

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

B.S.H.

Appellant

No. 1164 MDA 2015

Appeal from the Judgment of Sentence June 4, 2015
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-MD-0001035-2015

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY LAZARUS, J.:

FILED FEBRUARY 01, 2016

B.S.H. appeals from his judgment of sentence, entered in the Court of Common Pleas of Berks County, after being convicted of indirect criminal contempt¹ for violating a protection from abuse (PFA)² order. After careful review, we affirm.

On November 2, 2011, a Lancaster County trial judge issued a final PFA order against B.S.H. with regard to the victim, C.D. Several text messages sent by B.S.H. to the victim over the course of four hours precipitated the instant contempt matter. The affidavit of probable cause

¹ **See** 23 Pa.C.S. § 6114(a) (“Where the police, sheriff or the plaintiff have filed charges of indirect criminal contempt against a defendant for violation of a protection order issued under this chapter . . . or a court-approved consent agreement, the court may hold the defendant in indirect criminal contempt and punish the defendant in accordance with law.”).

² **See** 23 Pa.C.S. § 6102, *et seq.*

indicates that the PFA prohibits B.S.H. from "abusing, harassing, stalking or threatening the [victim and also] prohibits any contact with [the victim]." Affidavit of Probable Cause, 6/5/15, at 1. The affidavit also states that the PFA "specifically mentions that the defendant may not contact the [victim] in any way either directly, indirectly, or in personal or electronic writing." **Id.** The PFA, however, allowed B.S.H. to contact the victim regarding custody of the parties' minor children. N.T. Contempt Hearing, 6/4/15, at 4.

At a contempt hearing, the parties stipulated to the following seven text messages sent by B.S.H. to the victim on May 26, 2015:

@ 5:38 PM - "Only allowed contact in writing as per court order which is all i [sic] am doing deal with it."

@ 6:24 - "Your failure to comply with existing court orders works to my benifit [sic] it is time to deal wi"

@ 7:24 PM - "it is time to deal with it you do not have to like it touch s if you don[']t call me"

@ 8:16 PM - "Ready or not here i [sic] cum gotta key ask scotty yea right"

@ 8:34 PM - "There is still time to make this all right call me"

@ 8:52 PM - "Still wayyytying [sic] its time for you to get right right now i [sic] am asking as nice as i [sic] can please call me"

@ 9:12 PM - "You are still a very big part of the only world i [sic] know"

N.T. Indirect Criminal Contempt Hearing, 6/4/15, at 4. Following the hearing, the court entered an order finding that B.S.H. willfully violated the

PFA and sentenced him to three months' probation and a \$300 fine.³ B.S.H. filed a motion requesting the court reinstate his post-sentence motion rights *nunc pro tunc*, which the trial court granted on June 23, 2015. The court subsequently denied B.S.H.'s *nunc pro tunc* motion for reconsideration.⁴ He filed this timely appeal.

On appeal, B.S.H. raises the following issues for our review:

- (1) The evidence was insufficient to establish beyond a reasonable doubt that Appellant willfully violated the Protection from Abuse Order ("PFA") where the facts upon which the stipulated hearing was based failed to establish Appellant's wrongful intent to violate the PFA as the PFA expressly authorizes communication concerning the children between the parties, and the text messages at issues concerned the parties' children.
- (2) The guilty verdict was contrary to the weight of the evidence presented; if giving due weight to the context/content of the text messages between the parties the messages related to the shared custody of the children and therefore the communication was permissible under the PFA and as a result Appellant lacked the wrongful intent to violate the PFA.

"Where a PFA order is involved, an [indirect criminal contempt] charge is designed to seek punishment for violation of the protective order."

Commonwealth v. Jackson, 10 A.3d 341, 346 (Pa. Super. 2010) (citation omitted). To establish indirect criminal contempt, the Commonwealth must

³ The sentence was ordered to commence at the expiration of a current sentence he was serving for simple assault, involving the same victim.

⁴ In his *nunc pro tunc* motion for reconsideration, B.S.H. raised a weight of the evidence claim. Thus, he has preserved it for appellate review. **See** Pa.R.Crim.P. 607.

prove: 1) the order was sufficiently definite, clear, and specific to the contemnor as to leave no doubt of the conduct prohibited; 2) the contemnor had notice of the order; 3) the act constituting the violation must have been volitional; and 4) the contemnor must have acted with wrongful intent.

Commonwealth v. Walsh, 36 A.3d 613, 619 (Pa. Super. 2012) (citation omitted).

[W]hen reviewing a contempt conviction, much reliance is given to the discretion of the trial judge. Accordingly, [the appellate court is] confined to a determination of whether the facts support the trial court decision. ***Williams v. Williams***, [] 681 A.2d 181, 183 (Pa. Super. 1996)[.] We will reverse a trial court's determination only when there has been a plain abuse of discretion. [citation omitted]

Commonwealth v. Kolansky, 800 A.2d 937, 939 (Pa. Super. 2002).

In his first issue on appeal, B.S.H. claims that the court incorrectly determined that he had the wrongful intent to willfully violate the PFA where the terms of the PFA permitted him to communicate with the victim about their children.

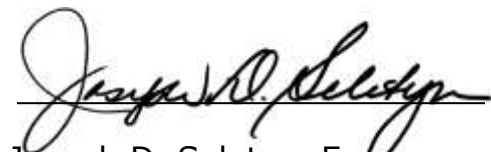
At the contempt hearing, the parties stipulated with regard to the text messages at issue; however, they disagreed on the context of those messages. B.S.H. testified that when he texted the victim that she is a very big part of his world, he did so because "the only contact [he has] with [his] children is through [the victim]." N.T. Contempt Hearing, 6/4/15, at 10. B.S.H. further testified "I'm trying to do anything I can to maintain contact with my children. The only way I am able to do that is through [the victim.]" ***Id.***

B.S.H.'s own testimony proves that he intentionally contacted the victim via an electronic writing in violation of the PFA. **Walsh, supra.** While B.S.H. may have had the pretext of establishing contact with his children, through the victim, the messages were not sent to discuss custody matters concerning the parties' children. Because the PFA specifically prohibits B.S.H. from "any contact with [the victim] . . . either directly, indirectly, or in personal or electronic writing," and because the texts did not concern the permissible discussion of custody matters, there was sufficient evidence to find B.S.H. in indirect criminal contempt under section 6114. **Kolansky, supra; Jackson, supra.**

B.S.H. next contends that the verdict was against the weight of the evidence where, had due weight been given to the context/content of the text messages between the parties, the messages clearly related to the permissible discussion of shared custody of the children. Having already determined that B.S.H. sent the text messages to the victim, with no intent to discuss custody matters, we find this argument unpersuasive.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016