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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1950**

In the Matter of the Welfare of the Children of:
A. S. A. W., E. E. A., J. L. P., and Any Man, Parents.

**Filed July 8, 2019
Reversed
Johnson, Judge**

Morrison County District Court
File No. 49-JV-18-786

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for
appellant Rhia Ann Marie Bornmann Spears)

Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and Klaphake,
Judge.*

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

After the dismissal of a child-protection case, the district court initiated a contempt proceeding against an attorney who had represented the mother of the children who were the subjects of the case. The district court issued a show-cause order and thereafter conducted a hearing at which it questioned the attorney without allowing her to offer any evidence. At the conclusion of the hearing, the district court found the attorney to be in

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

contempt of court and fined her \$1,000. We conclude that the district court committed procedural errors. Therefore, we reverse the finding of contempt, and we vacate the contempt order.

FACTS

On May 29, 2018, Morrison County petitioned the district court to adjudicate the three children of A.S.A.W. as being in need of protection or services on five statutory grounds. *See* Minn. Stat. § 260C.007, subd. 6(3), (4), (5), (8), (9) (2018). The petition alleged that A.S.A.W.’s third child, a boy who then was 10 months old, was born with an apnea condition and had recently been hospitalized because he had difficulty breathing while ill. The petition further alleged that A.S.A.W. left the hospital with the child despite contrary medical advice, did not follow the prescribed treatment, and did not cooperate with medical professionals who attempted to follow up on the boy’s condition. On June 1, 2018, the district court filed an order for emergency protective care. On June 4, 2018, Rhia Ann Marie Bornmann Spears, a licensed attorney, filed a certificate of representation of A.S.A.W.

On June 11, 2018, the district court scheduled a court trial to begin on August 9, 2018. On July 11, 2018, the county filed a pre-trial motion in which it sought 14 types of relief. The eighth issue raised by the motion was a request for an order “[r]equiring [A.S.A.W.] to sign releases of information so that [the county] can provide copies of all [the third child’s] medical records to his medical providers for purposes of coordination of care and trial preparation.” The county filed a memorandum of law concerning three of the 14 issues raised by the motion but not the eighth issue. The district court held a pre-

trial conference on July 17, 2018. It appears that, during the pre-trial hearing, the district court orally granted the eighth part of the county's motion. No transcript of that hearing has been included in the district court record or submitted to this court, so the precise terms of the district court's oral order are not in the appellate record.

On August 1, 2018, the county filed a motion for "an order authorizing [the county] to exchange copies of the child's medical records to his medical providers for purposes of coordination of care and trial preparation" and "an order authorizing the child's medical providers to disclose health information regarding the child to [the county] and/or their attorney for purposes of trial preparation." In an affidavit accompanying the motion, an assistant county attorney stated that the district court had "ordered that [A.S.A.W.] sign releases so that [the county] and the child's medical providers could share information with one another." She also stated that the county had provided blank release forms to A.S.A.W. and her attorney but that signed release forms had not been returned. She further stated that the child's pulmonologist would not speak to her without a signed release or a court order and that, consequently, she was "unable to adequately prepare for trial without speaking to [the pulmonologist] about her likely testimony, which may in turn impact which other witnesses are needed for trial." The assistant county attorney further stated that A.S.A.W.'s attorney had said that she did not intend to return signed release forms because the child's medical providers were freely communicating with each other concerning the child's care.

The district court conducted a hearing on the county's motion on August 6, 2018. No transcript of that hearing has been included in the district court record or submitted to

this court. It appears that, at the August 6, 2018 hearing, the district court clarified its July 17, 2018 oral order by orally ruling that A.S.A.W. must sign release forms authorizing the disclosure of medical records but that the assistant county attorney may not use the signed release forms to communicate with the child's pulmonologist. The signed release forms were delivered to the county later that day.

The case was tried to the court on August 9, 10, and 16, 2018. The county called eight witnesses, including A.S.A.W. A.S.A.W. called two other witnesses. On August 30, 2018, the district court filed a 17-page order in which it found that the county had not proved its case with respect to three statutory grounds because A.S.A.W. had not medically neglected the child and was not unwilling to provide appropriate care for the child. The district court also found that the county had proved that the third child was in need of protection or services on two statutory grounds because A.S.A.W. had not informed the county of her current address, had not cooperated with the county's inquiries concerning her living arrangements, and had not provided the county with information necessary for medical assistance.

On the same day, the district court scheduled a disposition hearing for September 11, 2018. No transcript of that hearing has been included in the district court record or submitted to this court, nor do any minutes of the hearing appear in the district court record. On the date for which the hearing was scheduled, the district court filed a one-page form order with a checked box indicating, "The petition is hereby dismissed." A handwritten note further states, "Child returned to mother today and file closed. GAL discharged."

On September 17, 2018, the district court filed an order entitled “Order to Show Cause.” The order notes that the case was “dismissed without adjudication” on September 11, 2018. The order further states that, during trial,

the Court became aware of an issue as it relates to Attorney Rhia Ann Marie Bornmann Spears’s direct violation of the Court’s previous Order regarding [A.S.A.W.’s] Court-ordered signed releases. Specifically, the Court ordered [A.S.A.W.] to sign releases on July 17, 2018 and again later on August 6, 2018. During the Court Trial it was learned that Attorney Rhia Ann Marie Bornmann Spears held the previously signed releases until delivered on August 6, 2018.

The order concludes by requiring Bornmann Spears to “personally appear before the Court . . . on October 1st, 2018, . . . and show cause why she should not be found in contempt of Court for a direct violation of the Court Order to have [A.S.A.W.’s] releases of information signed and delivered when Ordered on July 17, 2018.”

A hearing was held on October 1, 2018. A complete transcript of the hearing is in the appellate record. The district court began the hearing by asking Bornmann Spears whether she knew why she had been ordered to appear. In responding, Bornmann Spears stated that she wished to call the assistant county attorney as a witness at the hearing. The district court next asked Bornmann Spears about the release forms. Bornmann Spears explained that she believed that the release forms, which had been prepared by the county, “were not in compliance with what the Court ordered” on July 17, 2018, because the district court had “ordered that she sign releases in order for the doctors to communicate for care.” Bornmann Spears further stated that she promptly contacted the assistant county attorney to say that the “releases do not reflect what the judge just ordered,” that they agreed to

discuss the matter further, and that the assistant county attorney later told her that “she only intended to use the releases to get a witness to speak with her who was represented by Counsel.” After the district court asked additional questions, Bornmann Spears stated that she wished to submit copies of e-mail messages into the record. The district court stated, “There’s no testimony or submissions. I’m just asking questions.” The district court asked Bornmann Spears additional questions concerning the fact that Bornmann Spears did not give signed release forms to the county between July 17, 2018, and August 6, 2018, even after her client had signed them. The district court then asked Bornmann Spears, “Is there anything else you wanted to add just through argument?” After further colloquy, the district court stated, “I believe you’re in direct contempt of the Court’s Order, and I’m imposing a \$1,000 fine.”

Bornmann Spears appeals. No responsive brief has been filed.

D E C I S I O N

Bornmann Spears argues that, for several reasons, the district court erred by finding her in contempt of court.

A.

As a threshold matter, it is necessary to place the district court’s contempt order into its proper legal context.

By statute, there are “two kinds” of contempt in Minnesota: “direct and constructive.” Minn. Stat. § 588.01, subd. 1 (2018). Contempt is direct in nature if it “occur[s] in the immediate view and presence of the court, and arise[s] from” either “disorderly, contemptuous, or insolent behavior toward the judge while holding court,

tending to interrupt the due course of a trial or other judicial proceedings” or “a breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the business of the court.” *Id.*, subd. 2. “A direct contempt may be punished summarily, for which an order shall be made reciting the facts as occurring in the immediate view and presence of the court or officer, and adjudging the person proceeded against to be guilty of a contempt, and that the person be punished as therein specified.” Minn. Stat. § 588.03 (2018). Contempt is constructive in nature if it is “not committed in the immediate presence of the court, and of which it has no personal knowledge” and if it arises from any one of 11 specified “acts or omissions.” Minn. Stat. § 588.01, subd. 3. The third of the specified acts or omissions is “disobedience of any lawful judgment, order, or process of the court.” *Id.*, subd. 3(3).

In addition, the caselaw recognizes another dichotomy based on the purpose of a contempt order: civil contempt and criminal contempt. See *State v. Tatum*, 556 N.W.2d 541, 544 (Minn. 1996); see also D.D. Wozniak & Cynthia L. Lehr, *Dealing with a Double-Edged Sword: A Practical Guide to Contempt Law in Minnesota*, 18 Wm. Mitchell L. Rev. 7, 9-12 (1992). A contempt order is civil in nature if it “impos[es] a sanction that will be removed upon compliance with a court order that has been defied.” *Tatum*, 556 N.W.2d at 544. A civil contempt order is intended to be “remedial rather than punitive because its purpose is to coerce compliance with [a court] order, not to vindicate the authority of the court.” *Mower Cnty. Human Servs. v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996).

On the other hand, a contempt order is criminal in nature if it “punish[es] the contemnor for past behavior.” *Tatum*, 556 N.W.2d at 544. In this sense, criminal

contempts are “offenses against the dignity of the state as a whole.” *Peterson v. Peterson*, 153 N.W.2d 825, 830 (Minn. 1967). Accordingly, “constructive criminal contempts should not be prosecuted by attorneys other than those representing the state.” *Id.*; *see also Tatum*, 556 N.W.2d at 545 n.3; *In re Cascarano*, 871 N.W.2d 34, 38 (Minn. App. 2015). In addition, a person charged with constructive criminal contempt is entitled to the protections ordinarily due to a criminal defendant, such as a written complaint stating the allegations of criminal conduct. *Wozniak & Lehr, supra*, at 22 (citing Minn. R. Crim. P. 2.01). The attorney representing the state must prove the elements of contempt beyond a reasonable doubt. *State v. Binder*, 251 N.W. 665, 668 (Minn. 1933). A person accused of constructive criminal contempt is entitled to a trial by jury. *See Peterson*, 153 N.W.2d at 827-30. Similarly, the person has a right to give testimony in his or her defense. *Krmpotich v. Krmpotich*, 35 N.W.2d 810, 811 (Minn. 1949). A “prerequisite for an adjudication of constructive criminal contempt” is “a clear definition of the acts to be performed.” *Wozniak & Lehr, supra*, at 21. A district court may not impose punishment of imprisonment or a fine exceeding \$50 for a constructive criminal contempt unless “the right or remedy of a party to an action or special proceeding was defeated or prejudiced by it.” Minn. Stat. § 588.02 (2018).

B.

In this case, the district court stated on the record that it found Bornmann Spears in “direct contempt.” But the conduct for which the district court found Bornmann Spears in contempt occurred outside the presence of the court, in her interactions with opposing counsel related to a discovery matter, which is inherently extra-judicial in nature.

Bornmann Spears appeared before the court on multiple occasions, including the July 17, 2018 hearing, the August 6, 2018 hearing, and three days of trial in August 2018. But the district court did not question her about anything that had occurred in a courtroom proceeding. Thus, despite the district court's characterization, the finding of contempt is constructive in nature.

The district court did not specify whether it found Bornmann Spears in civil contempt or criminal contempt. By the time of the contempt hearing, Bornmann Spears had complied with the district court's oral orders by delivering the signed release forms to the county. The district court initiated contempt proceedings after it had dismissed the case following a disposition hearing. The district court's order did not give Bornmann Spears an opportunity to purge the finding of contempt. For these reasons, the purpose of the district court's finding of contempt is punitive, not remedial. Thus, the finding of contempt is criminal in nature.

C.

We now turn to Bornmann Spears's arguments for reversal. She first argues that the district court erred by not allowing her to offer evidence. She relies in part on a rule of court that provides, "The alleged contemnor must appear in person before the court to be afforded the opportunity to oppose the motion for contempt by sworn testimony." Minn. R. Juv. Prot. P. 14.03. During the contempt hearing, Bornmann Spears informed the district court that she wanted to present the testimony of the assistant county attorney, who was in attendance, and wanted to submit documentary evidence consisting of her e-mail correspondence with the assistant county attorney. The district court did not allow her to

do so. Bornmann Spears had a right under rule 14.03 to present sworn testimony. As a person facing a criminal charge, she also had a right to present evidence in defense of the allegations. *See Peterson*, 153 N.W.2d at 827 (stating that “a number of criminal procedural safeguards are applicable to constructive criminal contempt cases”); *see also State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006) (recognizing federal constitutional right “to a meaningful opportunity to present a complete defense”). Thus, the district court erred by not allowing Bornmann Spears to offer evidence at the contempt hearing.

Bornmann Spears also argues that the district court erred on the ground that the contempt proceeding was initiated by the district court, not by the opposing party. She relies on caselaw applicable to civil contempt for the proposition that “the party adversely affected by the alleged failure of the directed party to comply,” *i.e.*, the opposing party, must “appl[y] to the court for aid in compelling performance.” *See Hopp v. Hopp*, 156 N.W.2d 212, 216 (Minn. 1968). As stated above, the caselaw concerning constructive criminal contempt requires that a constructive-criminal-contempt proceeding be commenced by an attorney for the state. *See Peterson*, 153 N.W.2d at 830. Thus, Bornmann Spears is correct that the district court erred by initiating the contempt proceeding, albeit for a slightly different reason.

Bornmann Spears last argues that the district court erred because she did not fail to comply with a clearly defined court order. In any contempt proceeding, an “essential prerequisite . . . is that the prior decree or order of a court sought to be enforced by contempt must clearly define the acts to be performed by the alleged contemnor.” *Mr. Steak, Inc. v. Sandquist Steaks, Inc.*, 245 N.W.2d 837, 838 (Minn. 1976); *see also In re Welfare of A.W.*,

399 N.W.2d 223, 225 (Minn. App. 1987). Bornmann Spears contends that the district court's July 17, 2018 oral order did not expressly authorize the assistant county attorney to engage in *ex parte* communications with the child's pulmonologist and that she withheld the signed release forms while attempting to resolve that issue with the assistant county attorney. At the contempt hearing, Bornmann Spears expressed that understanding of the district court's July 17, 2018 oral order and explained that she did not promptly deliver signed releases to the county because she believed that the assistant county attorney planned to use the releases to speak with the pulmonologist for purposes of trial preparation. Bornmann Spears pointed out that the district court clarified its July 17, 2018 oral order in material ways in its August 6, 2018 oral order. It appears that the district court clarified its July 17, 2018 oral order in a way that is consistent with the position that Bornmann Spears had taken during her communications with the assistant county attorney. The district court acknowledged during the contempt hearing that there had been "a change" on August 6, 2018. But the district court did not expressly consider the relationship between that change and Bornmann Spears's conduct, did not state what the July 17, 2018 oral order required or prohibited, and did not expressly find that Bornmann Spears violated the terms of the July 17, 2018 oral order.

Furthermore, it appears that Bornmann Spears was correct in her position that her client was not obligated to authorize the assistant county attorney to engage in *ex parte* communications with her child's medical providers for purposes of trial preparation. As a general rule, "A licensed physician . . . shall not, without the consent of the patient, be allowed to disclose any information or any opinion based thereon which the professional

acquired in attending the patient in a professional capacity” Minn. Stat. § 595.02, subd. 1(d) (2018). There is an exception to the general rule in which the physician-patient privilege is impliedly waived, which might allow an attorney “to informally discuss . . . information or opinion with the health care provider if the provider consents.” *Id.*, subd. 5. But the exception applies only in certain types of actions “against a health care provider,” so it did not apply in this case. *See id.*; *see also Blohm v. Minneapolis Urological Surgeons, P.A.*, 449 N.W.2d 168, 170-71 (Minn. 1989). Thus, the district court erred by finding Bornmann Spears in contempt without finding that its July 17, 2018 oral order clearly defined the acts to be performed by her and without finding that she failed to engage in the required acts.

In sum, the district court erred in finding Bornmann Spears in constructive criminal contempt. The appropriate remedy is for this court to reverse and vacate the district court’s contempt order without remanding for further proceedings. In light of that conclusion, we need not consider Bornmann Spears’s argument that the district court also erred by imposing a fine in excess of the statutory maximum of \$250. *See* Minn. Stat. § 588.10 (2018).

Reversed.