

IN THE NEBRASKA COURT OF APPEALS

State of Nebraska, ex rel.,)
Michael J. Linder, Director,)
Nebraska Department of)
Environmental Quality,)
Appellant,)
v.)
Earl Long, d/b/a/)
Long Automotive Service,)
Appellee.)

No. A-06-1281

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

JAN 17 2008

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

The State of Nebraska, ex rel. Michael J. Linder, Director, Nebraska Department of Environmental Quality (hereinafter "the State"), appeals an order of the district court for Douglas County in which the court found insufficient evidence to levy sanctions for a prior finding of contempt and dismissing the State's motion for contempt. Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006) this case was ordered submitted without oral argument. We find that the district court's order was not supported by the evidence and was arbitrary, capricious, and unreasonable, and we reverse and remand for further proceedings.

II. BACKGROUND

On April 22, 2002, the State filed a petition alleging that Earl Long, d/b/a Long Automotive Service, had improperly disposed of various waste products and caused pollution on property owned by Long. On April 23 the parties entered a consent decree in which Long agreed to pay a fine of \$1,500 and to clean up the property within 90 days. On May 21 the State filed a notice that Long had satisfied the financial aspect of the consent decree.

On August 31, 2005, the State filed a motion for contempt. The State alleged that Long had yet to comply with the clean-up provisions of the April 23, 2002, consent decree. On September 27, 2005, the court entered an order directing Long to show cause why he should not be found in willful contempt. On October 20 the court entered an order finding Long in willful contempt and requiring his compliance by November 14. On November 17 the court ordered Long to serve 60 days in jail, but provided that Long could purge himself of the jail sentence by complying with the clean-up requirements of the consent decree.

On May 10, 2006, the State filed another motion for contempt, again alleging that Long had yet to comply with the clean-up provisions of the April 23, 2002, consent decree. On May 11, 2006, the court entered another show-cause order. On June 30 the court entered an order finding Long to again be in

willful contempt. The court ordered that a fine of \$10,000 per week would accrue for the following 8 weeks, but provided that Long could purge himself of the fine by complying with the clean-up requirements of the consent decree.

On September 18 and October 10, 2006, the parties appeared in court. The arguments presented by the parties, and the evidence adduced by the State, indicated that Long had still failed to comply with the clean-up requirements of the April 23, 2002, consent decree. However, instead of entering an order enforcing the accrued fine of \$80,000, the court entered an order on October 12 in which the court held that there was "insufficient evidence to levy sanctions" against Long and held that the motion for contempt was "dismissed." This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, the State has assigned two errors challenging the district court's findings that there was insufficient evidence to levy sanctions and dismissing the contempt motion.

IV. ANALYSIS

The State asserts on appeal that the district court erred in finding insufficient evidence to levy sanctions against Long and in dismissing the State's contempt motion after the court had previously found Long to be in willful contempt and the only evidence presented to the court was that Long failed to comply

and failed to purge himself of the contempt during the period in which the court had directed compliance. We agree.

We have previously recognized that an appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. *Thornton v. Thornton*, 13 Neb. App. 912, 704 N.W.2d 243 (2005). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous. *Id.*

On June 28, 2006, the parties appeared before the district court. The State asked the court to take judicial notice of the exhibits offered in the previous contempt proceeding, and the court did take judicial notice of the exhibits. The State then called an environmental programs specialist who worked for the Nebraska Department of Environmental Quality and who had inspected Long's property in May 2006. That witness identified approximately 65 photographs taken of Long's property which depicted Long's failure to comply with the clean-up requirements of the April 23, 2002, consent decree. Additionally, Long testified on his own behalf. At the conclusion of the June 28, 2006, proceedings, the State indicated its willingness to

execute on any judgment that might arise out of the contempt proceedings. At the conclusion of the proceedings, the court found Long to be in willful contempt and imposing the conditional fine of \$10,000 per week accumulating for 8 weeks, with the provision that Long could purge himself of the contempt finding and avoid the fine if he complied with the consent decree.

On September 18, 2006, the parties appeared in court again. No witnesses were sworn or provided testimony, but the State indicated to the court that although Long had "removed a significant amount of the . . . waste, there was still waste present at the site." The court granted Long an additional two weeks to comply with the provisions of the consent decree.

On October 11, 2006, the parties appeared in court again. The court received a report on behalf of the State, including 85 photographs documenting Long's noncompliance with the provisions of the consent decree. Long's counsel represented to the court that "the job [was] not done." The State again represented that if the court would impose the judgment of the \$80,000 fines that had accumulated, the State was prepared to foreclose on the property "and there are willing buyers who would buy and clean it up."

The court, sua sponte, noted the following, on the record:

Here's the problem I've got: I've had him in jail, it didn't seem to do a darned thing. He served out his time. I have concern over his overall competency. He's an elderly gentleman. He may be a shrewd. I'm not a psychologist or psychiatrist. There's no expert testimony in regard to his fitness to understand or deal with the problem as presented. . . .

I mean, there's got to be a point where I have got to move this case along. I know what I said I was going to do, but I'm troubled with his ability to -- ability to comply with the Court. I don't know whether he has the mental capacity to do it, but I don't have any evidence to say he doesn't.

. . . .

I think he's competent, I think he can understand why he's in court and why he's been brought here.

When the State indicated that it had "asked for contempt and monetary fees" and that it "thought th[e] Court was prepared to grant that," the district court replied:

I'm not. In fact, I don't think he's competent or capable of complying with the orders of the Court. I'm done with him. The contempt citation is dismissed. The State will have to take other avenues. We're done.

On October 12, 2006, the district court entered an order in which the court indicated that there was "insufficient evidence

to levy sanctions" and dismissing the State's motion for contempt.

On the record presented, the district court's final order is not supported by competent evidence. It is apparent from a review of the court's comments at the final hearing, as set forth above, that the court was reluctant to enforce its own finding of willful contempt and the fine schedule imposed by the court because of a concern about Long's competency. However, the court itself specifically recognized both that there was no evidence presented to indicate that Long was not competent to comply with the court's order and that the court did think Long was competent.

The only evidence presented to the court indicated that, although Long had successfully removed some of the waste materials from the property, Long had failed to comply with the provisions of the consent decree for approximately 4 1/2 years. There was no evidence presented to indicate that Long was, for any reason, incapable of complying with the clean-up provisions of the consent decree. There was no evidence presented to indicate that Long's compliance amounted to substantial compliance or that the remaining non-compliance was merely de-minimas. In short, the district court's finding that the evidence was insufficient to support levying sanctions was not supported by any evidence on the record.

The district court's conclusion that the State's motion for contempt should be dismissed was arbitrary, capricious, and unreasonable. The only explanation evident on the record presented is that the court had become frustrated by Long's continuing non-compliance with the court's orders. Such frustration, however, does not support dismissing the State's motion, especially after a finding that Long was in willful noncompliance and uncontroverted evidence that Long failed to purge himself of the contempt when given the opportunity. As such, we reverse the district court's order and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.



Janet A. Amussen
Clerk/Deputy Clerk

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