

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00135 COA

CLYDE RANDALL SHARP

APPELLANT

v.

SHERRI PARKERSON SHARP

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. VICKI R. BARNES

COURT FROM WHICH APPEALED: WARREN COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

OSCAR P. LABARRE

ATTORNEY FOR APPELLEE:

WALTERINE LANGFORD

NATURE OF THE CASE: DOMESTIC

TRIAL COURT DISPOSITION: GUILTY OF CONTEMPT; \$500 FINE, 6 MONTH SENTENCE
SUSPENDED

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Clyde Randall Sharp was found guilty of contempt of an agreed protective order. Mr. Sharp appeals, arguing (1) there was insufficient evidence to find him guilty of contempt, (2) the court abused its discretion in finding him in contempt, (3) the court erred in admitting hearsay testimony, (4) the court

violated his due process rights by failing to advise him of his right against self incrimination, and (5) the court erred in not finding the plaintiff, Sherri Parkerson Sharp, in contempt for violating the visitation agreement with the couple's minor child. Finding no error, we affirm.

FACTS

An agreed protective order was entered into by Mr. and Mrs. Sharp and approved by the court in February of 1995. The Order was to remain in effect for one year, and provided that Mr. Sharp was to refrain from abusing Mrs. Sharp and to stay away from her in public. The Order also provided temporary custody and visitation of the couple's minor child.

Evidence was introduced at trial that in November of 1995, Mr. Sharp entered Wal Mart, the place of Mrs. Sharp's employment, and threatened her life. One of Mrs. Sharp's co-workers testified that she heard the threat. Mrs. Sharp filed a complaint for contempt from domestic abuse, stating that the defendant had violated the agreed protective order. Mr. Sharp denied the allegation, and also requested that Mrs. Sharp be held in contempt for refusing to allow visitation of the minor child. At a hearing in the Chancery Court of Warren County, Mr. Sharp was found guilty of contempt and sentenced to six months incarceration and ordered to pay a fine of five hundred dollars. The chancellor refused to find Mrs. Sharp in contempt, assessed court costs to Mr. Sharp, and further modified the visitation terms with the child.

DISCUSSION

I.

Mr. Sharp's first and second issues on appeal challenge the sufficiency of the evidence to support finding him in contempt, and whether the court abused its discretion in making such a finding. Mr. Sharp also argues that failure to make a specific finding that he was guilty of contempt beyond a reasonable doubt was reversible error.

The factual findings of the chancellor in civil contempt cases are affirmed unless manifest error is present. *Purvis v. Purvis*, 657 So. 2d 794, 797 (Miss. 1994), citing *Caldwell v. Caldwell*, 579 So. 2d 543, 545 (Miss. 1991). However, this appeal addresses a finding of criminal contempt which is punitive in nature, and this Court is not bound by the manifest error rule when reviewing an appeal of a conviction of criminal contempt. Instead, this Court proceeds ab initio to determine whether the record proves the appellant guilty of contempt beyond a reasonable doubt. *Purvis*, 657 So. 2d 794, 797 (Miss. 1994); see Miss. Code Ann. 11-51-11 (Supp. 1994).

A citation for criminal contempt is to vindicate the dignity and authority of the court. A citation is proper only when the contemnor has wilfully, deliberately and contumaciously ignored the court. *Premeaux v. Smith*, 569 So. 2d 681, 683 (Miss. 1990). The burden of proving criminal contempt is on the party asserting it, and each element of contempt must be established beyond a reasonable doubt. *Premeaux*, 569 So. 2d at 683.

Though the evidence was contested, there was ample testimony that Mr. Sharp entered the Wal-Mart

and threatened his wife. There was no error.

II.

Mr. Sharp argues that the court erred in allowing one of Mrs. Sharp's co-workers to testify that she heard Mr. Sharp make the statement, "What are you worried about, bitch, you don't have long to live." Mr. Sharp argues the statement should have been excluded as inadmissible hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mississippi Rules of Civil Procedure, Rule 801(c).

The statement was not offered to prove that Mr. Sharp actually intended to kill, but was offered only to prove that a threat was made. Because it was not offered for the truth of the matter asserted, it was not hearsay and was properly admitted.

Mr. Sharp also argues that testimony that he was "banned" from Wal-Mart was hearsay and should have been excluded. However, Mrs. Sharp testified that she had personal knowledge that Mr. Sharp was banned from Wal-Mart. For that reason, the testimony was properly allowed.

III.

Mr. Sharp argues that the court erred in failing to advise him of his right against self-incrimination, and that, as a consequence, his due process rights were violated. He cites no authority to support this proposition. There is at least one case that discusses this kind of argument. *Moore v. Moore*, 558 So.2d 834, 837-837 (Miss. 1990). In *Moore*, the court found the husband to be in contempt for failure to abide by a divorce judgement. The husband argued on appeal that it was reversible error for the court not to inform him of his privilege not to testify. The court pointed out that the husband took the stand and his attorney did not object to his testifying. In affirming the finding of contempt, the court held that it was assumed that practicing attorneys are fully aware of the duty to protect their client's rights, and "if we were to impose a duty on trial judges to put a litigant on notice that he has a particular right or privilege, there would be no need for litigants to have counsel." *Moore*, 558 So. 2d at 838.

Mr. Sharp was represented by counsel. No protective steps by the trial court needed to be taken.

IV.

Finally, Mr. Sharp argues that the court erred in failing to find Mrs. Sharp in contempt for refusing to allow him visitation. He argues that the chancellor did not address this issue, and that Mrs. Sharp, by admitting that she refused visitation, admitted that she was in contempt.

The court addressed this issue in *Cook v. State*, 483 So. 2d 371, 375 (Miss. 1986), then again in *Premeaux v. Smith*, 569 So. 2d at 683. In *Cook*, the mother unilaterally modified visitation when she discovered the father was having girlfriends spend the night on weekends when the child was visiting. The Court held that the mother acted in good faith and did not find her in contempt. *Cook*, 483 So.

2d at 375. In *Premeaux*, the trial court found the mother in contempt for not notifying her ex-husband of her moving with their minor child. The mother testified at trial that she did not notify the father because she thought he did not care. The Mississippi Supreme Court reversed, holding that the record did not establish that the mother wilfully, deliberately and contumaciously concealed her whereabouts from the husband. *Premeaux*, 569 So. 2d at 683.

There was no evidence that Mrs. Sharp's refusal for visitation after Mr. Sharp threatened her life was wilful or contumacious. The evidence indicated that she was trying to protect her child. There was no error in failing to find Mrs. Sharp in contempt.

THE JUDGMENT OF THE CHANCERY COURT OF WARREN COUNTY FINDING CLYDE RANDALL SHARP GUILTY OF CONTEMPT AND THE SENTENCE TO SIX MONTHS IMPRISONMENT ALL SUSPENDED, AND FINE OF \$500.00, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.