROCEDURALLY DEFAULTED UNDER RULE 5A:18?

STATEMENT OF FACTS

The "Written Statement of Facts Not Transcribed" states:

> Attorney Gordon A. Zedd was retained to represent Kiwani Scott in a Reckless Driving appeal in Norfolk Circuit Court. The matter was set for trial on October 2, 2007. On October 1, 2007, Mr. Zedd contacted Tanja Korpi, the prosecutor assigned to the case, in order to obtain a continuance as he had a scheduling conflict the next day. Ms. Korpi agreed to a joint continuance because the state trooper assigned to the case was unavailable due to a death in his family. A new date of November 6, 2007 was agreed to by the parties. At some point between this conversation and the trial set for the

> following morning, Mr. Zedd advised his client that she need not appear in court the next day. The attorneys did not seek or obtain prior approval from a Norfolk Circuit Court judge for the continuance request.
>
> Mr. Zedd and Ms. Korpi appeared in court the next day without having an approved continuance order. A signed, agreed joint continuance order was submitted to the Court. Judge Griffith asked Mr. Zedd about the whereabouts of his client. Mr. Zedd stated he had excused his client knowing that no judge had approved the continuance request, but that his client would appear on the next date. Mr. Zedd's verbal response to Judge Griffith mentioned the unavailability of the state trooper and the Commonwealth's inability to proceed, but did not indicate that he (Mr. Zedd) was asking for a continuance as well. Ms. Korpi then highlighted that this was a joint motion, due to a mutual inability to proceed. Mr. Zedd acknowledged that he had no authority to excuse his client absent judicial approval to do so. The Court held Mr. Zedd in contempt of court for excusing his client from court without judicial approval. Mr. Zedd was processed and fined $50.00.

(App. 4-5). The trial court entered an order on February 28, 2008, finding the defendant guilty of contempt of court pursuant to Virginia Code § 18.2-456. (App. 8).

ARGUMENT

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

Zedd 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 held, however, that the evidence was sufficient to support the trial court's finding that Singleton was guilty of criminal contempt.

Under the well-settled standard of review, an appellate court may 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." Robinson v. Commonwealth, 41 Va. App. 137, 142-43, 583 S.E.2d 60, 63 (2003) (citation omitted). 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). Here, the Court of Appeals held that the

issues raised in Zedd's appeal are identical to those addressed in Singleton.

> In [Singleton], we held that "[b]y not showing up for trial and advising his client to do the same, Singleton undermined the trial court's authority in a manner warranting the sanction of contempt of court." [Singleton], [52 Va. App.] at 671, 667 S.E.2d at 26.

(App. 11).

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

Zedd does not dispute that he knowingly instructed his client not to appear for trial, but he argues that unlike Singleton, he appeared in court. The Court of Appeals correctly concluded this circumstance did not distinguish this case from Singleton, noting

> "that [t]hough it is often said that 'the question of continuances rests in the sound discretion of the trial court,' Singleton's conduct deprived the court of the opportunity to exercise that judicial discretion." [Singleton, 52 Va. App.] at 670, 667 S.E.2d at 25 (internal citations omitted). Zedd's conduct had the same result.

(App. 11).

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 Scott he did not need to appear for his trial, Zedd 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." Singleton, 52 Va. App. at 670, 667 S.E.2d at 25. In essence, Zedd dictated to the trial court how it would rule and how it must manage its own docket. Zedd's intent to interfere with the administration of justice could be inferred from his presumptuous, disrespectful behavior. Id. at 670-71, 667 S.E.2d at 25 (citing Robinson, 41 Va. App. at 142, 583 S.E.2d at 63).

Zedd's actions in rescheduling a case for trial and unilaterally instructing his client not to appear, thus ignoring a standing order of the court, obviously were intentional and knowing. Therefore, the trial court rightly found Zedd in criminal contempt of court and the Court of Appeals correctly affirmed his conviction.

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

Zedd argues the trial court wrongly held him in summary contempt and that the Court of Appeals erred in ruling this claim was procedurally barred pursuant to Rule 5A:18. Zedd 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 concluded, Rule 5A:18 barred its consideration of the issue of summary contempt. (App. 11). See Widdifield v. Commonwealth, 43 Va. App. 559, 562-63, 600 S.E.2d 159, 161-62 (2004) (en banc) (holding counsel's remarks, "I understand" and "I'm not sure that's how it works," 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 Zedd's assertion at oral argument that his failure to object at trial should be excused because he had had no opportunity to object then. (App. 11, n.2).

Additionally, the Court was not persuaded by Zedd's reliance on Virginia Code § 8.01-384 as authority to excuse his failure to raise the issue at trial. The Court determined that "Zedd, who we note is an

attorney, offered no reason why such objection could not have been made, either before the trial court or in a subsequent motion to set aside the verdict. Accordingly, we are not persuaded by this argument." (App. 11, n.2). Because Zedd 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 July 6, 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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