REL: June 26, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Ex parte H. Chase Dearman

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: H. Chase Dearman

v.

State of Alabama)

(Mobile Circuit Court, CC-17-5331.70; Court of Criminal Appeals, CR-18-0049)

MENDHEIM, Justice.

H. Chase Dearman petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' decision affirming, without an opinion, the Mobile Circuit Court's order finding Dearman in direct contempt, as that term is defined by Rule 33.1(b)(1), Ala. R. Crim. P. See Dearman v. State (No. CR-18-0049, July 12, 2019), ___ So. 3d ___ (Ala. Crim. App. 2019) (table) (on return to remand) ("Dearman II"). We granted certiorari review to determine whether the Court of Criminal Appeals' decision is in conflict with Hawthorne v. State, 611 So. 2d 436 (Ala. Crim. App. 1992); In re Powers, 523 So. 2d 1079 (Ala. Civ. App. 1988); and/or In re Carter, 412 So. 2d 811 (Ala. Civ. App. 1982).[1] We conclude that the Court of Criminal Appeals' decision is in conflict with Hawthorne, and we reverse the Court of Criminal Appeals' judgment.

[1]We note that Dearman also alleged that Dearman II is in conflict with Ex parte Walker, 122 So. 3d 1287 (Ala. Civ. App. 2013). However, we did not grant certiorari review as to Dearman's argument regarding Ex parte Walker because Ex parte Walker is a plurality decision and, thus, is not a "prior decision[]" of the Court of Civil Appeals for purposes of Rule 39(a)(1)(D), Ala. R. App. P.

Facts and Procedural History

On August 30, 2018, Dearman, an attorney, was representing James Markese Wright at Wright's probation-revocation hearing before the circuit court; Judge James T. Patterson was the circuit-court judge presiding over the hearing. During the course of the probation-revocation hearing, the following exchange occurred between Dearman and Judge Patterson:

> "[Wright's probation officer]: During the search [of Wright's house], I ended up locating in the kitchen drawer, what was later determined to be a controlled substance.
>
> "[The State]: Specifically, what was it?
>
> "[Wright's probation officer]: AK-47 Herbal Incense.
>
> "[The State]: Would that be on the streets known as --
>
> "MR. DEARMAN: I object. This officer has no training in narcotics whatsoever. This is not a regular drug and regularly identifiable.
>
> "And in addition to that, the district court found no probable cause on this case, the facts of which the court is now hearing.
>
> "THE COURT: All right.
>
> "MR. DEARMAN: We've had a preliminary hearing.

"THE COURT: 'Alabama Rules of Evidence, Article 11, Miscellaneous Rules, Rule 1101, rules inapplicable. These rules, other than those with respect to privileges, do not apply in the following situations: Preliminary questions of fact, grand jury, miscellaneous proceedings including proceedings for extradition or rendition, preliminary hearing in criminal cases, sentencings, granting and revoking probation.'[2]

"MR. DEARMAN: Judge, in district court --

"THE COURT: No. They don't apply.

"MR. DEARMAN: May I finish my objection?

"THE COURT: No, you may not. There's no objection here. They don't apply. The Rules of Evidence don't apply here.

"MR. DEARMAN: I have an objection for the record.

"THE COURT: No, sir. The rules don't apply. The rules don't apply, Mr. Dearman.

"MR. DEARMAN: The Judge is talking over me.

"THE COURT: The rules don't apply.

"MR. DEARMAN: My objection --

"THE COURT: The rules don't apply.

"MR. DEARMAN: My objection is --

"THE COURT: The rules don't apply.

"MR. DEARMAN: My objection is --

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[2]We note that this is not a verbatim reading of Rule 1101, Ala. R. Evid.

"THE COURT: The rules don't apply.

"MR. DEARMAN: Okay. Let me know when I can speak.

"THE COURT: You're not going to speak. If you're going to make an objection, you're not going to speak.

"MR. DEARMAN: May the record reflect that I'm not allowed to make --

"THE COURT: Get him out of here. Take the lawyer out. Get out.

"MR. DEARMAN: May the record reflect --

"THE COURT: Get out.

"MR. DEARMAN: -- that I am being ordered out of the courtroom --

"THE COURT: Get out.

"MR. DEARMAN: -- and the Judge has lost his temper --

"THE COURT: Get out.

"MR. DEARMAN: -- again.

"THE COURT: Get out.

"Take him back.

"(Proceedings concluded.)"

On the same day of the hearing, the circuit court entered the following order:

> "Based on his conduct before this court this date at hearing on the probation revocation of his client, James Markese Wright, and specifically his conduct after this court advised Mr. Dearman that per Ala. R. Evid. 1101(b)(3), the rules of evidence do not apply to granting or revoking probation, and because of his contemptuous conduct cted [sic] toward this court immediately after this Rule of Evidence was pointed out to him, this court finds attorney Chase Dearman in direct contempt of court per Rule 33.1(b)(1)[, Ala. R. Crim. P].[3]
>
> "This matter was immediately disposed of by undersigned ordering Mr. Dearman to leave [the] courtroom ..., and this court will take no further action in this regard -- this time. However, please be advised that further outbursts of this nature may lead to other sanctions allowed per Ala. R. Crim. P. Rule 33."

On September 24, 2018, Dearman filed a motion requesting that the circuit court vacate its August 30, 2018, order and requested a hearing on the matter. In his motion, Dearman alleged that he was not given notice of the specific contemptuous conduct and a reasonable opportunity to present

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[3]"Direct contempt" is defined in Rule 33.1(b)(1), Ala. R. Crim. P., as follows:

> "'Direct Contempt' means disorderly or insolent behavior or other misconduct committed in open court, in the presence of the judge, that disturbs the court's business, where all of the essential elements of the misconduct occur in the presence of the court and are actually observed by the court, and where immediate action is essential to prevent diminution of the court's dignity and authority before the public."

evidence or mitigating circumstances as required under Rule 33.2(b), Ala. R. Crim. P., which states:

> "The court shall apprise the person of the specific conduct on which the finding [of direct contempt] is based and give that person a reasonable opportunity to present evidence or argument regarding excusing or mitigating circumstances. No decision concerning the punishment to be imposed shall be made during the course of the proceeding at which the contempt occurs, unless prompt punishment is imperative to achieve immediate vindication of the court's dignity and authority."

On September 26, 2018, the circuit court denied Dearman's motion. Dearman appealed the order of contempt to the Court of Criminal Appeals. See Dearman v. State, [Ms. CR-18-0049, April 12, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019) ("Dearman I").

In Dearman I, the Court of Criminal Appeals concluded, as follows:

> "Rule 33.2(b) mandates that a person found in contempt be allowed a reasonable opportunity to present evidence or argument in an effort to excuse or to mitigate the contemptuous behavior. Dearman was not afforded an opportunity to do so. Therefore, the circuit court erred when it failed to comply with Rule 33.2(b), and Dearman is entitled to relief on this issue."

___ So. 3d at ___. Accordingly, the Court of Criminal Appeals remanded the matter to the circuit court and ordered it to

comply with Rule 33.2(b). The Court of Criminal Appeals expressly stated that, "[b]ecause we are remanding this case for the circuit court to comply with Rule 33.2(b), we pretermit discussion of Dearman's remaining issue on appeal, namely, whether the circuit court erred in finding Dearman in direct contempt." Dearman I, ___ So. 3d at ___ n. 1.[4]

On remand, the circuit court conducted a hearing on May 10, 2019, to comply with Rule 33.2(b). At the hearing, at which Dearman was present, the circuit court stated that it found Dearman in direct contempt "because of the challenge [to] judicial authority as shown in the record on appeal" and that Dearman's "behavior necessitated immediate and prompt punishment; i.e., removal from the courtroom." Dearman was then given the opportunity to present evidence or argument regarding excusing or mitigating circumstances, at which time Dearman stated:

[4]Dearman also argued in Dearman I that the Court of Criminal Appeals should order Judge Patterson to recuse himself from the contempt proceedings. See Dearman I, ___ So. 3d at ___. The Court of Criminal Appeals considered the merits of Dearman's argument, but did not find it convincing. Dearman did not petition this Court for certiorari review of Dearman I.

> "I would like to state for the record that it was my intent only to fulfill my duty as the advocate for my client.
>
> "I was taught in law school that if you do not put it on the record, you've lost it forever, and that was all I was simply trying to do. There was no intent on my behalf. It certainly wasn't anything personal."

Following the hearing, the circuit court entered an order, which states, in pertinent part:

> "Today at the hearing mandated by the Court of Criminal Appeals, Mr. Dearman was advised by this court ... th[at] he had been held in contempt [on August 30, 2018,] because the court was of the opinion that what transpired was a challenge to the court's authority; therefore, the court felt it necessary to promptly punish said behavior, yet considered the matter closed based on the order I had entered that day."

On return to remand, the Court of Criminal Appeals affirmed the circuit court's decision by unpublished memorandum. Dearman II. Dearman filed an application for rehearing, which was denied on August 2, 2019.

On August 19, 2019, Dearman petitioned this Court for certiorari review of Dearman II. We granted certiorari review to determine whether Dearman II is in conflict with Hawthorne, supra, Powers, supra, and/or Carter, supra.

Standard of Review

In Holland v. State, 800 So. 2d 602, 604 (Ala. Crim. App. 2000), the Court of Criminal Appeals stated:

> "'The scope of review on the issue of contempt "is limited to questions of law and, if there is any evidence to support its finding, the judgment of the trial court will not be disturbed."' [Graham v. State, 427 So. 2d 998,] 1006 [(Ala. Crim. App. 1983)], citing Murphy v. Murphy, 395 So. 2d 1047, 1049 (Ala. Civ. App. 1981)."[5]

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[5]Under Alabama precedent as it currently stands, the "any evidence" standard of review set forth in Ex parte Holland is applied in reviewing findings of criminal contempt occurring in a criminal case. However, we note that the following standard set forth in Ex parte Ferguson, 819 So. 2d 626 (Ala. 2001), is the standard of review applied in reviewing findings of criminal contempt occurring in a civil case:

> "[T]he standard of review in an appeal from an adjudication of criminal contempt occurring in a civil case is whether the offense, i.e., the contempt, was proved beyond a reasonable doubt. Hicks v. Feiock, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988); Combs v. Ryan's Coal Co., 785 F.2d 970 (11th Cir. 1986); and United States v. Turner, 812 F.2d 1552 (11th Cir. 1987)(an attorney was found guilty of criminal contempt by United States District Judge Brevard Hand)."

819 So. 2d at 629 (emphasis added.) Before the adoption of Rule 33, Ala. R. Crim. P., and its provision for the appeal of contempt findings, all contempt findings were reviewed by petition for the writ of certiorari. The "any evidence" standard of review was applied in that context. Stack v. Stack, 646 So. 2d 51, 56 (Ala. Civ. App. 1994)("In reviewing contempt judgments by writ of certiorari, this court applied the standard of whether there was any evidence to support the judgment of the trial court."). Rule 33 became effective on

Discussion

Dearman argues that his conduct at the August 30, 2018, hearing did not "constitute an act of direct contempt." Dearman's brief, p. 14. Dearman argues that he was not challenging the circuit court's authority at the August 30, 2018, hearing, but was attempting "to put a timely and complete objection on the record" in defending his client. In so arguing, Dearman argues that the Court of Criminal Appeals' decision is in conflict with Hawthorne, supra.

In Hawthorne, an attorney used the phrase "sons of bitches" during closing argument. There was no objection made by opposing counsel at the time the phrase was used, and the trial court took no immediate action to stop or to reprimand

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January 1, 1991, and the procedural components were later determined to apply to contempt proceedings in a civil case. See Baker v. Heatherwood Homeowners Ass'n, 587 So. 2d 938, 944 (Ala. 1991) ("Rule 33 applies to the contempt proceeding even though this is a civil proceeding."). The Court of Criminal Appeals continued to apply the "any evidence" standard after the adoption of Rule 33, but the Court of Civil Appeals began applying different standards of review. This explains the divergence in Alabama precedent, and there may be good reason for applying the same standard of review whether the contempt occurs in a criminal case or a civil case, but that issue is not before us today; the Court would be well served to address this complex area of the law at a future time when the issue is directly presented and the parties have had the opportunity to research, brief, and argue their positions concerning it.

the attorney for using the phrase. It was not until the opposing side was giving its closing argument that the attorney's use of the phrase "sons of bitches" was objected to as inappropriate. The trial court agreed, stating that "'[i]t was highly improper to use that language in the courtroom.'" Hawthorne, 611 So. 2d at 437. Ten days later, the trial court gave the attorney "an opportunity to be heard as to whether he should be held in contempt of court for using the phrase 'sons of bitches.'" Id. Following the hearing, the trial court "issued an order finding the [attorney] guilty of direct criminal contempt of court." Id. The attorney appealed to the Court of Criminal Appeals.

On appeal, the Court of Criminal Appeals stated that "[t]he question is whether the conduct amounts to direct criminal contempt of court" as defined by Rule 33.1(a) and Rule 33.1(c)(1) (now Rule 33.1(b)(1) and 33.1(b)(3)), Ala. R. Crim. P. Hawthorne, 611 So. 2d at 437. The Court of Criminal Appeals stated that, "[w]hile the language used was unprofessional, indecorous, unnecessary, and unbecoming of a member of the bar, the record is devoid of any evidence that 'immediate action [was] essential to prevent diminution of the

court's dignity and authority before the public.' See A[la]. R. Cr[im]. P. 33.1[(b)(1)]." Hawthorne, 611 So. 2d at 437. The Court of Criminal Appeals further stated that "the record is devoid of sufficient evidence that the [attorney's] use of the phrase 'sons of bitches' 'obstruct[ed] the administration of justice' or interrupted, disturbed, or hindered the court's proceedings." Id. at 438 (quoting Rule 33.1(c)(1) (now Rule 33.1(b)(3)(a)), Ala. R. Crim. P.).

In concluding as it did in Hawthorne, the Court of Criminal Appeals specifically stated that the record was "devoid of any evidence" supporting the trial court's judgment of contempt. Hawthorne, 611 So. 2d at 437. It is clear that the Court of Criminal Appeals applied the "any evidence" standard of review, which states that a trial court's judgment of contempt will not be disturbed if there is any evidence to support its finding. Holland v. State, 800 So. 2d at 604 ("'"[I]f there is any evidence to support its finding, the judgment of the trial court will not be disturbed."' [Graham v. State, 427 So. 2d 998,] 1006 [(Ala. Crim. App. 1983)], citing Murphy v. Murphy, 395 So. 2d 1047, 1049 (Ala. Civ. App. 1981)."). Having concluded that the record was devoid of any

evidence to support the trial court's judgment of contempt, the Court of Criminal Appeals reversed the trial court's judgment.[6]

In the present case, the circuit court held Dearman in contempt because he repeatedly attempted to make a specific objection after the circuit court determined that the Alabama Rules of Evidence did not apply at the August 30, 2018, probation-revocation hearing. It appears that the circuit court believed that the objection Dearman was attempting to make was related to that particular ruling. However, it is unclear from the record the exact objection that Dearman

[6]We note that, at the very end of its opinion in Hawthorne, the Court of Criminal Appeals stated: "Moreover, the Court of Civil Appeals has held that '[a]n error in judgment without clear and convincing evidence of bad faith intent is insufficient for a finding of contempt.' In re Powers, 523 So. 2d 1079, 1082 (Ala. Civ. App. 1988) (citing In re Carter, 412 So. 2d 811 (Ala. Civ. App. 1982))." Hawthorne, 611 So. 2d at 438. This would suggest that, in Hawthorne, the Court of Criminal Appeals abandoned the long-standing "any evidence" standard for the clear-and-convincing-evidence standard. However, the Court of Criminal Appeals provided no analysis of the facts of that case under the clear-and-convincing-evidence standard and discussed it no further; the above-quoted sentence appears to be purely dicta. This is supported by the fact that the Court of Criminal Appeals has never again cited Powers or Carter, and our research does not indicate that the Court of Criminal Appeals has ever applied the clear-and-convincing-standard in a contempt case. Contempt that occurs during a criminal proceeding has consistently been reviewed under the "any evidence" standard.

sought to assert. It is certainly true that the circuit court made its position clear that the Alabama Rules of Evidence do not apply in a probation-revocation proceeding, but it is unclear if Dearman was attempting to object to that particular ruling. The only objections on the record that Dearman made during the probation-revocation hearing are as follows:

> "MR. DEARMAN: I object. This officer has no training in narcotics whatsoever. This is not a regular drug and regularly identifiable.
>
> "'And in addition to that, the district court found no probable cause on this case, the facts of which the Court is now hearing."

Dearman then noted that "[w]e've had a preliminary hearing," at which point the circuit court read from Rule 1101, Ala. R. Evid., which states that the Alabama Rules of Evidence do not apply in probation-revocation hearings. Immediately thereafter, Dearman stated: "Judge, in district court --." It is at this point that the circuit court would not permit Dearman to continue to speak. Therefore, based on the facts before us, there is nothing indicating that Dearman was attempting to continually object to the circuit court's ruling that the Alabama Rules of Evidence do not apply in a probation-revocation hearing. Dearman stated that he had "an

objection for the record," but the circuit court responded, "[n]o sir." Dearman then attempted to state his objection, three times, beginning his objection with "[m]y objection ...." or "[m]y objection is ...." Each time, however, the circuit court spoke over Dearman and then told Dearman that "[y]ou're not going to speak. If you're going to make an objection, you're not going to speak." This statement of the circuit court indicates that not only was the circuit court not allowing Dearman to object to its determination that the Alabama Rules of Evidence did not apply to the hearing (if that was even Dearman's objection), but that Dearman could make no objection whatsoever.

As did the Court of Criminal Appeals in Hawthorne, we conclude in the present case that the record is devoid of any evidence that Dearman's conduct "disturb[ed] the court's business" and that "immediate action [was] essential to prevent diminution of the court's dignity and authority before the public." Rule 33.1(b)(1). The evidence before us indicates that Dearman, by trying to make an objection on the record to preserve the issue for appellate review, was simply trying to engage the court in the business before it, not

detract from it. The immediate action taken by the circuit court in silencing Dearman was not to prevent Dearman from diminishing the court's dignity or authority, but to prevent Dearman from asserting a necessary objection on behalf of his client. When finally given the opportunity to present mitigating evidence as to why Dearman continually attempted to state his objection on the record -- an opportunity afforded Dearman only after the circuit court was ordered to do so by the Court of Criminal Appeals in Dearman I -- Dearman specifically stated that his intent was "only to fulfill my duty as the advocate for my client." Dearman further explained that he believed that "if you do not put [a specific objection] on the record, you've lost it forever, and that was all I was simply trying to do. There was no intent on my behalf." Dearman's understanding of the law is correct. See Cook v. State, 384 So. 2d 1158, 1160 (Ala. Crim. App. 1980) ("Specific grounds for objection waive all grounds not specified, and the trial judge will not be placed in error on grounds not assigned in an objection. Carter v. State, 205 Ala. 460, 462, 88 So. 571 (1921); Andrews v. State, 359 So. 2d 1172, 1176 (Ala. Cr[im]. App. 1978). 'Unless appropriate

grounds are stated, objections to the admission of evidence are unavailing on appeal, even though the evidence may have been subject to some ground not assigned.' Reese v. State, 49 Ala. App. 167, 171, 269 So. 2d 622, 625, cert. denied, 289 Ala. 750, 269 So. 2d 625 (1972)."). Dearman was appropriately attempting to prosecute his client's cause.

In Hawthorne, the Court of Criminal Appeals determined that a trial court's judgment of contempt must be affirmed if there is any evidence in support of it. In the present case, as in Hawthorne, the record is devoid of any evidence in support of the circuit court's finding Dearman in direct contempt. Dearman was properly attempting to state a specific objection for the record; there is no evidence indicating that Dearman was diminishing the dignity or authority of the circuit court. The Court of Criminal Appeals' conclusion in its unpublished memorandum in Dearman II that there was some evidence to support the circuit court's contempt judgment is in conflict with Hawthorne. Accordingly, because Dearman II is in conflict with Hawthorne, we reverse the Court of Criminal Appeals' judgment in Dearman II.

Dearman also alleges that Dearman II is in conflict with Powers and Carter. However, because we have already concluded that Dearman II is in conflict with Hawthorne, there is no need to consider whether it is in conflict with Powers and Carter. Moreover, we note that Powers and Carter appear to be distinguishable from the present case. In both cases, the Court of Civil Appeals examined whether the trial court's finding of contempt that occurred during a civil proceeding was supported by clear and convincing evidence; those cases did not apply the "any evidence" standard that is applicable in the present case.[7]

[7]We further note that Powers and Carter, which stand for the principle that a finding of criminal contempt in a civil case is to be affirmed if supported by clear and convincing evidence, may have been overruled sub silentio by this Court's decision in Ex parte Ferguson, 819 So. 2d 626, 629 (Ala. 2001), in which this Court stated, in pertinent part:

> "[T]he standard of review in an appeal from an adjudication of criminal contempt occurring in a civil case is whether the offense, i.e., the contempt, was proved beyond a reasonable doubt. Hicks v. Feiock, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988); Combs v. Ryan's Coal Co., 785 F.2d 970 (11th Cir. 1986); and United States v. Turner, 812 F.2d 1552 (11th Cir. 1987)(an attorney was found guilty of criminal contempt by United States District Judge Brevard Hand)."

Dearman has not directed us to authority indicating that any such rule in Alabama has been applied to a finding of criminal

Conclusion

Based on the foregoing, we conclude that the Court of Criminal Appeals' affirmance of the circuit court's finding of criminal contempt is in conflict with Hawthorne. Accordingly, we reverse the Court of Criminal Appeals' judgment and remand the case to that court for proceedings consistent with this opinion.[8]

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.

Shaw, J., concurs in the result.

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contempt in a criminal case.

[8]We note that Dearman also raises two arguments in his brief before this Court that he did not raise in his petition for the writ of certiorari. Dearman argues that the circuit court's "failure to follow the procedures in Rule 33.2[, Ala. R. Crim. P.,] invalidate the contempt order." Dearman's brief, p. 20. Dearman also argues that this Court should order Judge Patterson to recuse himself from any further contempt proceedings. The Court of Criminal Appeals addressed Dearman's recusal argument in Dearman I, and, as noted above, Dearman did not seek certiorari review of Dearman I. Moreover, Dearman did not raise that argument in Dearman II. Accordingly, those issue are not properly before us, and we will not consider them.