IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

AMANDA EDGE-GOUGEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D14-5812

Opinion filed December 28, 2015.

An appeal from the Circuit Court for Santa Rosa County.
John F. Simon, Jr., Judge.

Luke Newman of Luke Newman, P.A., Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Virginia Chester Harris, Assistant Attorney General, Tallahassee, for Appellee.

ROBERTS, C.J.

The Appellant, Amanda Edge-Gougen, seeks review of her conviction for direct criminal contempt. She argues that the trial court improperly found her in direct criminal contempt. We agree and reverse.

FACTS

On the morning of November 14, 2014, the Appellant finished a volunteer activity and believed she was off of work for the day. However, in the early afternoon, she learned that one of her clients had a plea hearing that day, which she then attended. During the plea hearing, the trial judge asked the Appellant and the prosecutor to approach the bench. The judge stated that he had been told by two court employees that the Appellant smelled like alcohol. The judge asked her if she had been drinking, and she responded that she drank at lunch, but was not impaired. The judge asked her to take a breathalyzer test, to which she submitted. After the Appellant returned, the trial judge resumed the hearing and told those in the courtroom what had just transpired. The results of the breathalyzer were .082, .087, and .076 grams/100 milliliter BAL. The judge stated that the Appellant would not be permitted to represent the defendant. The judge then ordered her to be held in the county jail until she blew less than .08 g/100 ml. The bailiff informed the judge that if the appellant were booked in to the county jail, she would be required to stay a minimum of eight hours. The court scheduled a direct criminal contempt hearing for the following Monday, which was continued.

The Appellant moved to dismiss the contempt charge on the ground that direct criminal contempt requires that an intentional act be committed in the presence of the court, and this requirement was not met under the facts of this case.

At a hearing on the motion, two witnesses testified that they had seen the Appellant immediately prior to the hearing on the day in question and neither had smelled any alcohol on the Appellant nor did the Appellant seemed impaired in any way. After hearing argument, the trial court found that the Appellant's decision to come to court despite drinking at lunch was an intentional act that provided the grounds for a direct criminal contempt charge. The court denied the motion to dismiss, found the Appellant guilty of direct criminal contempt, and sentenced her to a suspended sentence of five months, 29 days in county jail with six months of probation.

ANALYSIS

A. Direct v. Indirect Contempt

A trial court may summarily punish direct criminal contempt if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. Fla. R. Crim. P. 3.830 (2015). Here, the State concedes that because the conduct at issue, drinking alcohol, occurred outside the presence of the judge, there was no direct criminal contempt. Additionally, there was no manifestation of contemptuous conduct within the courtroom. As such, the trial court abused its discretion in finding the Appellant in direct criminal contempt.

However, the State argues that the trial court's finding of direct criminal contempt was harmless because the Appellant was guilty of indirect criminal

contempt. See Schaffer v. State, 429 So. 2d 372, 372 (Fla. 3d DCA 1983) (finding that a conviction for direct criminal contempt was harmless when the appellant should have been convicted for indirect criminal contempt and the appellant received all the rights afforded by Florida Rule of Criminal Procedure 3.840, which governs indirect criminal contempt). In this case, we find the Appellant's conduct was not contemptuous, and as such, there was no indirect criminal contempt. Criminal contempt requires some willful act or omission calculated to hinder the orderly functions of the court. Woodie v. Campbell, 960 So. 2d 877, 878-79 (Fla. 1st DCA 2007) (internal quotations omitted). Here, there was no contemptuous act. The trial judge did not smell alcohol on the Appellant, and he did not observe any inappropriate behavior or deficient representation by counsel. Additionally, two witnesses testified that the Appellant was not impaired. The trial court stated he found it unlikely that this Court would find that it is acceptable behavior for an attorney to appear in court under the influence. While this Court agrees that type of behavior is not acceptable, under the unique facts and circumstances of this case, we find there was no contemptuous conduct. As such, the trial court abused its discretion in finding the Appellant guilty of contempt of court.

B. Judicial authority

The trial court abused its discretion when it requested that the Appellant take

a breathalyzer test and then detained the Appellant after receiving the breathalyzer results. First, the trial court's authority did not extend to ordering a breathalyzer when there was no lawful arrest or probable cause that a crime had been committed. Second, the trial judge placed the Appellant in protective custody without any lawful authority. Both of these actions were improper and violations of due process.

1. Judicial authority to use a breathalyzer

There is no specific statutory authority providing that a judge is permitted to ask an attorney practicing in front of the court to take a breathalyzer. However, this is not dispositive in this case. The authority to hold a person in contempt of court derives from the inherent authority of courts to enforce their orders and to protect the dignity of the judicial process. See The Fla. Bar v. Palmer, 149 So. 3d 1118, 1120 (Fla. 2013) (citing to Parisi v. Broward Cty., 769 So. 2d 359, 363 (Fla. 2000)). A judge should not be barred from using the technology of the breathalyzer to maintain the dignity of the legal process.

However, the provisions of the Florida Statutes that attach criminal penalties to driving under the influence provide that there must be a lawful arrest before a person is required to submit to a breathalyzer test. See Fla. Dep't of Highway Safety v. Hernandez, 74 So. 3d 1070, 1075 (Fla. 2011) (citing to section 316.1932(1)(a)1.a., Fla. Stat. (2011) (finding a breath test must be "incidental to a

lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving . . . while under the influence of alcoholic beverages")). Similarly, a statute governing the operation of a firearm provides that person may be required to submit to a breathalyzer "if there was probable cause to believe that the person was using a firearm while under the influence of alcoholic beverages." § 790.153(1)(a), Fla. Stat. (2015). Here, there was no lawful arrest prior to the admission of the breathalyzer test nor was there probable cause to make a lawful arrest as there was no evidence presented that the Appellant broke any laws. As such, the trial court's request that the Appellant submit to a breathalyzer was unlawful.

Additionally, the Appellant was questioned and asked to submit to a breathalyzer test without being told that a criminal contempt proceeding had begun. When the court is shifting from treating an attorney as an advocate to treating the attorney as a defendant, the attorney is entitled to be notified so that he or she may act accordingly. The trial court's failure to inform the Appellant that she was now a defendant in a criminal contempt proceeding violated her due process rights.

2. Judicial authority to hold someone in custody

After receiving the results of the breathalyzer test, the trial court placed the Appellant in "protective custody" until subsequent breathalyzer results showed she

was under the legal limit. Because judicial officers are conservators of the peace under the Florida Constitution, judges have the authority to hold a person in custody or to arrest a person. See Fla. Const. Art. 5, § 19; § 901.01, Fla. Stat. (2015) ("Each state judicial officer is a conservator of the peace and has committing authority to issue warrants of arrest, commit offenders to jail, and recognize them to appear to answer the charge."); Hill v. State, 132 So. 3d 925, 929 (Fla. 1st DCA 2014) ("Judicial officers of this state are conservators of the peace with actual authority to effectuate arrests."); see also Op. Att'y Gen. Fla. 77-79 (1977) (opining that a circuit Judge had authority to make warrantless arrests for violations of the Uniform Traffic Control Law). As such, the court had the authority to detain the Appellant. However, here, the trial court did not place the Appellant under arrest. Rather, he placed her in "protective custody." Florida law provides that a person can be placed in protective custody without consent. § 397.6772, Fla. Stat. (2015). Pursuant to the Marchman Act, a law enforcement officer can order a person placed in protective custody if there is a good faith reason to believe the person is substance-abuse impaired and because of such impairment has lost the power of self-control with respect to substance use and either has inflicted or threatened or attempted to inflict physical harm on him or herself or another person or is in need of substance abuse services, but is unable to make that decision due to impairment. § 397.675, Fla. Stat. (2015). There is no

evidence in the record that this is the situation here. As such, the trial court abused its discretion in ordering the Appellant to be held in protective custody.

Accordingly, the Appellant's judgment of contempt is REVERSED.

MARSTILLER, J. CONCURS; MAKAR, J. CONCURS WITH OPINION.

MAKAR, J., concurring with opinion.

Lawyers and alcohol do mix, so frequently that our profession's rate of substance abuse justified the establishment thirty years ago of a unique organization, Florida Lawyers Assistance, Inc., to provide confidential assistance to members of the Bar for a wide range of personal afflictions. See Florida Lawyers Assistance, http://fla-lap.org/ (last visited December 16, 2015). Judges, lawyers, and law students—whether for themselves or others—may seek FLA's assistance without the fear that FLA will tell the Bar, employers, family, or friends. Id. "FLA believes it is the responsibility of the legal community to help our colleagues who may not recognize their need for assistance." Florida Lawyers Assistance, About, http://fla-lap.org/about/ (last visited December 16, 2015). The entire December 1999 issue of The Florida Bar Journal was devoted to this topic. See, e.g., Richard B. Marx, Impaired Attorneys and the Disciplinary System, 73 Fla. B.J. 14, 14 (December 1999) (estimating that roughly fifteen percent of Florida Bar members—about 10,000 of the 64,800 total membership in 1999—were at risk of developing a problem with drugs or alcohol during their careers; there are now over 100,000 members).

To that end, a wealth of resources exists to help attorneys (including judges) with emerging or existing alcohol issues and how they ought to be addressed from a therapeutic perspective. The literature, including FLA's brochure designed solely

for judges' use, generally takes a remedial approach, seeking graduated curative measures versus a castigatory approach. See Florida Lawyers Assistance, Impairment in the Legal Profession: A Guide for Judges, http://fla-lap.org/wp-content/uploads/2009/08/Brochure1-Judges.pdf (last visited December 16, 2015); see also Anonymous, A View From The Bench, 73 Fla. B.J. 39, 39 (December 1999) (trial judge's discussion of how he/she—as a recovering alcoholic—handled such matters). This approach places trial judges in a parentalistic role, that of supervising attorneys and protecting their clients—and thereby the judicial system—via intervention when appropriate in a firm but compassionate manner, deploying incrementally the resources and judicial tools necessary to determine the nature of the possible problem and its correction, sometimes simply via informal judicial persuasion. Because of the sensitive nature of addictions of all kinds, including their medical dimensions and employment ramifications, protocols that allow for the confidential pursuit of psychological and other therapeutic services can be accomplished judicially while simultaneously protecting the dignity of the courtroom and the orderly dispensation of justice.

Research has found no Florida "playbook" for what judges should do when an attorney in a courtroom is reported as smelling of alcohol but exhibiting no signs of diminished capacity, inappropriate behavior, or deficient representation. Judiciousness, however, counsels that a circumspect and restrained approach be

followed, criminal contempt being a trump card to be played only when absolutely necessary and all else fails; we're taught that at new judges' college. The reasons are both prudential and legal: even where impairment is obvious, the remedy of contempt is not easily established because it requires proof beyond a reasonable doubt of some willful act or omission by a defendant that was calculated to hinder the orderly functions of the court. See Woodie v. Campbell, 960 So. 2d 877, 879 (Fla. 1st DCA 2007). Thus, where a defendant's impairment manifests itself in a dramatic way, such as passing out in the courtroom after having ingested cocaine, a seemingly straightforward case of direct contempt would seem to be presented. See, e.g., Miller v. State, 672 So. 2d 95 (Fla. 3d DCA 1996). As the majority in Miller recounted:

> During the course of his appearance on an unrelated charge of indirect contempt, the defendant-appellant passed out in the courtroom and could not readily be revived because he had "had a little coke" that morning.[1] We conclude that the trial court properly found that this

[1] The pertinent colloquy is as follows:

> THE COURT: Page 10, Johnny Miller.
> PROBATION OFFICER: I am not sure, he is under the influence of something.
> (Whereupon the Defendant was called several times)
> THE COURT: Mr. Miller, it appears you might be under the influence of something, is that correct? Let's try the truth.
> THE DEFENDANT: M'am.
> THE COURT: Are you under the influence of some drug at this time?
> THE DEFENDANT: M'am.

> conduct obstructed the administration of justice in the case so as to justify a finding of direct criminal contempt.

672 So. 2d at 95-96 (per Schwartz, C.J.). But judicial minds differed. The dissent in Miller would have overturned the contempt conviction, pointing to the lack of any evidence that the doped-out defendant intended to be disruptive. Although the defendant "may very well have inexcusably been as 'high as a Georgia pine' when he entered the courtroom and momentarily dozed off" the record was "completely

---

> THE COURT: I am going to have you tested. Can you hear me? Mr. Miller, it appears you may be under the influence of some controlled substance?
> ATTORNEY: She said she thinks you are under the influence of some drugs or something, are you?
> THE DEFENDANT: Inaudible.
> ATTORNEY: He said he is on antibiotics. He got some sort of flu. English translation**.**
> THE COURT: Mr. Miller, listen to me. At this time I am going to have them do a urine test on you.
> THE DEFENDANT: Yes M'am.
> THE COURT: Unless you want to tell me about what you had this morning.
> THE DEFENDANT: All I did was sat down for a while, I fell asleep.
> THE COURT: If you are not going to tell what you are under, we will do a urine test and we will find out. If you are clean, no problem. If you are not clean then you have a problem.
> THE DEFENDANT: I had a little coke.
> THE COURT: You had a little coke this morning?
> THE DEFENDANT: Yes, M'am.
> THE COURT: You come to court on a contempt proceedings completely gone? What is wrong with you?
> I need to think about this. Have a seat. We need to think about what needs to be done.

672 So. 2d at 96 n.1.

devoid of any evidence that the appellant's behavior was otherwise contumacious or served to significantly hinder or disrupt the orderly flow of the court's proceedings[.]" Id. (Green, J., dissenting). Rather, the defendant "addressed the court at all times in a most respectful, docile, and courteous manner and at no time created any outbursts." Id. at 96. The dissent further noted that similar interruptions in Dade County's courtrooms at the time were common. Id. at 97 ("Anyone with any familiarity with the day to day operations of our congested trial courts knows first hand that delays in courtroom proceedings due to an occasionally 'snoozing' litigant, witness, juror, lawyer, (or for that matter, judge) who may or may not be under the influence of anything are commonplace.").

Prior to Miller, no reported Florida decision had held a person in direct contempt "based solely upon his appearance before the court under the influence of an illegal substance and/or alcohol." Id. Nor has any other to date, probably because contempt is difficult to establish and reservedly used. "Other jurisdictions which have considered this issue have resoundingly rejected such an act as a sole basis for criminal contempt." Id. (citing cases). They recognize "that the per se act of appearing before the court under the influence of drugs and/or alcohol, as odious as it may be, is not a sufficient basis to sustain a finding of criminal contempt." Id.; see generally Joan Teshima, Annotation, Intoxication of Witness or Attorney as Contempt of Court, 46 A.L.R.4th 238 (2015) (collecting the literal handful of cases

on the topic). To be clear, the lack of caselaw directly on point doesn't mean there is not a problem out in the field; there is. But the sanction of criminal contempt is a tool of last resort, reserved for only the most egregious cases where contemptuous intent is evident. Berman v. State, 751 So. 2d 612, 616 (Fla. 4th DCA 1999) ("Although the power to punish for contempt is essential to the administration of justice, the criminal contempt power should be used cautiously and sparingly and reserved for those instances in which the conduct is calculated to hinder, embarrass, delay or obstruct justice.") (citations omitted); see, e.g., Ridge v. State Bar, 766 P.2d 569, 571 (1989) (visibly intoxicated attorney at preliminary hearing, upon whom the judge smelled alcohol, who slurred his speech and kept dropping exhibits, who acted inappropriately aggressive to counsel and witnesses, who had a .17 blood alcohol level, and who lied about number of beers had, held in direct contempt)

Turning to this case, I fully concur in Chief Judge Roberts's opinion, which concludes that due process was lacking in two ways (no basis for use of breathalyzer and lack of notice to the attorney that she was the subject of a contempt proceeding) and that the use of protective custody did not meet statutory requirements. Even absent these violations of law, the record is bereft of any evidence that the attorney was contemptuous. The attorney appeared respectful, compliant, truthful, and prepared to proceed with the hearing. No evidence

supported an intent on the attorney's part to "hinder, embarrass, delay or obstruct justice." To the contrary, despite believing her workday was over, she left home to come to the plea hearing. Perhaps she could have called in to tell the judge that she'd "had a drink at lunch" so that the hearing could be reset, a suggestion the trial judge made; but, doing so could have been viewed by the trial judge as contemptuous because it caused "disruption" of the proceedings.

A few observations. First, the Court's opinion in no way hampers the ability of judges to control their courtrooms; after all, nothing of record establishes that contemptuous behavior occurred or was likely to occur. None of the lengthy laundry list of "warning signs" in FLA's brochure—the one designed for trial judges—existed. See Florida Lawyers Assistance, Impairment in the Legal Profession: A Guide for Judges. A spectrum of intermediate methods of addressing "alcohol on the breath" situations exists short of full-blown criminal contempt proceedings against attorneys, witnesses, and other court participants. The judicial tool cabinet is adequately stocked to address almost all courtroom situations without pulling out the sledge hammer precipitously; doing so has the feel of the classic animation film "Bambi Meets Godzilla." See Bambi Meets Godzilla, https://en.wikipedia.org/wiki/Bambi_Meets_Godzilla (last visited December 16, 2015). Careers and reputations can be irreparably harmed or destroyed by public accusations of substance abuse, which is part of the reason why charging an

attorney in open court with contemptuous conduct triggers constitutional protections.

Second, criminal contempt proceedings are costly, putting a strain on scarce judicial resources, which is why informally counseling attorneys suspected of substance abuse is a preferred, if not superior, approach, consistent with the adage that we should "praise in public, criticize in private." As an example, the trial judge at the contempt hearing announced that he had informally met in his chambers with the attorney, at the attorney's urging, at which time she advised the judge of some unspecified personal conditions and problems, asking the judge "to make sure that she in fact does what she is supposed to do in court and hold her accountable[.]" Having an informal network of attorneys, or even judges, as a sentry is laudable; it is consistent with the goals of the organized Bar and FLA that substance abuse is a serious but treatable affliction. The trial judge, to his credit, takes seriously that attorneys are to be on their best behavior in his courtroom and undertook to look out for this attorney, though it appears the attorney and judge miscommunicated on what that meant exactly in practice. A quiet sidebar, followed by a continuance, concluding with private judicial words spoken to the attorney's employer may save a career; breathalyzing attorneys in court, holding them in "protective custody," and imposing criminal contempt sanctions is a surefire way to ruin one.

Finally, Florida currently has 921 trial judges (599 circuit and 322 county), who have—in large measure—broad discretion as to how they handle these situations. But other than anecdotes, no data or protocols appear to exist showing how that discretion is or should be exercised. An obvious tension exists between the role that trial judges play as avuncular figures looking out benignly for the best interests of lawyers who appear before them and the prosecutorial role judges play when they decide to punish criminally those who stray from standards of decorum in their courtrooms. Frequent mention is made in the transcripts of an incident that arose in the local jurisdiction that apparently influenced the trial judge's stern approach. It is unclear how often and under what circumstances other Florida judges are requiring lawyers, witnesses or others suspected of having consumed alcohol to take breathalyzers during court proceedings and how those procedures and results are subject to challenge.[2] It's doubtful that one-size-fits-all when it comes to establishing best practices, but it may be worth considering given the therapeutic and remedial approach that the judiciary and Bar support, the lack of clear guidance for trial judges to follow, and the gauntlet of indignities the attorney in this case experienced (detention, monitoring devices, and so on). Without a

[2] This practice raises other questions such as whether the legal standard of intoxication while driving a motor vehicle or shooting a gun is the appropriate one in this context. Or may judges apply a more stringent standard, such as the one used in some workplaces where blood alcohol levels of .02 or less can be grounds for discipline? What degree of objective evidence of impairment legitimates the use of a breathalyzer in court? Questions outnumber answers in this field.

doubt, attending court intoxicated violates the rules of professional conduct for which remedies exist, see Florida Bar Code of Professional Conduct 4-8.4; The Fla. Bar v. Scofield, 287 So. 2d 285 (Fla. 1973), but the judicial remedy of criminal contempt, is a hand that should not be overplayed.