IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1993 SESSION

FILED

September 5, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01-C01-9304-CR-00114**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. WALTER C. KURTZ,**
ALFRED B. ROLLINS, et al.,	)	**JUDGE**
	)	
Defendants,	)	(Contempt)
	)	
In re: JOHN HERBISON,	)	
	)	
Appellant.	)	

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

REVERSED AND DISMISSED

C. CREED MCGINLEY,
Special Judge

O P I N I O N

The appellant is appealing as of right from an order of the Criminal Court of Davidson County finding him in criminal contempt. The order was entered pursuant to Rule 42(a) of the Tennessee Rules of Criminal Procedure; that is, the order was issued summarily by the trial judge in whose presence the appellant's conduct occurred, without notice or hearing. The appellant challenges the sufficiency of the evidence supporting the order, the summary procedure used for issuing the order, and the constitutionality of the statute upon which the order is partially based and its application here. Because we find that the appellant's conduct did not constitute criminal contempt, we reverse the judgment below and dismiss these proceedings.

The order finding the appellant in criminal contempt arose out of a pretrial evidentiary hearing in conjunction with a criminal proceeding in which the appellant represented one of several defendants. One of the defenses was that the prosecution was retaliatory in response to a vulgar statement that one of the other defendants allegedly made about a police officer. The defendant who made the remark testified, and neither his lawyer nor the State deemed it necessary to elicit the exact wording of the remark. Rather, the defendant described the remark as "kind of vulgar" and admitted that it made reference to the police officer as "being a lesbian."

The appellant asked only one question on cross-examination of this defendant, that being "Councilman Rollins, I know you're reluctant to talk about it; but, in your conversation with the Mayor, did you refer to [the police officer][1] as a p---y-eating bitch?" The defendant responded "Yes, sir, I did." No objection was interposed at the time the question was asked, no motion to strike was made, and there had been no

[1]This Court declines to identify the woman about whom this remark was made.

previous court ruling disallowing the question or the use of the vulgar term.

At the conclusion of the hearing, the court issued its order summarily pursuant to Rule 42(a) of the Tennessee Rules of Criminal Procedure. The order found the appellant "in Criminal Contempt" and assessed a fine of fifty dollars ($50.00). In pertinent part, the Order states:

> [The language] was profane, obscene, and had absolutely . . . no place in the courtroom unless it was directly relevant and necessary to the proceedings. The question asked was simply beyond the pale. In over ten (10) years as a judge this Court has never heard a question so far outside the bounds of propriety.
> . . . .
> The question asked by Mr. Herbison contained both profane and obscene language. It contained reference to a remark that was not relevant and not arguably relevant or necessary in the context in which it was asked. There is no reasonable basis to believe that the remark was relevant as the defense had failed to lay any foundation to indicate that the remark had ever been mentioned to [the police officer]. The question contained information that was degrading, impertinent and certainly unnecessary.
>
> This Court is simply not going to allow attorneys to make scurrilous, lewd and unseemly comments about the character or activities of a witness unless and only unless those are directly relevant and necessary to the proceeding. In this case, the remark served only to bring disrespect and derision to the Court process. This type of conduct and comment cannot be tolerated in a Tennessee court-room.

In support of its ruling, the court cited T.C.A. § 29-9-107 and several disciplinary rules contained in the Tennessee Code of Professional Responsibility, Sup. Ct. R. 8.

Section 29-9-107 provides that "[a]ny person who profanely swears or curses in the presence of any court of record commits a Class C misdemeanor."[2] We agree with the appellant that the language at issue does not constitute profane swearing or cursing. There appear to be no Tennessee cases construing § 29-9-107 in either its

[2]The statute was amended to this form in 1989. The court below mistakenly relied on the prior version, which states "[a]ny person who shall profanely swear or curse in the presence of any court of record may be fined at the discretion of the court, and be imprisoned not exceeding twenty-four (24) hours."

amended or original form. Nor do there appear to be any Tennessee cases defining the term "profane." However, Black's Law Dictionary defines profane as "Irreverence toward God or holy things. Writing, speaking, or acting, in manifest or implied contempt of sacred things." (6th ed. 1990). While we find the language at issue to be vulgar and coarse, it is not profane in the sense of being irreverent toward sacred things. The appellant did not violate § 29-9-107 (1992 Supp.) by asking the question at issue. Because we hold that the evidence is insufficient to support a finding of criminal contempt based upon a violation of that section, we decline to address the appellant's arguments challenging the constitutionality of this statute. See Watts v. Memphis Transit Management Co., 462 S.W.2d 495, 498 (Tenn. 1971) (appellate court should not reach constitutional issue where case is disposed of on nonconstitutional grounds).

The State argues that we should affirm the criminal contempt under T.C.A. § 29-9-102(2), which provides:

> The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:
> . . .
> (2) the willful misbehavior of any of the officers of said courts, in their official transactions.

Assuming without deciding that the appellant is an "officer of the court" for the purposes of this statute, and assuming without deciding that the appellant violated the Tennessee Code of Professional Responsibility and therefore "misbehaved" when he asked the dastardly question, we do not think the record supports the conclusion that the appellant engaged in such misbehavior "willfully." There had been no prior ruling by the court that prohibited the use or repetition of the epithet. Nor did the appellant simply create the language in an attempt to intimidate, shock, harass or unbalance the witness: the witness admitted that he had, indeed, referred to the police officer in that fashion. When the court below challenged the appellant on his use of the question, the appellant responded

that he "felt it important for the Judge to have a full picture of what, in fact, went on."

While we remain skeptical of the question's value to the appellant's representation of his client, we do not find the proof sufficient to support a finding beyond a reasonable doubt that the appellant's conduct in posing the question was willful misbehavior. Cf. State v. Green, 783 S.W.2d 548, 553 (Tenn. 1990) ("To the extent that Mr. Green has been proven, beyond a reasonable doubt, to have misbehaved to the extent that he obstructed the administration of justice, we find that it was motivated by his sincere pursuit of the vigorous advocacy he deemed necessary, under the circumstances, to represent a client on trial for his life, and thus was not willful.").

For the reasons set forth above, we find the evidence insufficient to support the finding of criminal contempt. Accordingly, the order so stating is reversed and the contempt charge is dismissed. In light of our disposition of this case on the merits, we decline to address the appellant's arguments concerning the use of summary procedure in issuing the order, as well as the those challenging the constitutionality of T.C.A. § 29-9-107.

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C. CREED MCGINLEY, Special Judge

CONCUR:

_____
JOHN H. PEAY, Judge

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JOSEPH M. TIPTON, Judge