Opinion issued August 22, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00251-CV

IN RE KYOKO CAMPBELL, Relator

Original Proceeding on Petition for Writ of Habeas Corpus

MEMORANDUM OPINION

Kyoko Campbell was found to be in criminal contempt for three violations of her divorce decree.* In this original proceeding, she seeks relief from the trial court's orders finding her in contempt, awarding attorney's fees to her ex-husband's counsel, and imposing community supervision as a condition of the suspension of

* The underlying case is *In the Interest of M.G., K.G., and P.G.*, cause number 2009-72786, pending in the 246th District Court of Harris County, Texas.

her confinement. Construing the petition for writ of mandamus as a petition for writ of habeas corpus, we grant the writ.

Background

Randall Gibson moved to enforce a final order of divorce entered between him and Kyoko Campbell. Gibson alleged that Campbell violated provisions relating to the possession of and communications with their three children. After an evidentiary hearing, the trial court found that Campbell violated the decree by:

(1) picking up the children from school on October 20, 2016, during a period when Gibson was entitled to possession of them;

(2) not calling Gibson back by telephone after he attempted to communicate with the children by Skype during designated hours on November 22, 2016, and purposely being away from her computer and phone during this period in order to thwart his communication with the children; and

(3) failing to assist and encourage the children to return in a timely manner a missed telephone call Gibson made to them during designated hours on November 26, 2016.

Based on these violations, the trial court found Campbell in contempt of court and entered an order of commitment confining her to the Harris County Jail for 180 days. A week later, the court entered a judgment of contempt, which ordered that Campbell be confined for 180 days for each of the three violations, but provided that each period of confinement run concurrently. The court also ordered Campbell to pay Gibson's attorney $1,500 for attorney's fees incurred in connection with the enforcement motion.

After six days of confinement, Campbell moved for release from jail. The trial court released her and suspended the balance of the period of confinement. However, the court placed Campbell under community supervision for a period of two years and conditioned the suspension of her confinement on compliance with the terms of her supervision. Among other things, these terms require Campbell to report in person to a community-supervision officer monthly, permit the officer to visit her home and workplace, and pay a monthly $25 community-supervision fee.

Campbell subsequently moved for reconsideration of the trial court's judgment of contempt. After the court denied her motion, Campbell filed this original proceeding in which she seeks a writ of mandamus directing the trial court to vacate its contempt order as void, including the award of attorney's fees and imposition of community supervision.

Analysis

I. Unavailability of mandamus relief

Gibson contends that Campbell cannot seek mandamus relief. He argues that she may only seek the relief she requests by a petition for a writ of habeas corpus, rather than a writ of mandamus, because she was jailed for contempt. Gibson requests that the petition be denied on this basis.

A petition for a writ of habeas corpus is the lone procedural vehicle for the relief that Campbell seeks. Mandamus relief generally is not available concerning a

contempt order that imposes confinement as a punishment; instead, contempt orders imposing confinement must be challenged by a petition for a writ of habeas corpus. *See In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (per curiam); *In re Cornyn*, 27 S.W.3d 327, 332 (Tex. App.—Houston [1st Dist.] 2000, orig. proceeding). Habeas relief also may be unavailable if the confinement is suspended. *Cornyn*, 27 S.W.3d at 332. However, when the terms of suspension impose some restraint on the contemnor's liberty—such as by requiring her to report to a community-supervision officer monthly—a petition for a writ of habeas corpus remains available and is the sole vehicle for challenging the contempt order. *See Ex parte Williams*, 690 S.W.2d 243, 244 (Tex. 1985); *Ex parte Sealy*, 870 S.W.2d 663, 666 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding); *Ex parte Duncan*, 796 S.W.2d 562, 564 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (per curiam). Thus, we deny Campbell's request for a writ of mandamus.

Nonetheless, as the parties have fully briefed the issues and filed the record necessary to assess whether habeas relief is appropriate, we construe Campbell's petition to seek a writ of habeas corpus and address the merits. *See Deramus v. Thornton*, 333 S.W.2d 824, 827–28 (Tex. 1960); *Sealy*, 870 S.W.2d at 666–67.

II. Habeas corpus review

In an original habeas proceeding, this court does not decide whether the relator is innocent or guilty of contempt. *In re McLaurin*, 467 S.W.3d 561, 564 (Tex.

App.—Houston [1st Dist.] 2015, orig. proceeding); *In re Griffith*, 434 S.W.3d 643, 645 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding). Instead, we ascertain whether the relator is unlawfully confined or subject to an unlawful constraint on her liberty. *See McLaurin*, 467 S.W.3d at 564; *Griffith*, 434 S.W.3d at 645. We may grant the writ of habeas corpus only if we find that the trial court's contempt order is void for lack of jurisdiction or because the relator was deprived of her liberty without due process. *McLaurin*, 467 S.W.3d at 564; *Griffith*, 434 S.W.3d at 645.

The relator bears the burden of showing that the contempt order is void. *McLaurin*, 467 S.W.3d at 564; *Griffith*, 434 S.W.3d at 645. Campbell challenges aspects of the trial court's contempt findings on two independent grounds. She argues that some of the provisions of the final divorce decree are too vague or ambiguous to serve as a basis for a finding of contempt. She also argues that the evidence adduced at the hearing fails to support one or more of the essential elements required to support a finding of contempt of court for disobedience outside of the court's presence. *See Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (contempt requires proof beyond a reasonable doubt of a reasonably specific order, a violation of the order, and the willful intent to violate the order).

With respect to the ambiguity argument, a judicial decree or judgment must state the terms for compliance with clarity and specificity to be enforceable by contempt. *Chambers*, 898 S.W.2d at 260; *Ex parte Brister*, 801 S.W.2d 833, 834

(Tex. 1990). We focus on the wording of the decree, which must be definite and certain as to the obligations it imposes on the relator. *Ex parte Reese*, 701 S.W.2d 840, 841–42 (Tex. 1986); *In re R.E.D.*, 278 S.W.3d 850, 858 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding). The decree must unambiguously require the relator to act or refrain from taking some action. *Brister*, 801 S.W.2d at 834. The decree also must unambiguously inform her exactly what is required of her to comply with its terms. *Reese*, 701 S.W.2d at 841–42. The relator's rights under a decree must not rest on implication or conjecture. *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967).

As for our review of the evidence, we cannot weigh the proof and decide "whether it preponderates for or against the relator." *Chambers*, 898 S.W.2d at 259; *McLaurin*, 467 S.W.3d at 564. An appellate court can hold a contempt judgment void for lack of evidentiary support only if no evidence supports it. *Chambers*, 898 S.W.2d at 259, 262; *In re Fountain*, 433 S.W.3d 1, 5–6 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding). We cannot grant habeas relief merely because the trial court drew an incorrect conclusion from the proof or its judgment is erroneous. *Ex parte La Rocca*, 282 S.W.2d 700, 703 (Tex. 1955); *In re Castro*, 998 S.W.2d 935, 937 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding). Only the trial court has the authority to assess the credibility of the witnesses and the weight of their testimony. *Ex parte Elmore*, 342 S.W.2d 558, 561 (Tex. 1961); *Ex parte Rosser*, 899

S.W.2d 382, 386 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding). It is not bound by the uncontradicted testimony of an interested witness unless the testimony is clear, direct, and positive; readily capable of contradiction if untrue; and there are no circumstances that discredit or impeach it. *Rosser*, 899 S.W.2d at 386.

A. Exclusion of evidence

Campbell initially complains that the trial court abused its discretion by refusing to consider the testimony of an additional witness—Jennifer Yeggoni—when it heard her motion for reconsideration. However, an appellate court cannot entertain an evidentiary complaint of this nature on habeas review.

Mere errors in the admission or exclusion of evidence generally are not reviewable by a petition for a writ of habeas corpus. *Ex parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. 1922); *Ex parte Barlow*, 899 S.W.2d 791, 798 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding). If an evidentiary error were so significant that it deprived the relator of the ability to present a defense, an appellate court could grant a habeas writ. For example, in *In re Bryce*, 981 S.W.2d 887 (Tex. App.—Houston [1st Dist.] 1998, orig. proceeding), a panel of this court granted the writ because the trial court disallowed the relator from testifying on his own behalf during the contempt hearing. *Id.* at 888–89. The *Bryce* court held that this amounted to a denial of due process because the relator sought to testify about his inability to

comply with the order under which he was held in contempt, *id.* at 888, which, if credited, would have disproven the willfulness of the violation.

In contrast, the trial court did not deny Campbell the opportunity to put on evidence at the contempt hearing. Campbell knew of and testified about Yeggoni at the time of that hearing. But she only tried to call Yeggoni to testify after the contempt hearing and the trial court's entry of judgment. Due process required that Campbell have her day in court, not that she be given a second opportunity to present additional, previously available evidence on a motion for reconsideration. *See In re Oliver*, 333 U.S. 257, 275 (1948) (due process requires one charged with contempt to have reasonable opportunity to defend oneself, including chance to testify and call witnesses); *Ex parte Gordon*, 584 S.W.2d 686, 689–90 (Tex. 1979) (due process requires opportunity to prepare defense and be heard).

Because the evidentiary error Campbell alleges does not amount to a deprivation of due process, it is not reviewable in this original habeas proceeding.

B. Contempt findings

1. First violation

The trial court first found Campbell in contempt for willfully disobeying the divorce decree on the following basis:

> On Thursday, October 20, 2016, during the regular school year, [Campbell] picked up the children from school during [Gibson's] period of possession.

Campbell contends that this contempt finding is void because the underlying divorce decree's provisions relating to the possession of the children are ambiguous and therefore unenforceable by contempt. She argues that these provisions do not specify her duties and obligations relating to the possession of the children when neither Gibson nor his designee can pick them up from school during Gibson's period of possession.

The divorce decree states that Gibson has the right to possess the children after they are dismissed from school each Wednesday until school resumes on Friday. When the children are dismissed from school on Wednesday afternoon, Campbell must surrender them to Gibson at their respective schools. Gibson may designate another to pick up the children in his place. The decree provides that either Gibson or his designee must be present when the children are picked up from the school. It is silent as to what should happen if neither Gibson nor his designee are present.

Gibson testified that he was unable to pick up two of his children after school on Thursday, October 20, 2016, because he was on an overnight field trip with the third child. He designated Yeggoni to pick up and care for the other two children that day. Instead, Campbell picked them up from school, kept them for a time, and later dropped them off at Yeggoni's home, where the two children stayed overnight. Campbell admitted that she picked up the children from school on Thursday afternoon. She explained that Yeggoni was not there and that she later took the

children to Yeggoni. Gibson conceded that he did not know whether Yeggoni was there to pick up the children.

The evidence conclusively established that neither Gibson nor his designee, Yeggoni, was there to pick up the two children after school on Thursday. Gibson admitted that he was not there and did not know if Yeggoni was present. Campbell said that Yeggoni was not there. While the trial court sitting as factfinder generally may disbelieve a witness's testimony in whole or part, it cannot simply disregard the uncontradicted testimony of an interested witness that is, clear, positive, and direct, otherwise credible, free from contradictions and inconsistencies, and readily could have been controverted. *See City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005); *In re Doe 4*, 19 S.W.3d 322, 325 (Tex. 2000); *Rosser*, 899 S.W.2d at 386. Campbell's testimony about Yeggoni's absence meets this standard. She unequivocally stated that Yeggoni was not there, no other evidence casts doubt on this testimony, and Gibson could have controverted her testimony if it were untrue, such as by calling Yeggoni as a witness.

The divorce decree required Campbell to surrender possession of the children during this period. However, it also required Gibson to arrange to pick up the children. He didn't, and the decree did not inform Campbell what was required or permitted should this happen. Because the decree did not unambiguously bar her from temporarily taking possession of the children under the circumstances, its

possession provisions do not provide a basis for contempt. *See R.E.D.*, 278 S.W.3d at 858; *Brister*, 801 S.W.2d at 834; *Reese*, 701 S.W.2d at 841–42.

2. Second violation

The trial court next found Campbell in contempt for willfully disobeying the divorce decree on the following basis:

> On Tuesday, November 22, 2016 between the hours of 6:00 p.m. and 8:00 p.m. [Gibson], who was not in possession of the children, attempted to Skype to [the] children. [Campbell], the party receiving the call, did not return the call by ordinary telephone methods (cellular or land-line telephone). [Campbell] took [] purposeful actions to be away from a computer or phone with Skype or Facetime capabilities to thwart the spirit and intention of making it possible for [Gibson] to have a Skype/Facetime call with the children once per week.

Campbell contends that the trial court erred by holding her in contempt for the second violation because she did not violate the divorce decree's communications provisions. She argues that the decree does not require her to place a return call to Gibson if he unsuccessfully tries to contact the children via Skype. She further argues that there is no evidence that she purposely avoided her telephone and computer to thwart Gibson's effort to have a video conference with the children.

The divorce decree gives Gibson the right to call the children between 6:00 p.m. and 8:00 p.m. on Tuesdays when they are in Campbell's possession. He may place this call through video-conferencing software like Skype. If the children are not near a device with video-conferencing capability when Gibson tries to call them, the call instead is to take place by telephone, but Campbell cannot "take purposeful

actions to be away from a computer or phone" with video-conferencing capability "to thwart the spirit and intention of making it possible" for Gibson to have a video conference with the children. If a call is missed altogether and Gibson leaves a message, Campbell "shall assist and encourage the children in returning the call in a timely manner."

Gibson testified that he tried to call the children by Skype on Tuesday, November 22, 2016, between 6:00 p.m. and 8:00 p.m. but was unable to reach them and left voicemails. Just before 10:00 p.m., he sent a text message to Campbell complaining that he tried to contact the children by Skype but that she would not respond. The text-messaging program indicated that Campbell never read Gibson's text message. Gibson said that Campbell only let him talk with the children briefly by telephone on the following day. Campbell agreed that she did not call Gibson back on Tuesday. She testified that she generally tries to have the children return Gibson's calls in a timely fashion.

None of the evidence that the trial court heard supported its second contempt finding, which was premised in part on a determination that Campbell "did not return the call." The divorce decree contemplated that there would be times when the children missed Gibson's calls. On these occasions, it required Campbell to "assist and encourage the children in returning the call in a timely manner." There was no

evidence that Campbell did not return Gibson's call; the evidence instead showed that Gibson and the children spoke by telephone the following day.

The trial court also based its contempt order on a finding that Campbell purposely was away from a device with video-conferencing technology. However, there is no evidence as to why Campbell and the children missed Gibson's Skype call that Tuesday evening. Counsel did not ask Campbell any questions about the circumstances of the missed call. Nor does the spare record support an inference that Campbell purposely thwarted Gibson's attempt to have a video conference with the children. A trial court ordinarily may infer a contemnor's state of mind from her violation of an unambiguous order. *See Chambers*, 898 S.W.2d at 261. Here, however, there is no proof of an underlying violation by Campbell from which the trial court could draw such an inference.

3. Third violation

The trial court next found Campbell in contempt for willfully disobeying the divorce decree on the following basis:

> On Saturday, November 26, 2016 between the hours of 2:00 p.m. and 8:00 p.m. [Gibson], who was not in possession of the children, called the children. [Campbell] failed to assist and encourage the children in returning the call in a timely manner.

Campbell contends that the trial court erred by holding her in contempt for failing to assist and encourage the children to return Gibson's November 26, 2016 telephone

call in a timely manner. Among other things, she argues that the timeliness requirement is too vague or ambiguous to be enforceable by contempt.

The divorce decree states that Gibson may call the children once each Saturday between 2:00 p.m. and 8:00 p.m. when they are in Campbell's possession. If the children miss his call and he leaves a message, Campbell "shall assist and encourage the children in returning the call in a timely manner."

Gibson testified that he tried to call the children three times between 2:00 p.m. and 8:00 p.m. on Saturday, November 26, 2016, but was unable to reach them. He left Campbell a voicemail and sent her a text message asking that she have them call him back. The text-messaging program indicated that Campbell never read Gibson's text message, and Campbell did not return his call that Saturday. Gibson sent a follow-up text message to Campbell on Sunday and did so again on Monday morning. The text-messaging program again indicated that Campbell never read these messages. Campbell testified that the children were staying with her parents that weekend. She conceded that the divorce decree gave her possession of the children during this period. She also conceded that she did not assist the children to return Gibson's call while they were staying at her parents' home. Once the children returned, however, they called Gibson back. Though the record is unclear, the parties agree that the children called Gibson back on Sunday, the day after he called them.

"Timely" is an inherently ambiguous term when it is unqualified. The divorce decree uses the term as an adjective without further definition. Its plain, ordinary, common meaning encompasses actions taken "in good time" or "at a fitting or suitable time; seasonable, opportune, well-timed." 18 THE OXFORD ENGLISH DICTIONARY 111 (2d ed. 1989). Thus, whether an act is "timely" is contextual and generally a matter about which reasonable people may disagree. *See, e.g.*, *Union City Body Co. v. Ramirez*, 911 S.W.2d 196, 201–03 (Tex. App.—San Antonio 1995, orig. proceeding) (observing that timeliness defied definition and concluding that trial judge enjoyed discretion as to whether counsel acted timely). Given the flexibility inherent in the term, the divorce decree did not unambiguously inform Campbell of the deadline for timely assisting and encouraging the children to return missed telephone calls. *See Reese*, 701 S.W.2d at 841–42. The timeliness requirement therefore is too ambiguous or inexact to serve as a basis for contempt under the circumstances. *See id.*; *Slavin*, 412 S.W.2d at 44.

Conclusion

Because we hold that none of the trial court's contempt findings comport with the requirements of due process, we need not address Campbell's additional issues. We grant the writ of habeas corpus and declare void the trial court's January 18, 2017 order of commitment, January 25, 2017 order finding Campbell in contempt,

including its award of attorney's fees, and February 2, 2017 order confirming the contempt findings and imposing community supervision on Campbell.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.