

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

FEB 25 2014

TIME: 10:42:08

STATE OF ARKANSAS

PLAINTIFF #:

v.

CR-13-224

JOSHUA RYAN HASTINGS

DEFENDANT

**MEMORANDUM OPINION AND ENTRY OF CONTEMPT JUDGMENT AGAINST
WILLIAM O. JAMES, JR.**

The State of Arkansas charged Joshua Ryan Hastings with manslaughter (Ark. Code Annotated Section 5-10-104) in the death of Bobby Moore Joe Moore III after Hastings shot and killed Moore on August 12, 2012. Following three days of testimony (June 19, 20, and 21, 2013), a jury deliberated for more than twelve hours over the course of two days (June 22 and 23, 2013) before the Court declared a mistrial on June 23, 2013 after the jury failed to agree on a verdict.

After the jury was thanked for its service and dismissed, the Court assessed fines of \$2,500 each against William O. James, Jr., lead counsel for Hastings, for ten direct violations of an explicit order regarding cross examination of two juvenile witnesses, Jeremiah Johnson and Keontay Walker. The Court denied a subsequent motion filed on behalf of James by Jeff Rosenzweig which sought to vacate the contempt findings. The Arkansas Supreme Court dismissed James' appeal of the contempt ruling on February 6, 2014 pursuant Ark. Sup. Ct. Admin. Order No. 2(b)(1)-2(2) (2013).

The Court now enters judgment on the contempt citation. However, because it was error to assess fines of \$2,500 for each instance of contempt, the Court *sua sponte* reduces the punishment for each contempt finding to \$500, the fine prescribed for a Class C misdemeanor. See Arkansas Code Annotated § 16-10-108.

James advanced several arguments in his motion to vacate the contempt judgment. Despite the fact that the Court detailed the specifics of his contumacious conduct when it initially assessed fines against him, James asserted that he was entitled to an evidentiary hearing. Although the Court issued the sanctions on Sunday, June 23, when it convened for the explicit purpose of continuing jury deliberation, James argued that the Court was prohibited from assessing sanctions against James for contumacious conduct during the trial. James also argued that he was denied due process by the contempt findings, denied that his conduct was contumacious, and complained that the Court abused its discretion by imposing fines of \$2,500 for each instance of his disobedience. James argued that he did not know and could not have known that his actions violated the Court's order so as to have understood that his conduct "would later be construed as contemptuous" (James Motion, p. 8). Finally, James challenged the Court's order restricting examination of witnesses Johnson and Walker, as if disagreement with the Court's ruling either was a defense to his disobedience or, to quote his motion, "[a]t the very least, it is mitigation which James should be permitted to present" (James Motion, p. 10). As previously stated, the Court erred in fining James \$2,500 for each instance of contempt and now enters judgment of \$500 for each of the ten instances of contempt.

THE COURT'S CONTEMPT FINDING AND IMPOSITION OF FINES DID NOT VIOLATE JAMES' RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

James cited the decision of the U.S. Supreme Court in *Taylor v. Harris*, 418 U.S. 488 (1974) in support of his contention that the Court denied him reasonable notice of the specific charges and an opportunity to be heard. *Taylor v. Harris* involved a murder

trial in which the trial judge imposed consecutive sentences on nine counts of contempt which totaled four and one-half years imprisonment (including sentences of one year's imprisonment on two separate counts) against the attorney for the accused. The Kentucky Court of Appeals affirmed the contempt sanctions, but reduced the penalty to six months in jail. The U.S. Supreme Court reversed and remanded that decision because the trial judge denied the attorney involved an opportunity to be heard before he received a sentence that deprived his liberty.

James was not denied liberty. He walked from the courtroom on June 23, 2013; with the same freedom he enjoyed before the trial. He was not arrested or otherwise detained at any time as a result of the contempt sanctions imposed against him. James has never been denied liberty at any time, and deprivation of liberty (imprisonment) was the basis of the lawyer's due process challenge in *Taylor v. Harris*.

Moreover, the majority opinion in *Taylor v. Harris* actually distinguishes the instant situation from what was done in that case. Writing for the Court, Justice White commented: "We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him." *Taylor v. Harris*, 418 U.S. 488 (1974).

Beyond the fact that James was not deprived of liberty, it is beyond dispute that the conduct for which he has been held in contempt was committed in open court. As James admitted in his motion, Ark. Code Ann. Section 16-10-108(c) provides for summary punishment of contemptuous conduct that occurs "in the immediate view and presence of the court."

Perhaps even more telling is the fact that James at no time ever requested an opportunity to be heard or offer a defense for his contumacious conduct. In *Taylor v. Harris* the attorney attempted to address the trial judge but was threatened with jail for doing so. James never attempted to address the Court about his conduct. He was never threatened with jail. James was never in a situation even remotely similar to that of the attorney in *Taylor v. Harris*.

Finally, as to this issue, the argument James asserted ignores the fundamental principle that “the adequacy of notice and hearing respecting proceedings that may affect a party’s rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.” *Link v. Wabash R.R. Co.*, 370 U.S. 626, at 632 (1962), quoting, *Anderson National Bank v. Lockett*, 321 U.S. 233, 246. As detailed below, James had direct knowledge that the conduct for which he was sanctioned involved flagrant disobedience of a ruling by this Court. James knew on June 18, 2013 that the Court had ruled that the defense “is only permitted to inquire of the juvenile witnesses Johnson and Walker for the purpose of establishing or challenging credibility on grounds of bias or motive **but not for the purpose of showing state of mind as to those witnesses at the time of the occurrence [the death of Bobby Moore] or for the purpose of establishing their character.**” (Court’s remarks to counsel at the end of the day on June 18, 2013).

The notion that James did not know, had no way to know, or should not be treated as if he knew about the Court’s ruling is, simply put, stunning.

THE COURT WAS NOT BARRED BY ARK. CODE ANN. § 16-10-114 FROM IMPOSING SANCTIONS AGAINST JAMES FOR CONTUMACIOUS CONDUCT

James cited Ark. Code Ann. § 16-10-114 in support of the claim that his contumacious conduct could not be punished because the Court imposed sanctions on a Sunday. The statute prohibits courts from being open or transacting business “on Sunday unless it is for the purpose of receiving a verdict or discharging a jury.”

The Court convened on Sunday, June 23, 2013, to allow jury deliberations to continue. James did not object to Court being convened on Sunday. He was present on Saturday, June 22, 2013, when the Court instructed jurors to return on the following day to continue their deliberations. After the jury was unable to return a verdict and the court declared a mistrial, James did not request to be heard regarding his contumacious behavior.

The court did not convene a Sunday session to impose contempt sanctions. Court was in session on June 23 to allow the jury to deliberate and reach a verdict. There is no legal authority for the notion that the trial court somehow lost power to impose contempt sanctions when it declared a mistrial after jurors were unable to agree on a verdict.

THE COURT ERRED BY IMPOSING SANCTIONS EXCEEDING \$500 FOR EACH OF THE TEN INSTANCES OF CONTUMACIOUS CONDUCT

The Court erred when it fined James \$2,500 for the ten instances of contumacious conduct. Arkansas Code Annotated § 16-10-108(a) states: “Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts and no others: (1) Disorderly, contemptuous, or insolent behavior committed during the court’s sitting, in its immediate view and presence, and directly

tending to interrupt its proceedings or to impair the respect due to its authority: ... (3) Willful disobedience of any ... order lawfully issued or made by it.”

It is settled law in Arkansas that a court has inherent power to punish contemptuous behavior committed in its presence, without regard to restrictions imposed by Ark. Code Ann. § 16-10-108(a). Summary punishment for contempt committed in the presence of the court is an inherent power reserved to the judiciary, and cannot be abridged by legislation. See, *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995). The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings. *James v. James*, 237 Ark. 764, 375 S.W.2d 793 (1964). Finally, the Arkansas Supreme Court has recognized that one of the values of a court’s exercise of its criminal contempt power is its deterrent effect on others. *Ward v. Ward*, 273 Ark. 198, 617 S.W.2d 364 (1981).

Ark. Code Ann. § 16-10-108(b)(1) provides that punishment for contempt is a Class C misdemeanor. Consistent with the statute, the Court hereby reduces the fines assessed against James from \$2,500 to \$500 for each of the ten instances of contumacious conduct committed in its presence.

JAMES RECEIVED TIMELY AND ADEQUATE NOTICE OF THE COURT’S JUNE 18, 2013 RULING AND THAT HIS TRIAL CONDUCT WAS CONTEMPTUOUS

In his motion to vacate the contempt sanctions, James quoted from the Arkansas Supreme Court’s decision in *McCullough v. Lessenberry*, 300 Ark. 426, 780 S.W.2 9 (1989) for the contention that the trial court in this instance could not properly sanction him for contempt because “James could not have known that his remarks would later be construed as contemptuous.” (James Motion, p. 8). That argument is meritless.

As the Court stated on June 23 before announcing the contempt sanctions against James, a pretrial hearing took place in this case on June 11. During that hearing, the Court addressed a defense motion in limine to permit disclosure of and/or reference to the juvenile records of State witnesses Jeremiah Johnson and Keontay Walker. The Court initially denied that motion on June 11. The defense presented a timely motion for reconsideration of that ruling on June 13, based on the decision of the Supreme Court in *Davis v. Alaska*, 415 U.S. 308 (1974). *Voir dire* began on Monday afternoon, June 17. At the end of *voir dire* on that day, the Court reaffirmed its denial of the defense motion in limine.

On the morning of Tuesday, June 18, the Court spoke with trial counsel for the State and defense in chambers, informed them that it had reconsidered the defense motion and the decision in *Davis v. Alaska*, and would grant the defense motion. Jury selection was completed and the jury was sworn and seated on that day. After the jurors were released for the day, the following colloquy took place.

THE COURT: Before we depart, the Court needs to put on the record an evidentiary ruling that the Court has shared with counsel earlier today. The Court has reviewed and reconsidered its ruling of yesterday concerning the defense motion to reconsider the Court's ruling regarding the ability to cross-examine the juvenile witnesses Jeremiah Johnson and Keontay Walker regarding their—the fact that they were on probation as part of the defense cross examination. After reviewing the Supreme Court decision in *Davis v. Alaska* again and based upon the Court's reconsideration of that decision, the Court hereby reverses its ruling of yesterday and grants the defense motion to reconsider with this caveat.

The defense may cross-examine witnesses Jeremiah Johnson and Keontay Walker about the fact that they were on probation in juvenile court for the purpose of challenging their credibility on the grounds of bias or motive. The defense may not specify the offenses on which the probation was based, nor may the defense refer to any other offenses, juvenile offenses. The defense is only permitted to inquire of the juvenile witnesses Johnson and Walker for the purpose of establishing or challenging credibility on grounds of bias or motive but not for the purpose of showing state of mind

as to those witnesses at the time of the occurrence or for the purpose of establishing their character.

Mr. Johnson (lead counsel for the State), do you need to make a record on the Court's ruling?

MR. JOHNSON: I don't, Your Honor. Thank you.

THE COURT: Does the State understand the Court's ruling?

MR. JOHNSON: I do, Your Honor. It sounds like the same thing you told us in chambers and I think you've accurately put it on the record. Thank you.

THE COURT: Does the defense understand the Court's ruling?

MR. JAMES: We understand it, Your Honor.

THE COURT: Very well. The Court understands that the defense—and just for the record, the Court understands that the defense has—had requested opportunity to inquire about the specific adjudication offenses on which the juveniles were adjudicated and the Court denied that request and so I want to make sure on the record that that is preserved so if—for the purpose of any review subsequently, that issue is preserved, also to make sure that everyone understands that the Court will not allow any tolerance of that.

MR. JAMES: Thank you, Your Honor.

The record plainly demonstrates the following conduct by James.

1

Early during the statement for the defense on the following morning (June 19), the following event occurred.

MR. JAMES (opening statement): And when he (Mr. Hastings) gets there (the vehicle into which he shot and killed Bobby Moore), they're (juvenile witnesses Jeremiah Johnson and Keontay Walker) gone and I think Mr. Johnson (counsel for the State) said they ran because they were afraid they were going to get shot and that may be part of their fear, *but I think the evidence will show there was a whole lot of other fear and one of them is they're just going to get caught. They're on probation. I'm not going to call these boys a bunch of names. I will say it as it is. They're on probation, juvenile probation. They're committing felonies.*

MR. JOHNSON: Your Honor, approach?

THE COURT: You may.

(The following conference was held at the bench outside the hearing of the jury).

MR. JOHNSON: Your Honor, he's talking about them fleeing from the parking lot in conjunction with the night. It has nothing to do with their bias at the police department.

MR. JAMES: I will move on. I did go into that, Your Honor.

THE COURT: He's (referring to Mr. Johnson) making an objection.

MR. JOHNSON—That it had nothing to do with the bias of the police department with regard to how they were telling their stories a certain way.

THE COURT: *The objection is sustained. Mr. Johnson's objection is sustained. Mr. James, the Court has been very emphatic in its ruling yesterday evening and in its chambers conversation with counsel yesterday morning that evidence of the juvenile's probationary status is permissible for cross examination on bias and motive with regard to testimony but not with regard to their character or how they may have acted at the scene. Your argument is in direct violation of that. You will immediately move to another subject. I will take up the issue of sanctions after this trial, but I'm holding you in contempt.*

Nevertheless, Mr. James asked the following questions during cross examination of Jeremiah Johnson:

2

You weren't really worried about getting caught?

3

I mean you didn't want to get arrested, did you?

Did you know that if you got caught, you might get in trouble?

Did you know if you got caught, you might go to jail?

Did you want to go to jail?

4

Were you concerned about the fact that you had been caught committing felonies?

Not at all?

During cross examination of Keontay Walker on June 19 (the same day that he had been held in contempt for violating the Court's explicit ruling on June 18), Mr. James asked the following questions:

5

And would you agree with me that no matter what, you don't want to get caught?

Is that fair to say?

I mean did you have any information that your boys with you want to get caught?

6

All right. Did you have any reason to believe they didn't want—they wanted to get caught?

Are you concerned then about the possibility of someone seeing you—

Getting caught?

7

At what point, do you decide you're no longer concerned about getting caught?

8

So when you started walking toward the car, when you stopped breaking the law, you were no longer concerned about it?

9

Again, when this is all said and done, the last thing you want to have happen is get caught, right?

I mean is caught and getting arrested the same thing for you?

10

During his closing argument, Mr. James said:

These young men were not kids out after a high school game, toilet-papering someone's house. They were out roaming around, while the rest of the people in Little Rock slept, stealing, committing adult felonies, committing adult crimes. It's important to put all of this in context. The last thing that they wanted was to get caught. I asked both of them over and over "you don't want to get caught?" "No." "Why were you the lookout?" "Because I don't want to get caught?" "Why you moved from an alarm in one area of the complex to another one?" "Because we don't want to be caught, we don't want to get caught? Ask yourself as you think about this case does the desire not to get caught make it more or less likely that they did exactly what Josh Hastings said they did. They didn't want to get caught."

The record contains abundant evidence that Mr. James received timely and clear notice that his conduct violated the Court's bench ruling on June 18. Even more clear and abundant is the evidence that James defied the Court's ruling at his first opportunity—during his opening statement—and that he continued to defy it even after the Court held him in contempt. The excerpt from his closing argument proves, beyond question, that James engaged in the disobedient conduct pursuant to a calculated defense strategy. Despite knowing the Court's ruling, James defied it persistently, deliberately, and inexcusably. The claim that he didn't know what the Court ruled or didn't know he was disobeying the Court amounts to a brazen mis-statement, to put it charitably.

DISAGREEMENT WITH THE COURT'S ORDER RESTRICTING CROSS EXAMINATION ABOUT THE JUVENILE RECORDS OF JEREMIAH JOHNSON AND KEONTAY WALKER WAS NO EXCUSE FOR CONTUMACIOUS CONDUCT

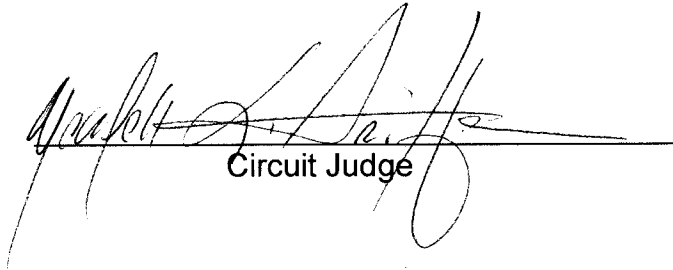
At no point during the trial did James attempt to cross-examine Jeremiah Johnson and Keontay Walker consistent with the Court's June 18 ruling. He never attempted to discredit their account of what they told the police about the defendant's conduct in shooting Bobby Moore by suggesting that Johnson and Walker somehow were motivated by pressure from the police to implicate Joshua Hastings, or that they were afraid that their juvenile probation might be revoked unless their accounts about

what Hastings did supported the police investigation of Hastings. Instead, he deliberately engaged in a course of conduct that violated the Court's ruling on multiple occasions.

There is no authority from any jurisdiction, let alone Arkansas, that supports the idea that a lawyer can avoid sanctions for contumacious conduct by claiming that he disagreed with court rulings. Disagreement with a court ruling is no excuse for blatant disobedience and disrespect for the rule of law.

For the foregoing reasons, the Court hereby fines and enters judgment against William O. James, Jr. for \$500 each for the ten aforementioned instances of contumacious conduct pursuant to Ark. Code Ann. § 16-10-108(b)(1).

ORDERED, this 25 day of February, 2013.



Circuit Judge