TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-20-00207-CV

In re Michelle Ann Jensen

ORIGINAL PROCEEDING FROM HAYS COUNTY

M E M O R A N D U M O P I N I O N

Relator Michelle Jensen filed a petition for writ of habeas corpus challenging the district court's contempt order and associated commitment request imposing a forty-five day jail sentence for her violation of an Agreed Final Judgment and Agreed Order for Issuance of Writ of Possession ("eviction judgment"). *See* Tex. Gov't Code § 22.221(d) (authorizing courts of appeals to issue writ of habeas corpus when order restraining liberty is issued because of violation of prior order, judgment, or decree in civil case). Real parties in interest are Jensen's mother, Paula Jensen, and Jensen's stepfather, Scott Ragsdale (collectively, "the Parents"), the prevailing parties on the eviction judgment. In her habeas petition, Jensen contends that the contempt order is void because the district court applied a "clear and convincing" civil evidentiary standard to its issuance of a criminal contempt order, and that the phrase "broom clean condition" in the eviction judgment was vague. She requests that the contempt order and commitment request be vacated.

We will conditionally grant the writ.

BACKGROUND

Paragraph 6 of the eviction judgment that the district court signed in favor of the Parents required Jensen, upon vacating the property, to "leave the entirety of the property in 'broom-clean' condition, including, without limitation, clean, swept floors, vacuumed carpets, clean toilets, tubs, showers and sinks, and a well-maintained yard." After a contempt hearing months later, the court found that Jensen violated the eviction judgment by failing to leave the property in "broom ready shape [sic]." The court specifically found that Jensen had "placed feces, shrimp, and catfish bait in the electrical plugs and AC"; "placed concrete in the plumbing"; and "removed fixtures." Additionally, the court noted that Jensen admitted "to the cutting of the well pump cables and wiring effectively ruining the water well."

The court signed a "Finding of Contempt of Court" order on November 25, 2019. The order states that on the date of the contempt hearing, Jensen

> appeared before the court[,] evidence was presented, [and] the evidence was clear and convincing that Michelle Jensen with conscious disregard violated the order of the court. This deliberate conduct caused otherwise needless litigation and costs.

The order then makes the specific findings quoted above as to the property damage. The final paragraph of the contempt order states that Jensen is "adjudged in contempt of court" and punished by "45 days in the Hays County Jail to be served without good time credit."

Subsequently, the court signed a commitment request requiring Jensen "to turn herself in" to the Hays County Sheriff's Office by 7:00 p.m. on March 22, 2020. Jensen filed this habeas petition, and we issued a stay pending our consideration of it. *In re Jensen*, No. 03-20-00207-CV, 2020 Tex. App. LEXIS 2413, at *1 (Tex. App.—Austin Mar. 20, 2020, order).

DISCUSSION

Jensen contends that the contempt order is void because the district court applied a "clear and convincing" civil evidentiary standard to its issuance of a criminal contempt order.[1] We issue a writ of habeas corpus if the contempt order is void because it deprives the relator of liberty without due process of law or because it was beyond the power of the court to issue. *In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005); *In re Ross*, 125 S.W.3d 549, 552 (Tex. App.—Austin 2003, orig. proceeding).

Contempt is "broadly defined" as "disobedience to or disrespect of a court by acting in opposition to its authority." *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding); *In re Krueger*, No. 03-12-00838-CV, 2013 Tex. App. LEXIS 5984, at *8 (Tex. App.—Austin May 16, 2013, orig. proceeding). Although courts have broad and inherent powers of contempt, "it is a tool that should be exercised with caution." *In re Reece*, 341 S.W.3d at 364; *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *8. "Contempt is strong medicine" and should be used "only as a last resort." *In re Reece*, 341 S.W.3d at 364 (internal citations omitted); *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *8-9.

Contempt may be civil or criminal. *In re Reece*, 341 S.W.3d at 365; *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *10. Criminal contempt is punitive in nature because the contemnor is being punished for some completed act that is an affront to the dignity and authority of the court. *In re Reece*, 341 S.W.3d at 365; *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *11. Civil contempt is remedial and coercive in nature because confinement is

[1] We begin with Jensen's second issue because it is dispositive of this original proceeding. Given our resolution of this issue, we need not address the other one. *See* Tex. R. App. P. 47.1 (requiring appellate court to issue opinion that is as brief as practicable, addressing every issue raised and necessary to final disposition of appeal), 52.8(d) (extending Rule 47 to opinions on petitions for extraordinary relief).

conditioned on the contemnor's obedience to the court's order; thus, the contemnor holds the key to his release. *In re Reece*, 341 S.W.3d at 365. Criminal contempt typically imposes a sentence of confinement for a finite time that is unaffected by the contemnor's performance of any future act. *In re Scariati*, 988 S.W.2d 270, 272 n.1 (Tex. App.—Amarillo 1998, orig. proceeding); *see also Ex parte Reese*, 23 S.W.3d 54, 57 (Tex. App.—Austin 2000, no pet.) ("Because the contempt order was obligatory rather than conditional and did not permit [contemnor] to avoid the fine or jail time, the contempt was criminal in nature."). Because this contempt order punished Jensen for her past conduct of damaging the Parents' property and did not condition her confinement on her performance of some future act, the order imposed criminal contempt.

The due process required for a particular contempt adjudication depends on the type of contempt that is charged. *See Ex parte Krupps*, 712 S.W.2d 144, 146 (Tex. Crim. App. 1986); *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *10. "Contempt may occur in the presence of a court (direct contempt), or outside the court's presence (constructive contempt)." *In re Reece*, 341 S.W.3d at 365 (citing *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979)); *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *10. Because constructive contempt occurs outside the court's presence, more procedural safeguards are afforded to constructive contemnors than to direct contemnors. *See Ex parte Werblud*, 536 S.W.2d 542, 546 (Tex. 1976); *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *10. Here, the court's contempt order is directed to its finding that Jensen engaged in conduct that violated the court's eviction order, and the violation identified in the order occurred outside the court's presence; thus, the contempt at issue is constructive contempt. *See Chambers*, 898 S.W.2d at 259; *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *10.

Contempt orders are not appealable. *In re Caldwell-Bays*, No. 04-18-00980-CV, 2019 Tex. App. LEXIS 2367, at *11 (Tex. App.—San Antonio Mar. 27, 2019, orig. proceeding); *In re Reposa*, No. 03-17-00769-CV, 2017 Tex. App. LEXIS 11471, at *1 n.1 (Tex. App.—Austin Dec. 11, 2017, orig. proceeding); *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *9; *see Norman v. Norman*, 692 S.W.2d 655, 655 (Tex. 1985). Contempt orders involving confinement may be reviewed by a writ of habeas corpus. *In re Caldwell-Bays*, 2019 Tex. App. LEXIS 2367, at *11; *In re Reposa*, 2017 Tex. App. LEXIS 11471, at *1 n.1; *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *9; *see In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) ("Contempt orders that do not involve confinement cannot be reviewed by writ of habeas corpus, and the only possible relief is a writ of mandamus."). The habeas corpus remedy "is in the nature of a collateral attack and its purpose is not to determine the ultimate guilt or innocence of the relator, but only to ascertain whether the relator has been unlawfully imprisoned." *Ex parte Gordon*, 584 S.W.2d at 688.

A contempt order challenged in a habeas proceeding is presumed valid. *In re Baker*, No. 14-15-00421-CV, 2015 Tex. App. LEXIS 4816, at *2 (Tex. App.—Houston [14th Dist.] May 12, 2015, orig. proceeding); *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *9; *In re Parks*, 264 S.W.3d 59, 61-62 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding). The contemnor has the burden of proving that it is void. *In re Coppock*, 277 S.W.3d 417, 418 (Tex. 2009); *In re Baker*, 2015 Tex. App. LEXIS 4816, at *2; *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *9-10. There is also a presumption that the trial court, sitting without a jury, used the correct standard of proof absent a showing to the contrary. *Freeman v. State*, 525 S.W.3d 755, 757-58 (Tex. App.—Austin 2017, pet. ref'd); *Ex parte Jackson*, 911 S.W.2d 230, 234 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding).

"A criminal contempt conviction for disobedience to a court order requires *proof beyond a reasonable doubt* of: (1) a reasonably specific order; (2) a violation of the order; and (3) the willful intent to violate the order." *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding) (emphases added); *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *12. The Supreme Court has stated that the

> distinctions [between civil and criminal contempt] lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt. Thus, because criminal penalties were handed down in this case, relator was entitled to have his guilt proven beyond a reasonable doubt.

Hicks v. Feiock, 485 U.S. 624, 632 (1988); *see International Union v. Bagwell*, 512 U.S. 821, 826 (1994) (noting that "[c]riminal contempt is a crime in the ordinary sense," and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings") (internal citations omitted); *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *11-12.

Here however, the contempt order states that "the evidence was *clear and convincing* that Michelle Jensen with conscious disregard violated the order of the court." Thus, the face of the contempt order recites that the clear and convincing evidentiary standard—a lesser standard than "proof beyond a reasonable doubt"—was applied in finding the violation. The Parents suggest that the order "may mean nothing more than that the trial court found the evidence against [Jensen] 'clear,' and that it was 'convinced' she had violated its prior order."[2] We disagree. Nothing supports the contempt order's inclusion of "clear and convincing" to

describe the quality of the evidence showing the violation if another standard was in fact applied when making that determination. Significantly, Jensen's habeas petition is distinguishable from those containing no indication that the trial court applied an incorrect evidentiary standard to hold the relator in criminal contempt. *Cf. In re Newby*, 370 S.W.3d 463, 467 (Tex. App.—Fort Worth 2012, orig. proceeding) ("Relator contends in his third issue that the trial court used a clear and convincing evidence standard to weigh the evidence instead of a beyond a reasonable doubt standard. Relator has not referred to any part of the record, and we have found none, supporting this conclusion."); *Ex parte Jackson*, 911 S.W.2d at 234 ("[T]here is nothing in the record to suggest that the trial court used an improper standard. The contempt/commitment order does not state what standard was used by the court in coming to its decision. There is nothing in any of the documents filed in this court to suggest what standard the trial court used in making its decision to hold relator in contempt.").

On this record, Jensen has met her burden of rebutting the contempt order's presumption of validity and the presumption that the court applied the correct evidentiary standard of beyond a reasonable doubt to this constructive criminal contempt. *See In re Baker*, 2015 Tex. App. LEXIS 4816, at *2; *In re Krueger*, 2013 Tex. App. LEXIS 5984, at *9; *In re Parks*, 264 S.W.3d at 61-62; *Ex parte Jackson*, 911 S.W.2d at 234. Accordingly, we conclude that the district court's contempt order, as written, is void because it deprives the relator of liberty without due process by applying a "clear and convincing" evidentiary standard that cannot support the finding of criminal contempt and punishment by confinement. *See In re Henry*, 154 S.W.3d at 596; *In re Ross*, 125 S.W.3d at 552. Jensen's second issue is sustained.

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[2] The Parents further suggest that we "could send the order back to the trial court with instructions to amend the contempt judgment to make its intent clear." We are unpersuaded that such action is proper to modify the evidentiary standard articulated in this contempt order.

CONCLUSION

We conditionally grant Jensen's petition for writ of habeas corpus and, in accordance with this opinion, order the district court to vacate its November 25, 2019 Finding of Contempt of Court and its March 11, 2020 Commitment Request. *See* Tex. R. App. P. 52.8(c). The writ will issue only if the court fails to do so.

The stay issued March 20, 2020 is lifted. *See id.* R. 52.10(b).

Jeff Rose, Chief Justice

Before Chief Justice Jeff Rose, Justices Baker and Triana

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