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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 22, 2023 Session

JANETTE C. GATES v. HANS M. SWITZER

**Appeal from the Circuit Court for Davidson County
No. 19D-702 Phillip R. Robinson, Judge**

No. M2021-01552-COA-R3-CV

During the pendency of a divorce, Wife was convicted of one count of criminal contempt. Wife filed a notice of appeal subsequent to this conviction. Before Wife's initial appeal was heard, the trial court entered its order granting the parties a divorce. Wife filed another notice of appeal challenging the outcome of the divorce. We consolidated the respective appeals, and now, upon our review, we affirm the judgment of the trial court in both the contempt and divorce proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed and Remanded**

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which KENNY ARMSTRONG and CARMA DENNIS MCGEE, JJ., joined.

Janette C. Gates, Nashville, Tennessee, Pro se.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

This consolidated appeal stems from a contentious divorce proceeding between Appellant, Janette Gates ("Wife"), and Appellee, Hans Switzer ("Husband"). As discussed later in this Opinion, we conclude that most of the issues Wife raises on appeal have been waived due to her noncompliance with applicable briefing requirements. Although an extensive examination of the facts is therefore not necessary for resolution of this appeal, a brief overview of the case's history and procedural context is helpful.

As the parties do not have any minor children, the primary focus of the divorce proceeding was on spousal support and an equitable division of the marital property. Of note, however, Husband filed a petition for criminal contempt against Wife during the

pendency of the divorce proceeding. The petition alleged that Wife was guilty of four counts of criminal contempt and averred, among other things, that Wife had violated a trial court order enjoining harassment through her communications with Husband, Husband's counsel, and the Board of Professional Responsibility of the Supreme Court of Tennessee. The petition also alleged that Wife had fabricated an emergency to compel the trial court to disburse funds.

Following a hearing, the trial court entered an order on December 8, 2021, which ultimately found Wife guilty of one count of criminal contempt. Following its entry, Wife timely filed a notice of appeal.

Subsequently, on January 10, 2022, the trial court granted the parties a divorce. In its final decree of divorce, the trial court divided the marital property pursuant to Tennessee Code Annotated section 36-4-121(c) and awarded Wife transitional alimony pursuant to Tennessee Code Annotated section 36-5-121(i). On March 3, 2022, the trial court entered a judgment adjudicating attorney's fees. Wife filed a motion to alter or amend the judgment relative to the division of marital property on March 11, 2022. The trial court initially ruled that it did not have jurisdiction to hear the issue. Wife then filed a notice of appeal as to the underlying divorce proceeding with this Court on June 8, 2022.

On July 7, 2022, this Court ordered the two appeals consolidated and, upon noting that certain motions concerning the divorce were pending before the trial court and that "those motions should be resolved," remanded for the resolution of any and all pending motions and issues. An order adjudicating Wife's motion to alter or amend was entered by the trial court on October 10, 2022, at which point the divorce judgment became final. This appeal followed.

ISSUES PRESENTED

Wife raises the following issues for our review:¹

1. Did the trial court judge err by denying approval of the transcripts provided by the Appellant?
2. Does the lack of a complete record and transcripts equate to a denial of Appellant's access to this Court?
3. Did the trial court judge err by denying Appellant access or participation to hearings?
4. Did the trial court err by denying Appellant's Motion to Quash subpoena for the testimony of her counsel and allowing former counsel to testify against her in the criminal contempt action?

¹ Husband did not file a brief and failed to comply with an administrative order entered by the Clerk of this Court on July 13, 2023. Pursuant to an order entered by this Court on July 26, 2023, it was ordered that the appeal would therefore be submitted "for a decision without a brief on behalf of the appellee." The order further stated that "appellee shall not be allowed to present oral argument."

5. Did the trial court judge err when hiring an attorney of its choice to represent Appellant and paying said attorney with funds determined to be her separate funds?
6. Did the trial court judge err by finding Appellant guilty of criminal contempt when the evidence was insufficient to support a finding of guilt beyond reasonable doubt?
7. Did the trial court judge err by failing to act as a neutral trier of fact?
8. Did the trial court judge err by failing to dismiss the petition for criminal contempt as being brought for an improper purpose?
9. Did the trial court err in failing to bifurcate the proceedings and not permitting argument or presentencing argument in a criminal contempt proceeding?
10. Did the trial court err in not classifying property and liabilities as marital or separate, valuing any property or making an equitable division of the same?
11. Did the trial court err in excluding Appellant's expert witness?
12. Did the trial court err in not performing a proper analysis regarding alimony determination?
13. Did the trial court err in having *ex parte* communications with opposing counsel?
14. Did the trial court err in making findings which were not supported by the testimony or evidence?
15. Did the trial court err in awarding attorney's fees to a third party and not allowing Appellant the opportunity to examine said attorney regarding the reasonableness of the same?

DISCUSSION

As an initial matter, we note that our ability to conduct appellate review of certain issues raised in relation to both the criminal contempt and the divorce is undermined by Wife's noncompliance with briefing requirements imposed by Rule 27(a) of the Tennessee Rules of Appellate Procedure ("Rule 27") and Rule 6 of the Rules of the Court of Appeals of Tennessee ("Rule 6").

Among other things, Rule 27 requires an appellant's brief to contain:

(7) An argument, which may be preceded by a summary of argument, setting forth:

(A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with **citations to the authorities** and **appropriate references to the record** (which may be quoted verbatim) relied on[.]

Tenn. R. App. P. 27(a)(7)(A) (emphasis added). Likewise, Rule 6 provides in pertinent part as follows:

(a) Written argument in regard to each issue on appeal shall contain:

(1) A statement by the appellant of the alleged erroneous action of the trial

court which raises the issue and a statement by the appellee of any action of the trial court which is relied upon to correct the alleged error, with citation to the record where the erroneous or corrective action is recorded.

(2) A statement showing how such alleged error was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded.

(3) A statement reciting wherein appellant was prejudiced by such alleged error, with citations to the record showing where the resultant prejudice is recorded.

(4) A statement of each determinative fact relied upon with citation to the record where evidence of each such fact may be found.

(b) No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

Tenn. Ct. App. R. 6. In sum, these rules place considerable emphasis on the importance of providing citations to the record whenever an appellant refers to an alleged erroneous trial court decision, potential prejudice, or material facts. If a party fails to comply with these rules, it can result in a waiver of the issue raised for review. *Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000). Indeed, “[c]ourts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue.” *Id.* In addition, an issue is waived where it is raised without any argument regarding its merits. *Id.* at 56.

Waiver

As discussed herein, Wife has waived multiple issues in this appeal due to her noncompliance with the above rules. Some of the waived issues relate to Wife's conviction of one count of criminal contempt; others relate to the disposition of the divorce itself. Although we acknowledge that Wife is proceeding pro se on these appeals and that such litigants are entitled to equal treatment from the courts, *Chiozza v. Chiozza*, 315 S.W.3d 482, 486 (Tenn. Ct. App. 2009) (citing *Hodges v. Tenn. Att'y Gen.*, 43 S.W.3d 918, 920 (Tenn. Ct. App. 2000)), pro se litigants still “must comply with the same substantive and procedural law to which represented parties must adhere.” *Id.* (citing *Hodges*, 43 S.W.3d at 920-21). We will briefly address Wife's waived issues here at the outset before turning to address any remaining issues that are not subject to waiver.

Waiver related to the Criminal Contempt Proceeding

As to issues concerning the criminal contempt proceeding, Wife's arguments on issues four, five, and nine fail to include any citations to the record and are therefore waived

pursuant to Rule 27 and Rule 6.

The argument in relation to issue seven, which concerns whether the trial court erred by failing to act as a neutral trier of fact, includes only a single citation to the record.² The citation itself concerns statements made by the trial court as it ruled on an evidentiary objection. In relation to the citation, Wife claims that the court “instructed [Husband] on elements necessary from his testimony and conducted leading examination.” Initially, inasmuch as the included citation relates to a ruling on an evidentiary objection, incidentally a ruling that was in Wife’s favor, the specific notion that the court was conducting “examination” does not appear to be accurate. In any event, a review of the cited portion of the trial transcript fails to reflect that Wife’s counsel made any objection to statements between the court and Husband’s counsel, it thus waiving the issue.³

The argument purportedly connected to issue eight concerns certain statements made by opposing counsel during the closing argument of Wife’s criminal contempt trial. Confusingly, however, the issue was styled in Wife’s “Statement of Issues” as follows: “Did the trial court judge err by failing to dismiss the petition for criminal contempt as being brought for an improper purpose?” Pursuant to Rule 27, an appellate brief must include arguments that advance “the contentions of the appellant with respect to the issues presented.” Tenn. R. App. P. 27(a)(7)(A). Here, Wife’s arguments concerning opposing counsel’s statements do not relate to her defined issue concerning whether the criminal contempt claim was “brought for an improper purpose.” As such, issue eight is waived pursuant to Rule 27. Furthermore, Wife does not cite to the record demonstrating that her counsel timely objected to opposing counsel’s statements, further waiving this issue under Rule 6.

Waiver Related to the Divorce Proceeding

As to issues related to the divorce proceeding, issues eleven, twelve, and thirteen fail to include any citations to the record and are therefore waived pursuant to Rule 27 and Rule 6. Furthermore, Wife’s issue two lacks a supporting argument section and is therefore waived pursuant to the same rules.

In Wife’s issue three, Wife claims she was denied access to hearings held on June 17, June 30, and July 27, 2021.⁴ While Wife alleges she was not present at hearings on any of these dates, Wife cites to a single order in the record to substantiate her claim. The order

² The initial grievances articulated in the argument, such as the notion that certain questions were “prohibited,” are entirely devoid of any supporting record citation.

³ Although proceeding pro se in this appeal and for significant periods during the divorce trial, Wife was represented during the criminal contempt hearing by a court-appointed attorney.

⁴ Wife categorized this issue as pertaining to her criminal contempt hearing. However, it appears that the hearings, at least with respect to the June 17 date, directly relate to the divorce proceeding and are only tangentially related to the contempt proceeding.

in question substantiates the existence of a hearing on June 17, 2021, but it does not support the existence of hearings on the other two dates. Nothing in the referenced order suggests the trial court excluded Wife from the hearing in question. As such, Wife's reference to the record is insufficient to support her argument concerning any alleged exclusion and is therefore waived pursuant to Rule 27 and Rule 6.

Raising concern with the trial court's classification and division of property, issue ten cites to a single exhibit in the record. The referenced exhibit was entered as evidence for another criminal contempt proceeding not at issue on this appeal. As a result, it cannot be considered for the purposes of assessing the division and classification of property pursuant to the final decree of divorce. Therefore, Wife's argument concerning the division and classification of marital property is waived pursuant to Rule 27 and Rule 6.

Regarding the trial court's findings of fact, issue fourteen cites to a number of statements found in the final decree of divorce. As previously discussed, Rule 27 requires the appellate brief to include "the reasons why the contentions require appellate relief." Tenn. R. App. P. 27(a)(7)(A). It is unclear how some of the complained-of findings have any ultimate bearing on any matters of consequence to the appeal; for instance, whereas Wife complains that the court made a finding that she discharged three attorneys, she insists that she only discharged one. In any event, Wife's brief is deficient inasmuch as it lacks any citations to the record in actual support of the notion that the evidence preponderates against any of the findings she highlights. Indeed, Wife's specific explanations as to why certain findings are "inaccurate" or "erroneous" are devoid of citations to the record. For this reason alone, the issue is waived for noncompliance with Rule 27.

Review of Remaining Issues

Wife's issue fifteen concerns the procedure in which the trial court awarded attorney's fees to Brooks Court Reporting Service, Inc. ("Brooks"), a non-party to the divorce action. The fees were awarded incident to the resolution of a motion filed by Brooks to quash a subpoena issued by Wife.

Despite Wife attempting to raise the award of attorney's fees to Brooks as an issue on appeal and a potential ruling by this Court on this issue clearly affecting the rights of Brooks, Wife failed to name Brooks as an appellee on her notice of appeal and further failed to provide either service of notice of her appeal or service of her brief to Brooks. Rule 3 of the Tennessee Rules of Appellate Procedure ("Rule 3") requires appellants to provide "service of the notice of appeal as provided in Rule 5." Tenn. R. App. P. 3(e). Failure to provide service is "ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal." *Id.* Rule 5 of the Tennessee Rules of Appellate Procedure ("Rule 5") requires that an appellant provide service to counsel of adverse parties or directly to unrepresented adverse parties. Tenn. R. App. P. 5. Here, though Brooks was styled as a non-party in the divorce proceeding, its interest in the award

of attorney's fees is being directly challenged in this appeal, making Brooks a proper party on appeal. The fact that Brooks was not named as an appellee on Wife's notice of appeal and the fact that it *never* received notice of this appeal is highly prejudicial to its interests.

Recently, this Court dismissed claims against parties that did not receive service pursuant to Rule 5, reasoning that lack of notice undermines procedural fairness. *Costner v. Maryville*, No. E2021-00189-COA-R3-CV, 2022 WL 3092906, at *3-6 (Tenn. Ct. App. Jan. 19, 2022). Moreover, failure to comply with Rule 5 may deprive a court of subject matter jurisdiction with respect to claims concerning the unserved parties. *Id.* (citing *Hicks v. Seitz*, No. E2014-02225-COA-R3-CV, 2015 WL 5602285, at *8 (Tenn. Ct. App. Sept. 23, 2015)).

In *Costner*, the appellants had sued four different parties at the trial level. *Id.* at *1. Thereafter, the appellants timely filed a notice of appeal, only listing one of the four parties as appellee. *Id.* at *2. Furthermore, the appellants only served notice upon the listed appellee. *Id.* It was not until the appellants provided service of their brief that the other three parties were provided notice. *Id.* This Court held that it lacked jurisdiction over the three parties that were not provided service of notice, reasoning that “[t]o exercise jurisdiction over parties unnamed in and unserved with the notice of appeal would amount to an impermissible extension of the time for filing a notice of appeal.” *Id.* at *4-5.

Here, Wife failed to list Brooks as an appellee on the notice of appeal, failed to provide service of the notice to Brooks, and failed to provide service of her brief to Brooks. As such, Brooks has even less, if any, notice than the omitted parties in *Costner*. We, therefore, conclude that this Court lacks jurisdiction over Brooks. Wife's issue as to Brooks is dismissed.

As to Wife's issue one, which contends the trial court erred in denying approval of uncertified transcripts provided by her, this Court previously entered an order on April 28, 2023, denying the admission of her transcript to the appellate record. Barring an extraordinary circumstance, the trial court's decision concerning the content of the record is conclusive. Tenn. R. App. P. 24. We note that here Wife obtained video records of the divorce proceeding and then proceeded to transcribe the record in part through her own efforts and with the paid assistance of a third party. Upon a motion to supplement the record with this transcript, the trial court denied the motion, citing concerns for the accuracy of the transcript.⁵ In lieu of the transcript prepared by Wife, the trial court instead approved a statement of the evidence of the divorce proceeding. We find no extraordinary circumstance to substantiate overturning the trial court's rejection of Wife's transcript.

Issue six concerns whether the evidence submitted to the trial court was sufficient

⁵ In denying the motion, the trial court stated it “cannot attest that the transcripts convey an accurate and/or complete account of the court hearings.”

to find Wife guilty of one count of criminal contempt. In reviewing a criminal contempt judgment, we apply the four-element test established in *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, 249 S.W.3d 346 (Tenn. 2008). *Furlong v. Furlong*, 370 S.W.3d 329, 340 (Tenn. Ct. App. 2011) (stating that the test established in *Konvalinka* applies to both civil and criminal contempt). The elements set out in *Konvalinka* require the following: (1) the order allegedly violated is lawful, (2) the order at issue is reasonably clear, (3) the defendant actually violated the order, and (4) the defendant “willfully” violated the order. *Konvalinka*, 249 S.W.3d at 355-57. As this Court has previously explained:

A person charged with criminal contempt is “presumed innocent and may not be found to be in criminal contempt in the absence of proof beyond a reasonable doubt that they have willfully failed to comply with the court’s order.” *Long v. McAllister–Long*, 221 S.W.3d 1, 13 (Tenn.Ct.App.2006) (citing *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn.1996); *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn.Ct.App.1993)). If the defendant is found guilty by the trial court, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the verdict of guilt. *Black*, 938 S.W.2d at 399. When the sufficiency of the evidence in a criminal contempt case is raised in an appeal, this court must review the record to determine if the evidence in the record supports the finding of fact of guilt beyond a reasonable doubt, and “if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt” we are to set aside the finding of guilt. *See* Tenn. R. App. P. 13(e) (directing that “findings of guilt in criminal actions shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt”).

Pruitt v. Pruitt, 293 S.W.3d 537, 545-46 (Tenn. Ct. App. 2008).

Wife specifically challenges the element of willfulness, arguing that, in the criminal context, a willful act is one undertaken for a bad purpose. *See Furlong*, 370 S.W.3d at 340. In tandem, Wife argues that the trial court erred in its conviction by failing to assess willfulness under the nuance discussed in *Furlong*. We agree with Wife’s characterization of willfulness; however, we respectfully disagree with her conclusion that the trial court’s finding of criminal contempt was in error.

On May 19, 2019, the trial court ordered both parties to avoid using harassing, intimidating, or threatening language when communicating with each other. The contempt charge at issue, which related to an alleged violation of this order, concerned an email Wife sent to Husband about a sum of money which read as follows:

Your attorney has placed you in a very bad situation. Everyone will see the consequences if YOU do not make her rectify it immediately.

Take this very seriously.

The Husband testified that, prior to this email, Wife had filed three separate petitions for contempt against Husband. The trial court found that Wife's email was "designed to threaten [Husband] and that it was sent in an effort to intimidate [Husband] and the message was harassing in nature" and as a result found Wife guilty of one count of criminal contempt. Based upon our review of the record, we conclude that the evidence in the record supports the trial court's finding of fact of guilt beyond a reasonable doubt of one count of criminal contempt.

CONCLUSION

For the reasons stated herein, the judgment of the trial court in both the criminal contempt and underlying divorce is affirmed.

s/ Arnold B. Goldin
ARNOLD B. GOLDIN, JUDGE