

RIN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Reproductive Gynecology, Inc.,	:	
Plaintiff-Appellee,	:	No. 22AP-141
v.	:	(C.P.C. No. 21CV-2008)
Alby Wu,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 25, 2023

On brief: *Brennan, Manna & Diamond, LLC, John N. Childs, and Brandon T. Pauley*, for appellee. **Argued:** *Brandon T. Pauley*.

On brief: *Alby Wu*, pro se. **Argued:** *Alby Wu*.

APPEAL from the Franklin County Court of Common Pleas

JAMISON, J.

{¶ 1} Defendant-appellant, Alby Wu, brings this appeal from a decision of the Franklin County Court of Common Pleas finding in favor of plaintiff-appellee, Reproductive Gynecology, Inc. (“RGI”). For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Wu is an individual who used various aliases to post false statements on RGI’s public Facebook page and public Google Review page. Wu’s actions were performed with the intent to be harmful to RGI and disrupt their business.

{¶ 3} RGI is a full-service medical fertility center and gynecological practice with five Ohio locations.

{¶ 4} As a result of Wu's postings, RGI filed a complaint docketed as case No. 20CV-8213 against Wu, alleging defamation, false light, and tortious interference with contract, and requesting injunctive relief. The matter was settled prior to trial and was dismissed on February 19, 2021.

{¶ 5} On March 5, 2021, RGI filed post-judgment motions for sanctions because Wu continued posting false comments to RGI's Google Review page. On March 29, 2021, the trial court dismissed the motions finding a lack of subject-matter jurisdiction to enforce the settlement agreement.

{¶ 6} On April 1, 2021, RGI filed a second complaint docketed as case No. 21CV-2008, alleging breach of contract, defamation, false light, and tortious interference with contract, and requesting injunctive relief. The complaint was in response to Wu continuing to post comments in violation of the settlement agreement. Wu answered and filed a counterclaim.

{¶ 7} On May 5, 2021, a magistrate issued a preliminary injunction order enjoining Wu from making statements about RGI in any form of media and requiring Wu to remove any current postings. On May 20, 2021, Wu's objections were overruled, and the trial court adopted the magistrate's decision.

{¶ 8} Wu continued to post, and on July 27, 2021, RGI filed a motion for Wu to show cause why she should not be held in contempt.

{¶ 9} A magistrate's decision was issued on November 3, 2021 finding Wu in civil contempt, and the trial court adopted the decision after overruling objections on February 25, 2022. This appeal followed.

{¶ 10} Appellee filed a motion to strike the notice of supplemental authority and the notice of correction on April 6, 2023. Wu filed a memo contra to the motion on April 10, 2023. This court will consider and address these motions within this decision.

II. ASSIGNMENTS OF ERROR

{¶ 11} Appellant assigns the following four assignments of error for our review:

[I.] The Trial Court Erred In Violating Indigent Appellant's Duo Process Rights And Failing To Inform Indigent Appellant Of Her Right To Counsel And To Provide Counsel.

[II.] The Trial Court Erred In Violating Appellant's Duo Process Rights And Denying Appellant A Chance To Fully Present Evidence.

[III.] The Trial Court Erred In Entering A Judgment Of Conviction Based On Insufficient Evidence And Against The Manifest Weight Of The Evidence.

[IV.] The Trial Court Errored In Violating Appellant's Due Process Rights And Finding Appellant Guilty Of Contempt When The Trial Court Indicated That The Uncounseled Conviction Will Be Subsequently Used To Enhance Punishment Upon A New Conviction.

(Sic Passim.)

III. STANDARD OF REVIEW

{¶ 12} An appellate court applies an abuse of discretion standard when reviewing a trial court's adoption of a magistrate's decision. *State Farm Mut. Auto Ins. Co. v. Fox*, 182 Ohio App.3d 17, 2009-Ohio-1965, ¶ 10 (2d Dist.), citing Civ.R. 53. A finding of contempt is not to be disturbed on appeal absent an abuse of discretion. *Ferritto, Exr. v. Krihwan*, 11th Dist. No. 2009-L-114, 2011-Ohio-4017.

{¶ 13} An abuse of discretion "implies that the trial court's attitude is unreasonable, arbitrary or unconscionable." *Barksdale v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 16AP-297, 2017-Ohio-395, ¶ 11. A trial court abuses its discretion when it fails to "exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

IV. LEGAL ANALYSIS

{¶ 14} Civ.R. 53(D)(3)(b)(i) allows a party to "file written objections to a magistrate's decision within fourteen days of the filing of the decision." The trial court undertakes an independent review of objections to a magistrate's decision in order "to ascertain [whether] the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d).

{¶ 15} The objecting party must file "a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Civ.R. 53(D)(3)(b)(iii).

{¶ 16} App.R. 9 requires a transcript of the proceedings or a statement of the evidence in an appeal. “It is the duty of the appellant to provide a transcript or acceptable substitute because the appellant is required to show the error [s]he claims the trial court made.” *Eubanks v. Simons*, 2d Dist. No. 2017-CA-50, 2018-Ohio-519, ¶ 5.

{¶ 17} “The absence of a transcript or affidavit of evidence restricts the scope of review at both the trial court and appellate levels.” *Cargile v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 11AP-743, 2012-Ohio-2470, ¶ 10. Without either, “the trial court must accept the magistrate’s findings of fact and may only examine the legal conclusions drawn from those facts.” *Ramsey v. Ramsey*, 10th Dist. No. 13AP-840, 2014-Ohio-1921, ¶ 18, citing *Ross v. Cockburn*, 10th Dist. No. 07AP-967, 2008-Ohio-3522, ¶ 5.

{¶ 18} If an appellant does not file a complete transcript, a reviewing court “must presume that the findings of fact are correct and supported by the evidence.” *Barksdale* at ¶ 17.

{¶ 19} This matter was referred to a magistrate pursuant to Civ.R. 53, and on August 10, 2021, a hearing on the motion commenced. Wu testified she authored and posted the violative posts but could not recall the date she posted them. The hearing was then continued to allow investigation as to the exact date of the postings and concluded on September 21, 2021.

{¶ 20} On November 3, 2021, the magistrate issued a decision finding Wu in civil contempt. Wu filed objections on November 5, 2021 and indicated that she would provide the transcripts and video within 30 days. On December 6, 2021, Wu filed an affidavit, but it was not a summary of the evidence. No transcript was ever filed.

{¶ 21} On appeal, Wu filed a transcript from the September 21, 2021 hearing, but did not file a transcript from the August 10, 2021 hearing. Wu did not file an App.R. 9(C) statement of facts. The proceedings from the August 10, 2021 hearing are relevant, and this court cannot conduct a review in the absence of the transcript.

{¶ 22} “When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court’s proceedings, and affirm.” *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199

(1980). In the absence of a transcript or alternative record under App.R. 9, regularity is presumed at the trial court.

{¶ 23} In Wu’s first assignment of error, she argues that her due process rights were violated because the trial court failed to inform her of her right to counsel and did not provide court appointed counsel. The argument is not persuasive.

{¶ 24} We first note that Wu was represented by counsel during this matter, including at the time she executed the settlement agreement. Wu’s attorney withdrew, and she has been appearing pro se.

{¶ 25} Contempt proceedings are sui generis and “bear some resemblance to suits in equity, to criminal proceedings and to ordinary civil actions; but they are none of these.” *Cincinnati v. Cincinnati Dist. Council 51*, 35 Ohio St.2d 197, 202 (1973). The distinction between civil and criminal contempt is often murky but important. *Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783.

{¶ 26} Analysis starts with examining the character and purpose of the penalties to determine if a contempt action is characterized as civil or criminal. *Brown, Atty. Gen. v. Executive 200, Inc.*, 64 Ohio St.2d 250 (1980). Civil contempt is a violation against a party for whose benefit the court issued an order, and punishment is remedial or coercive. *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-357, 2006-Ohio-2531. Prison sentences are conditional, and “[t]he contemnor is said to carry the keys of his prison in his own pocket, since he will be freed if he agrees to do as ordered.” *Brown* at 254. Criminal contempt, on the other hand, is a violation against the dignity or process of a court and is usually characterized by an unconditional prison sentence, and is punishment for a completed act. *Ford* at ¶ 42.

{¶ 27} The trial court correctly determined that the contempt is civil, and fined Wu \$250. Wu could purge the contempt penalty by filing an affidavit attesting that all the posts in violation of the order have been removed.

{¶ 28} There is no constitutional right to appointed counsel in a civil case between individual litigants. However, courts have held that under some circumstances, an indigent defendant facing civil contempt proceedings with the possibility of a jail sentence has a right to appointed counsel. *Strizak v. Strizak*, 7th Dist. No. 11 CA 872, 2012-Ohio-2367. See *Burton v. Hootman*, 5th Dist. No. 06-COA-016, 2007-Ohio-521; *Evans v. Evans*, 10th Dist.

No. 03AP-12, 2003-Ohio-6073; *Pressler v. Pressler*, 12th Dist. No. CA96-03-024, 1996 Ohio App. LEXIS 3122 (July 22, 1996). As a person's interest in liberty diminishes, so does his right to appointed counsel. *Lassiter v. Dept. of Social Servs. of Durham Cty.*, 452 U.S. 18 (1981).

{¶ 29} The right to court appointed counsel in a civil matter normally involves contempt issues regarding child support. *Kuzniak v. Midkiff*, 7th Dist. No. 05 MA 217, 2006-Ohio-6133, ¶ 13. A party facing contempt for failure to pay child support must be informed of their right to counsel, and if indigent, they must apply for a court-appointed attorney. R.C. 2705.031(B)(1) and (C). Wu has not directed us to a legal basis for appointed counsel in her situation.

{¶ 30} Wu argues she is indigent and qualifies for appointed counsel. Wu submitted an affidavit of indigency and later filed a motion requesting a ruling on her indigent litigant application. The record reflects the trial court never took up the motion and it was denied in the February 25, 2022 journal entry.

{¶ 31} Wu has not established entitlement to court appointed counsel. Wu's first assignment of error is overruled.

{¶ 32} In Wu's second assignment of error, she argues her due process rights were violated when she was not allowed to fully present evidence, and in her third assignment of error she argues the evidence does not support the judgment. We shall combine the two assignments of error for analysis.

{¶ 33} Wu argues the judgment was based on insufficient evidence and the judgment was against the manifest weight of the evidence, which are not synonymous legal tenets but rather "quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). A sufficiency argument tests whether the evidence is legally sufficient to support a jury verdict as a matter of law. *State v. Robinson*, 162 Ohio St. 486 (1955).

{¶ 34} In a manifest weight matter, the focal point is whether the greater amount of credible evidence sustains the issue and induces belief. *Bell v. Nichols*, 10th Dist. No. 10AP-1036, 2013-Ohio-2559, ¶ 64. "Judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as

being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

{¶ 35} Wu argues that she was not allowed to present evidence because the court did not allow her to perform forensic extraction on her phone at the conclusion of the September 21, 2021 hearing. Wu also offered to allow the magistrate to search her phone. Finally, Wu requested the magistrate to advise her how to “prove that that was not me.” (Tr. at 57.)

{¶ 36} The trial court must find that a person is guilty of civil contempt by clear and convincing evidence. *Ford*. The trial court found Wu in civil contempt and issued a magistrate’s decision with findings of fact.

{¶ 37} The lack of a transcript or App.R. 9(C) statement precludes an assessment of whether the evidence supports the trial court’s conclusions or if the judgment is against the manifest weight of the evidence. “[I]n the absence of the trial transcript or a proper recreation of that evidence, we cannot conclude the trial court’s judgment was against the manifest weight of the evidence.” *Albritton v. White*, 2d Dist. No. 24027, 2011-Ohio-3499, ¶ 16.

{¶ 38} The presumption of regularity is not undermined by any evidence contained in the limited record before this court, and in the absence of a transcript we are required to find that the trial court was correct. *Terrell v. Morgan Furniture*, 11th Dist. No. 2022-T-0033, 2022-Ohio-3981. Wu’s second and third assignments of error are overruled.

{¶ 39} In her fourth assignment of error, Wu argues the trial court violated her due process rights by indicating that new contempt convictions would result in enhanced punishment. Wu asserts her conviction was uncounseled and may be used to enhance punishment for a new case. “An uncounseled conviction cannot be used to enhance the penalty for a later conviction if the earlier conviction resulted in a sentence of confinement.” *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶ 12, citing *Nichols v. United States*, 511 U.S. 738, 749 (1994).

{¶ 40} R.C. 2705.05(A) provides penalties for repeated findings of contempt:

- (1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;

(2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;

(3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both.

{¶ 41} Wu participated in the hearing voluntarily without counsel, and the lack of a complete record precludes any contrary finding. Pursuant to R.C. 2705.05, if she continues to be found in contempt, the penalties may escalate, however, there is no enhancement “if [Wu] remains within the confines of the law.” *State v. Berndt*, 29 Ohio St.3d 3, 5 (1987). The recitations are warnings of possible penalties should Wu’s conduct continue, and not a due process issue. The fourth assignment of error is overruled.

V. CONCLUSION

{¶ 42} Appellee’s April 6, 2023 motion to strike Wu’s April 4, 2023 notice of supplemental authority and notice of correction of wording in Wu’s reply brief is granted. For the foregoing reasons, we overrule Wu’s four assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

*Motion to strike granted;
judgment affirmed.*

BEATTY BLUNT, P.J., and LELAND, J., concur.
