IN THE MISSOURI SUPREME COURT

No. SC90425

***In re* Carl Smith**

Petitioner

v.

The Honorable Gary Witt and Sheriff Raymond Pace
Respondent

PETITIONER'S REPLY BRIEF

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Reply to Jurisdictional Statement of Respondent (page 9)

Petitioner originally requested the court issue a Writ of Habeas Corpus to the Douglas County jail. Respondent asserted that no jurisdiction exists because the Sheriff of Douglas County removed Petitioner from the Douglas County jail and placed him in the Taney County jail, on the same day the Petitioner requested a writ of Habeas Corpus with this court. Petitioner sought relief from an order placing him in custody of the Douglas County Sheriff. That order remained in effect throughout the pendency of the litigation. Respondent cited no authority supporting the jurisdictional argument. Respondent failed to note that this Court issued the Writ to the Ozark County Sheriff, who held the Petitioner at the request of the Douglas county Sheriff. No jurisdictional issue exists.

Reply to Arguments presented as to the First Point Relied On (page 17, supra)

Petitioner argued that as applied, the judgment of contempt and the Judgment of commitment violated the First Amendment. The Respondent found Petitioners brief to be unrepentant. Respondent overreached when its brief asserted that the Petitioner's brief described the offensive pleading as meritorious. Respondent's Brief, page 17, (hereinafter RB, p. 17) Petitioner conceded that the argument failed and led to his incarceration. Petitioner's brief never used the word meritorious in describing the two paragraphs under this Court's consideration. Just as similarly, the Petitioner never referred to the grand jury court as a "crook."

RB, p 24. Petitioner concedes the argument contained offensive language subject to at most, a civil remedy; not a criminal sentence.

The Respondent's characterized the matter criminal because it constituted a threat to the grand jury trial judge. RB, p 25. 33, 34. In the course of litigation, Respondent raised the threat issue for the first time in its brief to this Honorable Court. The original show cause order never referred to the two paragraphs at issue as a threat. Exhibit 2, L.F. p. 213. The bill of particulars never referred to the two paragraphs as a threat. Neither the Judgment of Contempt, Exhibit 21, L.F. 376 nor the Judgment for Commitment for Criminal Contempt, Exhibit 22, L.F. 378, contained a factual or legal finding that the two paragraphs constituted a threat.

The original show cause order, without comment, listed the two offending paragraphs subject to the trial. Exhibit 2, Legal File, p. 213. The show cause order continued by stating: "Mr. Smith's Petition continues on to defame the elected Douglas County Prosecuting Attorney, several members of the local bar, and even goes so far as to question the actions of the Office of the Chief Disciplinary Counsel's actions." Exhibit 2, L.F. p. 214. These people were in no way protected by common law or statutory contempt. Defamation is unpleasant to anyone, but not a threat.

The show cause order then stated: "Additionally, the affidavits and exhibits attached to Mr. Smith's Petition are the most scurrilous, defamatory, venomous attack on the Judicial System the Court has ever witnessed." Exhibit 2, Legal File

p. 214. . The Respondent never provided introduced those documents as evidence to the jury.

Respondent's brief asserted that the grand jury judge "refused to let attorney Smith intimidate him and refused to allow Smith to disrupt the grand jury…." R.B. 34, (emphasis original). Contrary to Respondent's assertion, the grand jury judge never testified that he refused to let Petitioner intimidate him. T.T. 41-98. He never testified that he felt threatened by the Petitioner or the pleadings. T.T. 41-98. Moreover, the grand jury judge testified that Mr. Smith argued properly during the grand jury proceeding. T.T. p. 50. He testified that the delay in the enforcement of the subpoena sought to be quashed arose because the grand jury judge thought his decision to enforce the subpoena might have been wrong and thus allowed petitioner seven days to file the request for Writ of Prohibition.

Most importantly, for this court's review of whether Respondent litigated a threat, the trial judge in the contempt matter never made a finding that the paragraphs constituted a threat in the Judgment of Contempt, Exhibit 21, LF. p. 376 nor the Judgment of Commitment for Criminal Contempt. Exhibit 22, L.F. p 378. "This court and the court of appeals have held consistently since the beginning of this century [twentieth] that in contempt proceedings the facts and circumstances constituting the offense, not mere legal conclusions, must be recited in both the judgment of contempt and the order of commitment. *Exparte Brown*,

530 S.W.2d 228 (Mo.banc.1975) at 231. "We hold again that in contempt proceedings, whether direct or indirect, the facts and circumstances constituting the offense, not mere legal conclusions, must be recited with particularity in both the judgment of contempt and the order of commitment." Id. Threats are not a part of the case.

Rather, at trial the Respondent argued that the words constituted an affront. TT p. 111, 114,-116, 127-128. The trial court's verdict director, submitted by Respondent over Petitioner objection, never asked for a finding that the Petitioner threatened the court. Exhibit. 18, L.F. p. 373. The essence of the contempt as pled, argued and instructed to the jury, and found by the trial court consisted of an aspersion. "The expression of opinion, even in the form of pejorative rhetoric, relating to fitness for judicial office or to performance while in judicial offices is safe guarded." *Rinaldi v. Holt, Rinehart*, 42 N.Y.2d 369 at 381 (1977)(Court of Appeals) "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Id.* c*iting Craig v. Harney*, 331 U.S. 367, 376 (1947).

Respondent also argued that the words were false or misleading. "False statements made in court, even by a witness under oath, do not constitute contempt of court." *State v. Kinder*, 14 S.W.3d 674 (Mo.App.W.D. 2000). Missouri courts are not wrong to disallow contempt based upon falsity. Weighing the truth or falsity of either a statement of fact or argument based on one witness creates a problem of constitutional dimensions. "To hold otherwise would create a chilling

effect on a party's exercise of his constitutional right to freedom of speech, access to the courts, and due process." *Newry v. State*, 654 So.2d 1292 at 1294 (Fla.App. 4 Dis. 1995), *citing State v. Colemen*, 138 Fla. 555 189 So. 713 (1939).

The Respondent asserted that that publication via writ somehow influenced the judge. Assuming that the general public of Douglas County read Petition's for Writs of Prohibition, a fact not proven, the instant case resembles *Wood v. Georgia*, 370 U.S. 375 (1962). In that case, a sheriff publicly criticized the assembly and implementation of a grand jury. Newspapers reported his remarks during the grand jury processes. Reversing the conviction, the Court discussed the flaws of the state court's finding that the criticism created a serious evil:

> The court did not indicate in any manner how the publications interfered with the grand jury's investigation, or with the administration of justice. Unlike those cases in which elaborate findings have been made to support such a conclusion, this record is barren of such findings. The prosecution called no witnesses to show that the functioning of the grand jury was in any way disturbed; no showing was made that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task because petitioner "interfered" with its completion. There is nothing in the record to indicate that the investigation was not ultimately successful

or, if it was not, that the petitioner's conduct was responsible for its failure."

Id. at 398.

Substitute the words request for writ of prohibition for the word newspaper, and the outcome in this case is obvious.

Finally, the Respondent urged the court a less stringent analysis in examining the speech of lawyers in contempt cases as different from that which applies to Sheriffs, media and the general citizenry. Whatever the number of attorney disciplinary cases the Respondent cited in his brief, the standard for punishing a person for utterances, false, venous or repugnant, in criminal contempt matters remains: Did the words create a clear and present danger of imminent harm? To quote justice Holmes, as did the United States Supreme Court in *Bridges v. California*, 314 U.S. 252 (1941): "I confess that I cannot find in all this or in the evidence I the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words." Id. At 259 *citing Toledo Newspaper Co. v. United States*, 247 U.S.402, 425 (1918).

Reply to Arguments Presented as to the Third Point Relied On (page 41, supra)

Respondent described as "deficient" Petitioner's Point Relied On claiming a violation of Petitioner's right to counsel or, in the alternative, the right to

proceed *pro se*. RB, p. 41. Respondent further argued that an attorney has no greater right to make "contemptuous" statements in his own defense than in defense of a client. *Id.* Respondent then suggests that Petitioner's argument is that Petitioner is "immune" from the criminal contempt statutes for statements he makes in his own defense. *Id.*, p. 41-42.

Respondent misinterpreted Petitioner's argument. First, no one claimed to be "immune" from any criminal statutes – this is a freedom of speech case, and the punishment of speech chills advocacy. Second, based on the original show cause order and the State's verdict director, Petitioner is still not convinced whether the State prosecuted this case under statute or common law. Finally, no one argued that Petitioner has a "greater right" to be "free from criminal sanctions for his speech" (which is exactly what the State did to Petitioner) than anyone under the First Amendment. Petitioner simply argued that he, too, is protected by the First Amendment.

Reply to Arguments Presented as to the Fifth Point Relied On (page 51, supra)

This Point Relied On is not, and never was, an indictment of Judge Witt. Petitioner never accused Judge Witt of actual wrongdoing. Respondent argues to this Court that Judge Witt had no duty to disqualify himself because a criminal contempt proceeding is "of its own kind" and, apparently, therefore, the Code of

Judicial Conduct 2.03, Canon 3[1] does not apply. At the very least, Respondent left the Code of Judicial Conduct out of his argument for some reason. Respondent then uses the testimony of Ron Jarrett (convicted of perjury) to distract the Court from the issue of whether an appearance of impropriety required recusal, which is the only issue in this Point Relied On.

[1] Code of Judicial Conduct 2.03, Canon 3 is included in a previously filed Appendix (Petitioner's Brief) at page A8. Pursuant to Rule 84.04(h), it is not included in Petitioner's Reply Brief.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered to all attorneys of record and to Respondent, the Honorable Gary Witt, by depositing same with the United States Postal Service, postage pre-paid, to their business address, on the 5th day of February, 2010.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Pursuant to Rule 84.06(c), the undersigned hereby certifies that Petitioner's Reply Brief is in Microsoft Word 2002 format, contains 2,156 words, and is concluded with a signature block containing the information required by Rule 55.03.

_____

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned hereby certifies that an electronic copy of Petitioner's Reply Brief is being filed along with this written brief. The undersigned further certifies that the disk has been scanned for viruses and is virus-free.

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