

Summary of SC90425, *In re: Carl Smith v. Sheriff Raymond Pace and the Honorable Gary Witt*

Writ proceeding arising in the Douglas County circuit court, Special Judge Gary D. Witt
Argued and submitted March 16, 2010; opinion issued May 11, 2010

Attorneys: Smith was represented by Bruce Galloway and Daniel Brogdon of Bruce Galloway LLC Trial Attorneys in Ozark, (417) 863-1200. The state was represented by Timothy Anderson of the attorney general's office in Jefferson City, (573) 751-3321, and Ozark County Prosecutor Thomas W. Cline of Gainesville, (417) 679-4649.

Several organizations submitted briefs as friends of the Court: the Missouri Association of Criminal Defense Lawyers was represented by Talmage E. Newton IV of Evans & Dixon LLC in St. Louis, (314) 552-4042; the ACLU of Eastern Missouri was represented by in-house counsel Anthony E. Rothert of St. Louis, (314) 652-3114; and the ACLU of Kansas and Western Missouri was represented by in-house counsel Stephen D. Bonney of Kansas City, (816) 756-3113.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A jury found an attorney guilty of criminal contempt for written comments he made in a pleading to the court of appeals. The attorney was committed to jail. In a unanimous decision written by Judge Michael A. Wolff, the Supreme Court of Missouri orders the attorney discharged from his jail sentence. To satisfy current constitutional protections for lawyer speech, where an attorney is prosecuted for indirect criminal contempt of court, the state must prove that the attorney's statements were false, that the attorney knew the statements were false or acted with reckless disregard for the truth or falsity of the statements, and that the effect of the statements constituted an actual or imminent impediment or threat to the administration of justice. Here, the jury was not asked to make such findings, there was a lack of evidence as to these essential elements, and neither the trial court's judgment nor its order of commitment contained any findings of fact as to these essential elements.

Facts: Attorney Carl Smith appeared in March 2008 before Judge R. Craig Carter, who had been assigned to oversee a Douglas County grand jury that just had been convened. On behalf of one of his clients and his secretary, Smith filed a motion to quash a subpoena issued for the grand jury and a motion for continuance. The motion to quash was overruled; Smith petitioned for a writ in the court of appeals challenging that decision. On the basis of two paragraphs of Smith's writ petition – alleging bias and criminal conduct against the judge, the county's prosecutor and others in the local court system as well as alleging that the judge, prosecutor and others were using the grand jury to threaten, intimidate and silence others – the judge cited Smith for criminal contempt, noting in his order that Smith's writing "tends to degrade or make impotent the authority of the court or to impede or embarrass the administration of justice." Judge Gary Witt was assigned to preside over Smith's jury trial for criminal contempt. The jury found Smith guilty of criminal contempt, and Smith was committed to 120 days in jail. Smith now seeks to be released from this commitment.

PETITIONER ORDERED DISCHARGED.

Court en banc holds: (1) There are two categories of contempt – civil and criminal – with each category having two subcategories – direct and indirect. Criminal contempt is punitive in nature and is intended to protect, preserve and vindicate the judicial system’s authority and dignity and to deter future defiance. Civil contempt is intended to benefit a party for whom relief has been granted by coercing compliance with the relief granted. Direct contempt occurs in the immediate presence of the court or so near as to interrupt its proceedings. Indirect contempt arises from an act outside the court that tends to degrade or make impotent the court’s authority or to impede or embarrass the administration of justice. Here, the alleged criminal contempt was indirect because it was sought for the language Smith used in his writ petition.

(2) This Court does not accept the proposition that First Amendment rights bar punishment of contemptuous speech by lawyers but does recognize that the values and limits of the constitutional right must inform the development of the elements of criminal contempt, especially for cases of indirect contempt, which takes place outside the court’s presence. Absent a “clear and present danger,” First Amendment protections apply to comments made by non-lawyers about pending court cases, *Bridges v. California*, 314 U.S. 252, 263 (1941), and to comments made by non-lawyers criticizing specific judges, *Craig v. Haney*, 331 U.S. 367, 373 (1947). With respect to lawyers, however, it is not as clear what protection the First Amendment provides. The United States Supreme Court held that states may use a lesser standard than that applied to non-lawyers to decide whether a lawyer should be disciplined for his or her speech, *Gentile v. State*, 501 U.S. 1030 (1991), and this and other states have disciplined lawyers under state ethics rules where there is some knowledge of falsity or a reckless disregard for whether the false statement was true or false. As such, the disciplinary process may be a more suitable forum than a contempt proceeding for ascertaining a lawyer’s knowledge as to the truth or falsity of the lawyer’s statements, and monetary sanctions pursuant to Rule 55.03(c) may be more suitable than incarceration.

(3) Here, the jury instructions did not ask the jury to find that Smith knew his statements were false or that Smith showed reckless disregard for the truth, nor was there any evidence from which the jurors could find the requisite state of Smith’s mind regarding the falsity of the statements. Rather, the jury only was asked to find whether Smith’s written statements to the court of appeals degraded and made impotent the circuit court’s authority and impeded and embarrassed the administration of justice, regardless of whether the statements were true or false or whether Smith thought they were true or false. Although this language is present in the scant case law available – see *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994) – as a sole basis for a finding of criminal contempt and the resulting order of commitment to incarceration, it does not comport with current constitutional protections of free speech. Even in disciplinary cases, this Court and the United States Supreme Court have recognized that lawyers have First Amendment rights. Before a lawyer can be found guilty of criminal contempt for what is written in his pleadings, there must be a finding that the lawyer’s statements were made with actual knowledge of their falsity or that the statements in fact were false and were made with reckless disregard of whether they were true or false.

(4) Under current law, words that degrade or make impotent a court's authority or that impede or embarrass the administration of justice, by themselves, are not enough to support a finding of criminal contempt. The First Amendment requires that the threat to the court's authority be real – that the lawyer's statements and attendant conduct actually have interfered with or posed an imminent threat of interfering with the administration of justice. This is the standard in cases of direct contempt, and there is no logical reason to have a more relaxed standard for indirect contempt of court for written pleadings. Here, the state stipulated that Smith's actions did not interfere with the grand jury and that the judge did not rule differently or fail to take any action with regard to the grand jury based on Smith's actions. As such, there is no evidence that Smith's written statements interfered with or posed an imminent threat of interfering with the administration of justice. Smith is ordered discharged.