In re Tarpley & Santos

Supreme Court, Appellate Division
Benson J.A., Siquenza and Villagomez Temp JJ.
3 April 1987

Contempt of court – negligent failure to appear as prosecuting attorney – whether intentional obstruction of the administration of justice.

The appellants were found guilty of contempt of court for their failure to appear to prosecute a criminal case. Inadequate prior arrangements were made to arrange for another attorney to appear on the government's behalf when they left on vacation and went fishing for the day respectively. No prosecutor at all appeared for the juvenile case hearing.

HELD: Convictions reversed (quashed). The F.S.M. Code requires an "intentional obstruction of the administration of justice". Neither negligence nor knowingly creating a substantial risk of obstruction provide the culpable mental state necessary to support the imposition of criminal sanctions.

Cases referred to in judgment:
Afituk v. *F.S.M.* 2 F.S.M. Intrm. 260 (Truk 1986)
F.S.M. v. *Tipen* 1 F.S.M. Intrm. 79 (Pon. 1982)
In re Robert 1 F.S.M. Intrm. 18 (Pon. 1981)
In re Tarpley 2 F.S.M. Intrm. 221 (Pon. 1986)

Legislation referred to in judgment:
4 F.S.M.C. section 119
National Criminal Code 11 F.S.M.C. section 104

Other sources referred to in judgment:
Webster's Ninth New College Dictionary (1986)
Model Penal Code, section 2.02
W. La Fave & A. Scott, *Criminal Law* (1972)
R. Perkins & R. Boyce, *Criminal Law* (3rd ed. 1982)

The first appellant in person
R.B. Michelsen for the second appellant
J. Warndof for the appellee

BENSON A.J.
Judgment:

Issue and Decision

Is one guilty of criminal contempt if he obstructs the functioning of the court through negligence, or through an act that creates a substantial risk of court delay?

We conclude he is not, and reverse the convictions based on such acts.

Holding

We hold that since contempt is defined as the "intentional obstruction" of the administration of justice, the act is not contemptuous unless done with the purpose to obstruct.

Procedural History

The defendants were convicted of contempt and the trial court imposed fines. The defendants have appealed their convictions to this court. The cases were consolidated because they involved a failure to appear in the same case and involved similar facts and the same issue of law.

Facts

The facts are undisputed.

The defendant Tarpley is an attorney admitted to practice before the Supreme Court. He is an employee of the State of Pohnpei in the Department of Justice. In this capacity he prosecutes criminal cases arising in Pohnpei coming within the jurisdiction of the Supreme Court.

In the course of this employment Tarpley represented the government in Juvenile Case No. 1985-500. He was served on 15 May 1986 with a notice from the court that there was to be a hearing in the case on 21 May at 2 p.m.

Tarpley planned to leave Pohnpei on 22 May for vacation. Weather reports received the afternoon of the 20th prompted him to advance his departure to the evening of the 20th. Tarpley asked another attorney, Michael Berman, to appear in the juvenile case and in a second case. The second case required careful briefing; the juvenile case very little. Tarpley could not locate the juvenile file, and so did not deliver it to Berman. Tarpley took no other steps.

The defendant Dickson Santos is a trial counsellor entitled to practice before the Supreme Court under the supervision of an attorney. He is an employee of the State of Pohnpei in the Department of Justice. Tarpley is his supervisor. Santos supervises the prosecutor's office in Tarpley's absence.

On the morning of 21 May, Santos learned of Tarpley's departure. Tarpley left him a note asking that Santos appear in another case. The note did not mention the juvenile case. Santos reviewed the calendar and informed the administrative officer of the Department of Justice of the scheduled juvenile hearing. The administrative officer replied that he might contact Michael Berman, who was with the officer in his office at the time. Later in the morning Santos met with Berman, but did not mention the juvenile hearing. At 11 a.m. Santos left the office to go fishing. He did not return to the office that day.

No attorney appeared at the juvenile hearing. Berman has no recollection of Tarpley's request to appear.

The trial court issued orders to show cause to Tarpley and Santos after their failure to appear. The order to Tarpley required him to appear on 4 June to show cause why he should not be found in contempt "for the fact that you, nor anybody under your supervision, appeared on behalf of the government." The order to Santos required him to appear on 22 May to show cause why he should not be found in contempt for his failure to appear in the juvenile case.

On 22 May, Santos appeared in person and by counsel. No notice or grounds were given for the issuance of the order, beyond the statement in the order to show cause. The defendant was invited to proceed. Santos presented witnesses and that
90 testimony forms the basis for some of the court's findings. The court found that the defendant's actions were not wilful, that the failure to appear was caused by negligence, that he had not shown irresponsibility in any earlier dealings with the court, but that Santos's efforts to insure appearance at the hearing was inadequate.

For his failure to appear at the hearing the court found Santos guilty of contempt and imposed a fine. These findings were made, the sentence imposed and judgment entered on 22 May. The notice of appeal was filed 28 May 1986.

The hearing on the order to show cause directed to Tarpley was heard on 5 June 1986. The defendant appeared in person. There was no testimony. The court responded to Tarpley's explanation that he asked Berman to appear by saying
100 "... There's disagreement between you and Mr Berman as to whether something was said apparently, or at least he says he doesn't recall it. It is your job to make sure that he recalls it, that there would be no question about it, that somebody be handling it." Tr. p. 6. Based on his failure to have someone appear for the juvenile hearing, Tarpley was found in contempt of court and was given a fine. On 24 July 1986 the court entered its opinion entitled *In re Tarpley* 2 F.S.M. Intrm. 221 (Pon. 1986) explaining its reasons for the convictions of both Tarpley and Santos, setting forth the culpability it found, and designating the code provision that had been violated.

In that opinion, referring to Tarpley's request to Berman, the court states at
110 p. 223, "... Tarpley says he briefly mentioned the juvenile case, but Berman had no such recollection ... I conclude that, in his haste, Mr Tarpley simply failed to make adequate provision for the juvenile case." It appears that the court accepted as true Tarpley's request to Berman for coverage, but it found that there was not a clear transfer by Tarpley to Berman of responsibility to attend the hearing.

The opinion states that neither took wilful steps intended to reflect disrespect, and points out the occasion was atypical – that their earlier appearances had been marked by responsibility, respect for the court, and punctuality.

Tarpley filed his notice of appeal on 30 July 1986.

Reasoning

120 The defendants were convicted under section 119 of the Code of the Federated States of Micronesia which, in pertinent part, reads:

> (1) Any Justice of the Supreme Court shall have the power to punish contempt of court. Contempt of court is:
>
> (a) any intentional obstruction of the administration of justice by any person ...

The trial court held that Santos's failure to appear was caused by negligence.

Transcript of 22 May 1986, p. 19. *In re Tarpley* states the culpability of both defendants in these words: "[B]oth acted intentionally in such a way as to create a substantial risk that their conduct would obstruct the administration of justice . . ." 2 F.S.M. Intrm. at 222; and "[Each] knowingly created a substantial risk [of nonappearance]" *Id.* at 225.

The facts giving rise to both instances of contempt differ markedly from the facts of *In re Robert* 1 F.S.M. Intrm. 18 (Pon. 1981) In that case the attorney decided to follow the directions of the High Court and undertake a lengthy journey. The attorney used up one-half of the available time without reaching his destination. By continuing his journey he knew he would not appear on time. The attorney intentionally persisted in the mission.

The facts of Robert are similar only if Tarpley had boarded the plane knowing Berman was not going to appear, and if Santos had gone fishing knowing that the administrative officer had not spoken to Berman.

The issue is whether negligence or knowingly creating a substantial risk of obstruction satisfies the statute's "intentional obstruction".

We do not find the word "intentional" ambiguous. It is not a term given meaning only by judicial decision. See *F.S.M.* v. *Tipen* 1 F.S.M. Intrm. 79, 82-83 (Pon. 1982) in which the meaning of "unreasonable" as applied to searches was held to be not self-evident and *Afituk* v. *F.S.M.* 2 F.S.M. Intrm. 260, 264 (Truk 1986) in which "income" was held not to be dependent upon judicial decision for its meaning.

Intentional means "done by intention or design". *Webster's Ninth New Collegiate Dictionary* 1986 ed. S.V. "intentional". The same source defines intention as "what one intends to do or bring about . . . a determination to act in a certain way." In listing synonyms it states, "[i]ntention, intent, purpose, design, aim, end, object, objective, goal mean what one purposes to accomplish or attain."

We find the conclusions of the trial court do not fulfil this meaning. A negligent act is one born of inattention or carelessness – the opposite of an intended act. An act, not wilfully intending the result, creating a substantial risk of the unlawful result, is not an act done purposefully or intentionally.

Sources from the United States have been drawn upon by the parties. We now discuss those in order to determine whether they are consistent with the conclusion made here, and whether they shed additional light upon the problem.

Centuries ago in England the criminal act itself and alone was considered in determining guilt. The mental element which accompanied the act was not considered. Thus, intentional homicide was treated the same as a killing caused by negligence. The common law in England developed to require a mental element before guilt could be found. Thus, before guilt could be sfound, there had to be the requisite criminal intent. W. LaFave and A. Scott, *Criminal Law* 192 (1972); R. Perkins and R. Boyce, *Criminal Law* 826-28 (3rd ed. 1982). The requirement of the mental element was adopted in the United States and continues to be a subject of further refinement in legal treatises and decisional definitions.

The necessity of a mental element of a crime has led to a twofold definition of an intentional act: (1) the consequences of the act must represent the very purpose for which the act was done, or (2) the consequences of the act were known to be substantially certain to follow from the act. LaFave and Scott at p. 196; Perkins and Boyce at p. 835. This definition was incorporated into the Model Penal Code's definitions of culpability for an act done "purposely", and one done "knowingly".

Section 2.02(a) and (b). The National Criminal Code of the Federated States of Micronesia employs the words, "intent" (not purpose) and "knowledge". 11 F.S.M.C. 104(4) and (5).

The definition of intent in United States authorities is consistent with the ordinary meaning of the word that we have adopted in analyzing the contempt provision. This is also in harmony with the approach decided upon by Congress when it adopted the National Criminal Code.

The common law developed not only culpability for purposeful and knowing acts (punished more severely), but also for acts involving the creation of a risk either knowingly or one which should have been known. Perkins and Boyce at p. 828; LaFave and Scott at pp. 208-209. The creation of a risk, either knowingly or where the person should have known, provided the culpable mental state to support criminal sanction. If the risk was great and the actor was aware of it, it is called reckless. LaFave and Boyce at p. 211. Thus a homicide caused unintentionally but where the actor created an unreasonable risk is not murder, but may be involuntary manslaughter – a crime. This culpable mental element is called criminal negligence.

Four states of culpability have developed which establish the requisite mental element: intentional, knowing, reckless and negligent.

These latter two are the elements the trial court described when it spoke of the creation of a substantial risk of non-appearance. By the ordinary meaning of the words, and by the entire legal context, such acts are not intentional.

The defendant Santos also argues that the proceeding in the trial court which resulted in his conviction failed to conform procedurally to the requirements of criminal actions and deprived him of due process protections. While our holding in this appeal is on another ground, we find merit in these contentions of Santos. We note for instance that the record at the start of the contempt hearing on 22 May fails to show why it was Santos's duty to have appeared at the juvenile hearing. The defence testimony at the contempt hearing provided the record that Santos is in charge when Tarpley is absent, and that Santos's efforts to have Berman cover were inadequate. However it is not necessary to decide these issues because our holding on culpability disposes of the appeal.

We arrive at this decision recognizing the necessity of each trial judge to maintain punctuality, discipline and professionalism in his courtroom. We sympathize with the trial judge whose court proceedings are delayed, and who wishes to inculcate more responsible conduct in attorneys. We are also keenly aware that the trial judge had no disciplinary procedures or rule to refer this matter to, and used the provisions at hand to correct the negligent non-appearance by the defendants, endeavouring to raise the professional performance of those appearing before him, and the performance of the bar as a whole.

The convictions are accordingly reversed and the cases remanded to the trial court for dismissal of the orders to show cause.

Reported by: D.V.W.