Dalton v. Heirs of Borja, 5 ROP Intrm. 95 (1995)
MARGARITA BORJA DALTON, et al.,
Plaintiffs,

v.

THE HEIRS OF BERNARDO BORJA, et al.,
Defendants.

CIVIL APPEAL NO. 27-94
Civil Action Nos. 354-93 & 335-94

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: May 16, 1995

Counsel for Appellant: Martin Wolff

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; PETER T. HOFFMAN, Associate Justice.
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NGIRAKLSONG, Chief Justice:

This matter is before the Court on Martin Wolff's ("Wolff") appeal from a criminal contempt order issued by the trial court (Civil Action Nos. 354-93 and 335-94). We affirm.

I. FACTS

This matter arose as the result of statements made by Wolff, counsel for plaintiffs in the underlying action, about opposing defense counsel. The statements were made by Wolff in his affidavit filed with the trial court on July 26, 1994 in support of plaintiff Dalton's response to certain defendants' motion for sanctions. In paragraph four of his affidavit, Wolff stated:

> [Opposing counsel] suffers from a minority complex because he is not truly Palauan and he is reminded of this fact every day of his miserable existence in Palau. This makes him a nasty, impertinent, offensive boor of low class and poor taste who takes out his frustration on anyone who dares to cross his path.

Wolff admits making the statements under oath. See also *In re Wolff* , 5 ROP Intrm. 51, 51 (1995).

On September 1, 1994, Justice Beattie issued an Order to Show Cause "why Wolff should not be held in criminal contempt of this court for the filing of his affidavit containing the above language." Wolff filed his response to the Order on October 27, 1994. A hearing was held on

October 31, 1994, and a written Contempt Order was entered on November 2, 1994. The trial court fined Wolff $1,000 for criminal contempt of court.

In doing so, the trial court found certain facts beyond a reasonable doubt, including:

1. The subject language is highly offensive, abusive, scandalous and an improper personal attack on [opposing counsel] which is irrelevant and immaterial to any of the issues involved in this case.

2. The offensive language was filed in order to embarrass, humiliate, intimidate, impede and coerce [opposing counsel]. This is clear because the language had nothing to do with the issues or merits, so it could have little other purpose.

⊥97 3. Wolff was motivated to insert the offensive language in his affidavit, not to address the issues, but because 'sick bullies increase their aggression when they get away with it and their [sic] was no desire to allow [opposing counsel] to think he had gotten away with anything." (quoting Affidavit of Martin Wolff in Response to Order to Show Cause ¶ 10, filed Oct. 27, 1994).

4. The filing of the affidavit has been disruptive to these proceedings in that it has diverted attention from the issues, causing [opposing counsel] to file pleadings in response to the racially toned allegations and the court to devote time to this extraneous matter as well.

5. Wolff filed the affidavit when he knew or reasonably should have known that he was exceeding the outermost limits of his proper role and was hindering rather than facilitating the search for truth.

In fashioning the appropriate sanction, the trial court also made certain conclusions of law, including:

1. Wolff's written response to the Order to Show Cause was nothing more than another improper and irrelevant attack on [opposing counsel], perhaps more shocking in its impropriety than the original. Consequently, Wolff's "repudiation" of any attempt to embarrass, humiliate or intimidate [opposing counsel] rings hollow. In filing his Memorandum, Wolff simply reloaded and fired another salvo of mud at [opposing counsel].

2. The filing of the affidavit with the offensive language constituted an abuse of process and offends and degrades the dignity of the court.

3. This misuse of the process of court to publish scandalous, embarrassing and offensive matters which are irrelevant is not only an improper use of the court files but contemptuous conduct.

4. Use of inherent power of the trial court to impose a $1,000 fine on Wolff is warranted under these facts.

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II. DISCUSSION

Wolff appeals from the trial court's Contempt Order. Wolff contends that the trial court (1) made findings inconsistent with the record, (2) made incorrect conclusions of law and (3) exceeded the limits of its inherent power to sanction contempt of court.[1]

We review a trial court's findings of fact under the clearly erroneous standard and its exercise of its inherent power to issue either civil or criminal contempt citations under the abuse of discretion standard. *Cushnie v. Oiterong* , 4 ROP Intrm. 216, 219 (1994); *Chambers v. NASCO, Inc.* , 111 S.Ct. 2123 (1991); *United States v. Engstrom* , 16 F.3d 1006, 1011 (9th Cir. 1994); *District Court v. Sandlin* , 12 F.3d 861, 864-65 (9th Cir. 1993); *United States v. Walker* , 964 F.2d 1214, 1217 (D.C. Cir. 1992). Because the trial court imposed a sanction to punish Wolff for his conduct, as opposed to prompting him to comply with a court directive, the contempt order is properly considered as a criminal matter. *Cushnie*, 4 ROP Intrm. at 219.

A. Factual Findings

Wolff contends that certain material findings of fact by the trial court were inconsistent with the record. First, Wolff asserts that the trial court erred in finding that the affidavit was filed in connection with his motion to reconsider the dismissal of the amended complaint. Wolff contends that the affidavit was actually submitted in response to certain defendants' motion for sanctions. Wolff's charge of error is nonsensical for two reasons. First, Wolff fails to explain how this alleged error is material in any respect to the contempt citation. If there was error in this finding, it was harmless. Second, it is not at all clear that it was error. The motion for sanctions was directed at Wolff's filing of the motion for reconsideration. Thus, although indirectly, the affidavit related to the motion for reconsideration.

Second, Wolff contends that his statements did not disrupt the proceedings. Rather, Wolff contends that the proceedings were disrupted by the trial court acting sua sponte to take action. Wolff asserts that "it is hardly logical or fair to blame [Wolff] therefore." On the contrary, it is entirely appropriate to blame Wolff for the disruption in the proceedings. ⊥99 Wolff's racist remarks given under oath demeaned the trial court and the judicial system, and forced the trial court into action to rectify the indignities thrust upon it by Wolff. The findings of the trial court that Wolff caused a disruption in the administration of justice are not clearly erroneous.

Third, Wolff contends that the trial court erred in its finding concerning Wolff's written response to the Order to Show Cause. In particular, Wolff defends his response by arguing that he was merely trying to prove that the contents of his affidavit were truthful. Wolff's response

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[1] ROP Rule of Criminal Procedure 42 sets forth the proper criminal contempt procedures. *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 219-20 (1994). Wolff does not contend that the trial court failed to follow the dictates of the rule.

attempted to justify his racist remarks with similar outrageous statements. The trial court did not error in concluding that Wolff's response showed that he lacked sincerity in his proclamation that he did not have an improper purpose in filing the affidavit.

Finally, Wolff contends that the trial court erred in finding that the offensive statements in the affidavit were irrelevant. Wolff asserts that credibility of witnesses is always relevant and, Wolff implies, opposing counsel is likely to be a witness. How Wolff's racist statements touch on the credibility of opposing counsel is not at all apparent. Furthermore, Wolff's racist statements were made in response to a motion for sanctions; the credibility of opposing counsel was in no way at issue.

Accordingly, none of the trial court's findings of fact was clearly erroneous.

B. Conclusions of Law

Wolff contends that "actual obstruction of the proceedings" is an element of the offense of criminal contempt. Wolff also contends that provocation mitigates against a finding of criminal contempt. Wolff charges that there was no obstruction of court proceedings and that the trial court ignored mitigating circumstances. We reject both contentions.

First, assuming without deciding that obstruction is an element of the offense of criminal contempt, the trial court expressly found that Wolff's statements did obstruct the court proceedings. Although there was no in-court fracas caused by the filing, it did disrupt the normal administration of justice and imposed on the trial court the obligation to take affirmative measures to guard against Wolff's maligning the dignity of the judiciary.

Second, we reject Wolff's contention that provocation, as a matter of law, excused his racist remarks to the trial court. We do not view the law of criminal contempt as a game in which ⊥100 offenses may off-set one another. Even if Wolff was shoved first, this does not vindicate his abuse of the court system to shove back.

C. Scope of Inherent Power of the Trial Court

The trial court expressly based its sanction on the inherent power of the court to punish contempt. We have recently held that "it is firmly established that the power to punish for contempt is inherent in all courts." *Cushnie*, 4 ROP Intrm. at 219. It is equally well established that this inherent power extends to punish an attorney who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Chambers v. NASCO, Inc.* , 111 S.Ct. 2123, 2133 (1991); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y* , 95 S.Ct. 1612, 1622-23 (1975); *F.D. Rich Co. v. United States*, 94 S.Ct. 2157, 2165 (1974).

Wolff acknowledges, as he must, that courts possess certain inherent powers. He argues, however, that due process and other concerns limit that power to impose civil contempt sanctions only. Wolff contends that courts may impose criminal contempt sanctions only when authorized by statute. From this, Wolff argues that the trial court exceeded its inherent power. We disagree.

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1. Due Process

Wolff's first contends that his due process rights were violated.[2] Although his argument is ill-defined, Wolff asserts that because there is no proper notice or opportunity to respond to criminal contempt charges raised by the inherent power of the court, no courts have imposed such sanctions. Contrary to Wolff's representation to this Court, courts in other jurisdictions have used inherent power to impose criminal sanctions. See, e.g., *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1545-46 (11th Cir. 1993) (affirming use of inherent powers to punish; fines ⊥101 "justly punished the defendants and their attorneys and, hopefully, will deter other litigants from engaging in similar activity.").[3]

We recognize that where indirect contempt of court occurs outside the courtroom and serious sanctions are imposed, the need for immediate and summary action by the court may not exist and significant rights of the defendant may be at jeopardy. In such instances, the trial court may have an obligation to invoke the procedural protections used in the criminal process.

> For a discrete category of indirect contempts . . . civil procedural protections may be insufficient. Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable fact-finding. * * * Under these circumstances, criminal procedural protections such as the right to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.

International Union, United Mine Workers of Am. v. Bagwell , 114 S.Ct. 2552, 2560-61 (1994) (citations omitted).

Where the sanction imposed is of minor import, the charge may be viewed as petty criminal contempt requiring fewer procedural safeguards. See *Taylor v. Hayes* , 94 S.Ct. 2697, 2701 (1974) ("[p]etty contempt like other petty criminal offenses may be tried without a jury."). It is only when the sanction is "serious" that criminal process is due. See *Muniz v. Hoffman*, 95 S.Ct. 2178, 2190 (1975); see also *Bagwell*, 114 S.Ct. at 2562 n.5 (U.S. Supreme Court "has not specified what magnitude of contempt fine may constitute a serious criminal sanction, although it has held that a fine of $10,000 imposed on a union was insufficient to trigger the Sixth Amendment right to a jury trial.").

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[2] Wolff failed to make this argument in his briefs to this Court and raised it in the first instance during oral argument. Although we address the issue because of its importance, Wolff's belatedly raising the argument made briefing by opposing counsel and pre-argument preparation by the Court impossible. We warn counsel that they act at their and their clients' own peril in omitting arguments from briefs.

[3] On at least one occasion, this Court imposed sanctions under its inherent power for the "egregious conduct" of a Trial Counselor. *Kubarii v. Olkeriil*, 3 ROP Intrm. 39, 42 (1991). Because we did not discuss the purpose of the sanction, it is not clear if the contempt was criminal or civil.

The $1,000 contempt sanction imposed here to punish Wolff for making the racial slurs in his affidavit is a far cry from the complex injunction and formidable sanctions at issue in *Bagwell*. Nonetheless, Wolff received the full rights afforded a criminal defendant including those found in ROP Rule of Criminal Procedure 42. See *Cooke v. United States* , 45 S.Ct. 390, 395 (1925) (due process rights of criminal contempt defendant to notice, ⊥102 opportunity to present defense and obtain assistance of counsel); see also *Bloom v. Illinois*, 88 S.Ct. 1477, 1484 (1968) (addressing process due in criminal contempt proceedings).

We find disingenuous Wolff's contention that he did not have sufficient notice that his conduct was sanctionable. Wolff should have known that the use of the court system as a means to publish racial slurs was contumacious. That such conduct is unacceptable and sanctionable has been made clear by the decisions of other jurisdictions faced with similar instances of misuse of judicial machinery. See, e.g., *Coats v. Pierre* , 890 F.2d 728, 734 (5th Cir. 1989) ($1,800 sanction properly imposed on *pro se* litigant for stating in motion for sanctions that opposing counsel "acted like a little nasty dumb female Mexican pig in heat" and that she was "nothing but garbage"), *cert. denied*, 111 S.Ct. 70 (1990); *Redd v. Fisher Controls* , 147 F.R.D. 128, 132-33 (W.D. Tx. 1993) (statements by counsel that opposing counsel runs up large fees and unreasonably refuses settlement sanctionable); *Sassower v. Field* , 138 F.R.D. 369, 375 & n.8 (S.D.N.Y. 1991) (sanction imposed for personal attack on opposing parties and counsel such as statements during deposition: "[a]gain, are you crazy? You are so totally out of order and so improper. You are totally an unprofessional, despicable individual.").

In addition to notice that such conduct is well outside the bounds of what is permissible, Wolff was given meaningful opportunities to respond to the contempt charges by presenting to the trial court legal argument, documentary evidence and testimony. Furthermore, the trial court applied the criminal burden of proof in evaluating the evidence. The process did not even remotely resemble summary adjudication of the charges. Rather, in addition to the rights found in ROP Rule of Criminal Procedure 42(b), Wolff was given all the procedural protections of a criminal trial. Accordingly, we find Wolff's due process contention unconvincing.[4]

[4] Because Wolff received the highest level of process that could have been due, we need not identify the minimum monetary sanction that would constitute a "serious" contempt fine and require criminal process.

2. Duty to Client

Wolff also argues that his use of denigrating language was part of his zealous representation of his client and that the trial court's inherent power should not be extended to chill an attorney's allegiance to his or her client. Given its complete lack of relevance, Wolff's venomous verbal attack can hardly be characterized as anything more portentous than a personal assault ⊥103 using the court system. As the decisions above illustrate, courts faced with less vile statements have imposed stiff sanctions on the offending actor. The use of fines, as opposed to attorney's fees or costs, to punish such contumacious conduct is appropriate. See, e.g., *Malautea*, 987 F.2d at 1545-46.

3. Preemption by Statute

Finally, Wolff spends considerable effort arguing that criminal contempt is governed exclusively by Title 14, section 2203 of the Palau National Code. That section provides in relevant part: "Courts of the Republic of Palau have the power to punish for a criminal contempt, a person guilty of any of the following acts, and no others . . . ". Wolff argues that, by virtue of Section 2203, the trial court may issue criminal contempt citations only for the acts explicitly listed in the section "and no others." Accordingly, Wolff's argument runs, the trial court's inherent power to impose criminal contempt sanctions has been vanquished by this provision.[5]

The United States Supreme Court has recognized that the inherent powers of the United States District Courts may be limited by acts of Congress. "It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" *Chambers*, 111 S.Ct. at 2134 (quoting *In re Robinson*, 22 Law. Ed. 205, 208 (1874)). The rationale for this stems from article III of the United States Constitution, which provides that "[t]he judicial power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. United States District Courts are inferior courts established by Congress. *Kline v. Burke Constr. Co.* , 43 S.Ct. 79 (1922). Because the United States District Courts are creatures of the national legislature, that body may define the powers of those courts, including their inherent powers of contempt.

The Trial Division of the Palau Supreme Court is not, however, a creature of the legislative will. Rather, it is an entity created by article X, section 1 of the Palau Constitution. "The judicial power of Palau shall be vested in a unified judiciary, consisting of a Supreme Court, a National Court, and such inferior courts of limited jurisdiction as may be established by law." Section 2 of article X defines further the structure of ⊥104 the Supreme Court: "The Supreme Court is a Court of Record consisting of an appellate division and a trial division."

Accordingly, unlike United States District Courts, the Trial Division is a creation of the Constitution, not the national legislature. The inherent powers of the Trial Division are thus

[5] Wolff argues that his conduct did not fit any of the acts listed in Section 2203. We do not reach this issue.

derived from the Constitution, not the national legislature. Although the legislature may certainly limit the scope of its contempt legislation, such a limitation does not affect the scope of the Trial Division's inherent authority to punish or rectify contumacious behavior. We reject Wolff's contention that the inherent power of the Trial Division to impose sanctions is circumscribed by statutory and procedural mechanisms, such as section 2203 and ROP Rule of Civil Procedure 11.

Furthermore, nothing in the Contempt of Courts Act suggests that the legislature sought to limit the Court's inherent power to defend "the dignity of and respect towards the court or any judicial office in the performance of a judicial function." 14 P.N.C. § 2202(b). To the contrary, the First Olbiil Era Kelulau, understandably uncertain of the scope of this Court's inherent powers, enacted the Act as part of its "constitutional responsibility to . . . empower the courts," 14 P.N.C. § 2202(a), and made the explicit legislative finding that the "[p]ower to punish contempt of courts is vital to a strong, honorable judiciary." 14 P.N.C. § 2202(c). If Wolff is correct that his behavior escapes the confines of section 2203, then the case for the trial court's invocation of its inherent powers is even more compelling. *Cushnie*, 4 ROP Intrm. at 221-22; see *Chambers*, 111 S.Ct. at 2136 ("if in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power.").

It may be that the trial court could have relied on Section 2203 or Rule 11 to impose the same sanction it did using its inherent power. See *Coats*, 890 F.2d at 734. The trial court did not commit reversible error, however, in electing to invoke its inherent power instead. *Chambers*, 111 S.Ct. at 2135 ("the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.").

D. Conclusion

We agree with Wolff that because a court's inherent powers are so potent, they should be exercised with restraint and discretion. *Chambers*, 111 S.Ct. at 2132. In this case, however, use of the power was appropriate. Abusive language towards opposing counsel has no place in documents filed with the courts.

⊥105 There being no reversible error in the imposition of the sanction against Wolff, we AFFIRM.