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IN THE SUPREME COURT OF THE STATE OF IDAHO

C&M INVESTMENT GROUP, LTD., and)
KARLIN HOLDINGS LIMITED)
PARTNERSHIP,)

Supreme Court No. 44719-2017

Plaintiffs/Respondents,)

vs.)

NEIL DAVID CAMPBELL, individually,)

Defendant/Appellant)

and)

PHILIP RICHARD POWERS,)
individually; POWERS INVESTMENTS)
AND MANAGEMENT, INC., S.A., a)
corporation; GUANANA GRIS, S.A., a)
corporation; PROTECCION FORESTAL)
DE TECA S.S., a corporation; and DOES 1)
through 50 inclusive,)

Defendants)

RESPONDENTS' BRIEF

Appeal from the District Court of the Fifth Judicial District,
The Honorable Robert J. Elgee, Presiding

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STATEMENT OF THE CASE

I. NATURE OF THE CASE.

Appellant Neil Campbell (“Campbell”) was convicted of thirteen counts of contempt punishable by criminal sanctions (“Criminal Contempt”) for testifying falsely during a sworn debtor’s examination taken by Respondents C&M Investment Group, LTD and Karlin Holdings Limited Partnership (collectively, “Respondents”). Campbell was also found guilty of two factually unrelated counts of contempt punishable by civil sanctions (“Civil Contempt”) due to his failure to produce documents that the court had ordered him to produce. Only the Criminal Contempt sentence is at issue in this appeal. In this regard, Campbell challenges only the sentence—he does *not* challenge the district court’s findings. Citing Idaho Rule of Civil Procedure 75(i)(2)(D) (“Rule 75(i)(2)”) as well as United States and Idaho Constitutional privileges against self-incrimination (“Privileges”), Campbell maintains that the district court was foreclosed from imposing the 65 day jail sentence for Campbell’s contempt because Campbell was required to take the witness stand on unrelated Civil Contempt charges that—without objection from Campbell—were tried together with the Criminal Charges. On this basis alone, Campbell aims to vacate the jail sentence sanction. Campbell is incorrect and the sanction should stand for two reasons.

First, as the district court recognized and Campbell does not assert otherwise, the Civil and Criminal contempt counts were factually unrelated. This, of course, makes for a different case than the ones to which Campbell relies, namely, trials of factually related civil and criminal counts. As to the discrete Criminal Contempt counts, Campbell was given the right not to take the stand. As to the unrelated Civil Contempt counts, Campbell was ordered to take the stand

but nevertheless given the right to invoke the Privileges, which he did, albeit with negative inferences drawn solely as to the Civil Contempt counts. As even Campbell acknowledged, had the civil counts been tried during a separate proceeding, the district court could permissibly compel Campbell to take the witness stand and be examined as to the facts underlying the civil contempt counts. Reporter's Transcript on Appeal ("Tr.") Vol. I, p. 256, L. 11-13.

Second, all of the above aside, any error of which Campbell complains was harmless and not grounds for reversal. *Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 157 Idaho 106, 122 (2014) ("A party alleging error on appeal must also show that the alleged errors were prejudicial"). Indeed, Campbell does not articulate in his brief on appeal how having to take the stand created any prejudice given that the district court permitted Campbell to assert the Privileges on the stand (which Campbell did) without prejudice to the Criminal Contempt counts. Moreover, in the context of a bench trial, the judge is presumed to have relied on only competent evidence and disregarded incompetent evidence. *State v. Powell*, 120 Idaho 707, 710 (1991). And here, the district court expressly stated that its findings of fact regarding the Criminal Contempt counts were *not* based on Campbell taking the stand. Thus, Campbell was not prejudiced and any alleged error is harmless.

II. COURSE OF THE PROCEEDINGS/STATEMENT OF FACTS.

The contempt proceeding giving rise to this appeal derives from a judgment entered against Campbell and for Respondents by a Los Angeles Superior Court for over \$24 million. ("Judgment"). The Judgment represented a combination of compensatory and enhanced damages for breach of contract, fraud and RICO violations committed by Campbell in the course of his business relationship with the Respondents. Clerk's Record on Appeal ("R."), p. 489

(Contempt Judgment ¶ 12); R., pp. 285–306 & 306–11 (Am. RJN Exs. F & G). During the litigation, Campbell repeatedly flouted the discovery process—including by refusing to respond to written discovery and failing to attend his deposition. R., p. 489 (Contempt Judgment ¶¶ 10–11); R., pp. 278–80 & 281–84 (Am. RJN Ex. D & E). Campbell’s discovery abuses were sufficiently egregious that the California court imposed monetary sanctions, terminating sanctions, struck Campbell’s answer, and entered a default against him. R., p. 489 (Contempt Judgment ¶¶ 10–1); R., pp. 278–80 (Am. RJN Ex. D); R., pp. 281–84 (Am. RJN Ex. E); R., p. 188 (Am. RJN Ex. F. at 2).¹ Later, Campbell was found guilty of a felony by a Los Angeles jury as a result of his fraud on the Respondents.

On June 21, 2012, after filing the California Judgment in Idaho, Plaintiffs obtained an order from the district court domesticating the Judgment in Idaho. R., p. 489 (Contempt Judgment ¶ 13); Pls.’ Trial Ex. 12. On March 23, 2015, the district court granted Respondents’ Motion for a Judgment Debtor’s Examination. R., p. 489 (Contempt Judgment ¶ 14); Def.’s Trial Ex. 511. The district court amended this order twice, first on April 1, 2015, and again on August 3, 2015, to change the date for the debtor’s examination. R., pp. 489–90 (Contempt Judgment ¶ 14); Pls.’ Trial Ex. 13; Def.’s Trial Exs. 512 & 513.

A. Facts Relating to the Civil Contempt Charges.

The Amended Order compelling Campbell to appear for a debtor’s examination also required Campbell to produce, *inter alia*, documents “evidencing any payments made by Defendant to any legal counsel over the period of 2009 to present, including documents

¹ The facts underlying the Judgment are recited by the district court in its Findings of Fact and Conclusions of Law. R., pp. 488–89 (Contempt Judgment ¶¶ 6–9).

evidencing the source of the funds used to make those payments,” and “all records relating to financial accounts (savings accounts, checking accounts, or otherwise) maintained in Defendant’s name or to which Defendant has access for the time period commencing January 1, 2012 to the present date.” R., p. 490 (Contempt Judgment ¶ 15); Pls.’ Trial Ex. 13-2 & 13-3. The Amended Order required Campbell to produce the responsive documents no later than April 13, 2015. R., p. 490 (Contempt Judgment ¶ 16); Pls.’ Trial Ex. 13-2. Campbell was initially charged with ten counts of Civil Contempt for failure to produce responsive documents. R., pp. 32–33. Following Campbell’s untimely production of additional documents, only two of those counts were tried.

At trial, Campbell was called to testify about his failure to produce two categories of records: (1) documents evidencing his payments to one of his lawyers, David Flyer; and (2) documents relating to a bank account he opened at HSBC in Hong Kong. Tr. Vol. I, p. 160, L. 22 - p. 201, L. 25. He was also examined about the completeness of his recent production of the documents at issue in civil contempt Charges Two through Seven, which Respondents then dismissed. *Id.*; R., p. 488 (Contempt Judgment ¶ 6). The district court found Campbell guilty of two counts of civil contempt for failing to produce documents related to his payments to Flyer and documents relating to the HSBC Hong Kong account. R., pp. 494–99, 530–31 (Contempt Judgment ¶¶ 37–69, 176–85).

B. Facts Relating to the Criminal Contempt Charges.

On August 24, 2015, Campbell appeared before the district court for a debtor’s examination. R., p. 500 (Contempt Judgment ¶ 71); Pls.’ Trial Ex. 1-4. The court put Campbell under oath prior to the debtor’s examination. R., p. 500 (Contempt Judgment ¶ 71); Pls.’ Trial

Ex. 1-3. During the examination, Respondents' counsel asked Campbell a series of basic questions about his finances and living situation. To nearly every one of these questions, Campbell responded "I don't know" or "I don't remember." R., p. 500 (Contempt Judgment ¶ 72).

Because of Campbell's false sworn testimony, Respondents brought 23 separate Criminal Contempt charges against Campbell pursuant to Idaho Code § 7-601(4), which provides that deceit by a party to a special proceeding constitutes a contempt of court. Each of the criminal contempt charges set forth in the Charging Affidavit related solely to Campbell's untruthful testimony during his August 24, 2015 debtor's examination. R., pp. 33–47. The charged lies relate to (a) the source of funds Campbell used to open his Bank of America account, his car, and where he lived (Counts 11–17); (b) the source of a large cash deposit to Campbell's Bank of America Account (Count 18); (c) Campbell's claim that he did not remember the name of the company in whose name he opened the HSBC Hong Kong account (Count 19); (d) the source of large cash deposits to Campbell's Zions bank account (Counts 20–30); and (e) how Campbell paid his rent during a time when his bank records did not reflect payments (Counts 31–34).

C. The Trial.

On February 1, 2016, Plaintiffs filed the Charging Affidavit setting forth Civil Contempt counts (for failure to produce documents) and Criminal Contempt counts (stemming from Campbell's sworn lies). R., pp. 486–87 (Contempt Judgment ¶ 2). On February 22, 2016, the district court held a hearing at which the court informed Campbell of all of the counts against him and advised him of his rights, including his right to remain silent. R., p. 487 (Contempt Judgment ¶ 3). In May 2016, the Court appointed counsel to represent Campbell. R., p. 153.

Prior to trial, the parties engaged in motion practice. At no time did Campbell move to bifurcate the civil and criminal contempt charges. R., pp. 7–9; Tr. Vol. I, p. 256, L. 22-25.

The district court held a bench trial on July 26 to July 27, 2016, during which the court heard both the Civil and Criminal Contempt counts. R., p. 487 (Contempt Judgment ¶ 5). During the trial, Respondents called Campbell as a witness to testify as to the Civil Contempt counts. R., p. 488 (Contempt Judgment ¶ 6). The district court permitted this over Campbell’s objections because it correctly found that the Civil and Criminal Contempt counts were factually distinct. Tr. Vol. I, p. 157, L. 22 - p. 158, L. 4. As the district court recognized, Campbell was questioned solely regarding the Civil Contempt counts. Respondents’ counsel made “no attempt to cross-examine Campbell on the criminal contempt charges.” R., p. 488 (Contempt Judgment ¶ 6). Moreover, Campbell was given the right to invoke the Privileges during this limited questioning and did in fact invoke the Privileges. R., p. 499 (Contempt Judgment ¶ 70). The district court expressly stated that it did not draw from Campbell’s invocation of the Privileges any negative inferences related to the Criminal Contempt counts. *Id.*

After reviewing the evidence, on November 3, 2016, the district court issued written Findings of Fact and Conclusions of Law. *See generally* R. pp. 486–544 (Contempt Judgment). The district court found Campbell guilty of two counts of Civil Contempt and thirteen counts of Criminal Contempt. R., p. 542 (Contempt Judgment ¶¶ 222 & 223). In reaching its findings of fact as to the Criminal Contempt counts, the court expressly stated that “[t]he following findings of fact [regarding the criminal contempt charges] are based solely on the documentary evidence admitted or judicially noticed during trial. They are not based in any way on Campbell’s testimony during trial (which related only to the civil contempt counts).” R., p. 499 (Contempt

Judgment ¶ 70). This documentary evidence included bank statements, check images, and Campbell's own written statement provided to Respondents before the trial. *See, e.g.*, Pls.' Trial Exs. 3 to 6.

On December 1, 2016, the district court sentenced Campbell to serve five (5) days in the Blaine County Jail for each of the thirteen counts of Criminal Contempt on which he was found guilty, for a total of sixty-five (65) days.² R, pp. 602–06. Campbell then filed a Motion to Stay Execution of Judgment. After a hearing was conducted, the Court stayed the sentence it imposed on the thirteen counts of Criminal Contempt of Court pending the outcome of Campbell's appeal.

COUNTERSTATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the district court not err by imposing a Criminal Contempt sanction in a bench trial that did not require Campbell to take the stand as to Criminal Contempt Charges and solely required Campbell to take the stand without prejudice to Campbell asserting the Privileges as to factually unrelated Civil Contempt charges that Campbell did not request be tried separately?
2. Assuming it was error for the district court to require Campbell to take the stand as to the Civil Contempt Charges, should the district court's order imposing a Criminal Contempt sentence be affirmed because such error has not been shown and could not be shown to be prejudicial in light of the circumstances?

² As to the civil counts, the court also sentenced Campbell to jail pending his compliance with certain conditions. The jail sentence was initially stayed, and Campbell ultimately complied with the conditions without being incarcerated.

ARGUMENT

I. STANDARD OF REVIEW.

The “standard of review applicable to questions of law is one of deference to factual findings, but [the Court may] freely examine whether statutory and constitutional requirements have been met in light of the facts as found.” *State v. Hedges*, 143 Idaho 884, 886 (2007). Additionally, “[a] party alleging error on appeal must also show that the alleged errors were prejudicial. Alleged errors not affecting substantial rights will be disregarded.” *Saint Alphonsus Diversified Care*, 157 Idaho at 122 (internal quotations omitted); *see also* Idaho R. Civ. P. 61 (“At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”). Errors affecting constitutional rights are harmless where the court finds beyond a reasonable doubt that the alleged error did not impact the outcome of the case. *State v. Christiansen*, 144 Idaho 463, 471 (2007) (violation of criminal defendant’s Fourth Amendment rights was harmless error). Issues not raised in an opening brief are waived. *Tucker v. State*, 162 Idaho 11, 61 (2017).

Here, the district court’s factual findings that the criminal and civil contempt charges were factually independent and that its findings regarding the criminal contempt charges were unrelated to Campbell’s testimony are entitled to deference. *Staggie v. Idaho Falls Consol. Hosps., Inc.*, 110 Idaho 349, 351 (Ct. App. 1986) (appellate courts defer to trial court’s factual findings unless clearly erroneous).

II. THE DISTRICT COURT HONORED CAMPBELL'S RIGHT AGAINST SELF-INCRIMINATION AS TO THE CRIMINAL CONTEMPT CHARGES IN A TRIAL INVOLVING DISTINCT AND UNRELATED CIVIL CONTEMPT CHARGES.

Campbell argues that, under Rule 75(i)(2), no criminal sanction can be imposed against him because he was called to the stand during the contempt trial. Rule 75(i)(2) provides as follows: "*Trial Rights Required to Impose a Criminal Sanction.* The court cannot impose a criminal sanction following a trial unless the respondent was provided the following rights: . . . (D) the privilege against self-incrimination[.]" Idaho R. Civ. P. 75(i)(2).

Rule 75(i)(2) provides a right against self-incrimination *only* as to charges of criminal contempt. It does not provide that same protection for charges of civil contempt. As Campbell's own attorney admitted, "if it was only a civil contempt case, he takes the stand and has the potential to invoke the Fifth Amendment" as to particular questions. Tr. Vol. I, p. 256, L. 11-13. The district court expressly found that the Civil and Criminal contempt charges were factually distinct. *Id.* at p. 157, L. 22 - p. 158, L. 4. As discussed above, the Criminal Contempt charges stemmed from Campbell's lies about his finances and related issues. R., pp. 33-47. These charges were unrelated to whether Campbell had the ability to produce the documents that the court ordered him to produce. In contrast, the Civil Contempt charges related *solely* to Campbell's failure to produce documents. R., pp. 29-33. As such, the district court permitted Respondents to call Campbell to testify solely as to the Civil Contempt charges. Tr. Vol. I, p. 137, L. 21-25, p. 158, L. 5-8.³ In other words, the district court permitted Respondents to do

³ Campbell knew by no later than the February 2016 Charging Affidavit that the contempt trial involved both criminal and civil contempt charges. R., pp. 29-47. He also knew that he could be called as a witness to testify regarding the civil contempt charges. Despite this knowledge, he

exactly what even Campbell admits would have been proper if the Civil Contempt charges had been tried separately.

In the Contempt Judgment, the district court specifically found that Respondents' examination was "limited to questions related to the civil contempt charges" and Respondents "made no attempt to cross-examine Campbell on the criminal contempt charges." R., pp. 488, 499 (Contempt Judgment ¶¶ 6, 70). The court also issued separate findings of fact as to the Civil and Criminal Contempt charges, and expressly stated that its findings of fact as to the Criminal Contempt charges were "based solely on the documentary evidence admitted or judicially noticed during trial" and were "not based in any way on Campbell's testimony during trial[.]" R., p. 499 (Contempt Judgment ¶ 70). This documentary evidence included bank statements, check images, and Campbell's own written statement provided to Respondents before the trial. *See, e.g.*, Pls.' Trial Exs. 3 to 6. These documents showed that Campbell told numerous lies about such topics as the source of funds that he used to open an account at Bank of America, whether he owned a car in 2012, where he was living in 2012, whether he remembered the name of the company in whose name Campbell opened the HSBC Hong Kong account, what assets he had upon moving to Idaho, and how he paid his rent at a time when his bank records did not reflect payment. The evidence used to prove that Campbell lied was not associated with his taking the stand, any testimony he gave on the stand, his invocation of the Privileges while on the stand, or even his failure to produce documents. Campbell was afforded the full right against self-incrimination to which he was entitled under Rule 75(i)(2).

never requested to have bifurcate the civil and criminal contempt charges. He therefore waived this argument.

Campbell does not point to any contrary authority. Instead, the primary case on which he relies deal with criminal sanctions imposed for civil contempt charges. *See Camp v. E. Fork Ditch Co.*, 137 Idaho 850, 865 (2002) (court erred where it announced at the outset of proceedings that charges were civil, never advised contemnor that criminal punishment could be imposed, and nevertheless imposed criminal sanction for those contempt charges). Campbell also relies on out-of-context dicta from *State Department of Health & Welfare v. Slane*, 155 Idaho 274, 277 (2013). In *Slane*, the Court noted that “[i]f both civil and criminal relief are imposed in the same proceeding, then the ‘criminal feature of the order is dominant and fixes its character for purposes of review.’” *Slane*, however, did not involve a trial for factually independent charges of criminal and civil contempt. Rather, *Slane* involved a contempt sanction that the district court incorrectly treated as a civil contempt sanction when it was in fact a criminal sanction. Here, the district court correctly found that the civil and criminal contempt sanctions were factually distinct and, therefore, that Respondents could call Campbell to testify solely as to the civil contempt counts. This court should therefore affirm the district court’s orders finding Campbell guilty of thirteen counts of criminal contempt and sentencing him to 65 days in jail.

III. CAMPBELL WAS NOT PREJUDICED AS TO THE CRIMINAL CONTEMPT CHARGES BY VIRTUE OF TAKING THE STAND.

As noted above, a showing of prejudice is required for the district court’s Criminal Contempt sentence to be vacated. *See Saint Alphonsus Diversified Care, LLP*, 157 Idaho at 122 (district court’s order affirmed where alleged error did not cause any prejudice to appellant). Campbell’s right against self-incrimination was respected and he was not prejudiced by any

alleged error.

At bottom, the issue boils down to the Court requiring Campbell to take the stand and exercise the Privileges with respect to the Civil Contempt charges in open court, as opposed to not taking the stand. Campbell makes no argument on appeal that that this prejudiced him. Nor could he.

First, Campbell was allowed to and did invoke the Privileges when he took the stand. Moreover, in the case of a bench trial, there is no concern that the mere act of taking the stand prejudiced Campbell. Second, the district court expressly found that Campbell was not asked any questions related to the criminal contempt charges, that its findings of fact as to the criminal contempt charges were not based in any way on Campbell's testimony during trial, and that its findings of fact as to the criminal contempt charges were based solely on the documentary evidence admitted or judicially noticed during trial. R., p. 499 (Contempt Judgment ¶ 70). Indeed, the judge in a bench trial is presumed to consider only competent evidence and disregard any incompetent evidence. *Powell*, 120 Idaho at 710. Finally, had the Civil Contempt counts been tried separately from the Criminal Contempt counts, the same district court trying the latter would have witnessed Campbell taking the stand and assert the Privileges in the former trial. There is no reason to believe that any effect on the fact finder under this scenario—a scenario that Campbell concedes would have been entirely proper—would be any different than in the trial that was had.

Even if the district court erred by allowing Respondents to call Campbell to testify as to the civil contempt charges, any such error had no effect on the outcome of the trial as to the criminal contempt charges. Therefore, any error was harmless and the district court's order

should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court affirm the district court's Contempt Judgment and Sentencing Order.

RESPECTFULLY SUBMITTED this 1 day of March 2018.



Erin Farrell Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1 day of March, 2018, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Neil D. Campbell
P.O. Box 3372
Ketchum, ID 83340

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy



Erin Farrell Clark