

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41571

STATE OF IDAHO,)	2015 Unpublished Opinion No. 410
)	
Plaintiff-Respondent,)	Filed: March 13, 2015
)	
v.)	Stephen W. Kenyon, Clerk
)	
JASON R. McCLURE,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Elmore County. Hon. Michael Wetherell, District Judge. Hon. Lynn G. Norton, District Judge.

Judgment of conviction and sanction for contempt, vacated and case remanded.

Sara B. Thomas, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant. Jason C. Pintler argued.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent. Russell J. Spencer argued.

GRATTON, Judge

Jason R. McClure appeals from the district court’s judgment of conviction entered upon a conditional guilty plea to criminal contempt. We vacate the district court’s judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 1999, McClure pled guilty to two counts of burglary, Idaho Code § 18-1401. The district court sentenced McClure to a unified term of ten years with two years determinate and retained jurisdiction. The district court also ordered McClure to pay \$18,600.06 in restitution to the victims for damaged property and unrecovered stolen property, as well as costs and fees. At the end of the period of retained jurisdiction, the district court suspended the sentence and placed McClure on probation. Subsequently, McClure admitted to violating his probation and the district court revoked his probation, but again retained jurisdiction. At the close of the second period of retained jurisdiction, the court reinstated McClure’s probation.

In 2010, prior to the expiration of McClure's probation, the State filed a motion to clarify McClure's restitution obligation. Following a hearing on the motion, conducted after McClure's probation had terminated, the court entered an order stating that "all fines, fees, restitution and other costs that have not yet been paid in this matter are reordered for a total of \$14,452.56," including \$13,881.56 in restitution. The order required McClure to make monthly payments of fifty dollars, and warned that the failure to do so could result in contempt proceedings against him which could result in a \$5,000 fine and/or five days in jail. The court also entered a corresponding civil judgment for the remaining restitution balance, but stayed the execution of the judgment so long as McClure made minimum payments of fifty dollars per month.

Approximately two years later, an Elmore County deputy district court clerk filed a "Motion and Affidavit in Support of Contempt Proceedings," declaring that McClure had violated the court's order by failing to pay restitution.¹ An arrest warrant for contempt was issued and over one year later McClure was arrested. McClure filed a motion to dismiss the contempt proceeding against him, which was denied. McClure conditionally pled guilty to the contempt allegation, preserving his right to challenge the denial of his motion to dismiss, and he was sentenced to five days in jail with credit for time served. McClure timely appeals.

II.

ANALYSIS

McClure challenges, for the first time on appeal, the sufficiency of the motion and affidavit which alleged he was in contempt of the restitution order. Specifically, he contends that the contempt proceeding was not properly commenced because the affidavit was not sworn to before a notary public, and thus it did not confer subject matter jurisdiction upon the district court, rendering the judgment void. On the other hand, the State advances several arguments as

¹ Although not directly raised as issues in this appeal, the Court has several concerns regarding this matter: First, we question the district court's authority to enter the 2010 order on the motion to clarify, particularly since probation had expired by the time the order was entered. Second, even if the 2010 order was effective, the motion and purported affidavit do not reference or appear to relate to the 2010 order clarifying McClure's restitution obligation. Rather, the purported affidavit references the original judgment entered in 1999 that ordered McClure to pay \$18,600.06 in restitution; yet, without explanation of how the amount is arrived at, the document identifies his remaining restitution obligation as \$13,184.56. Third, in light of the above, we further question the propriety of the contempt proceeding seeking criminal sanctions when a civil judgment had been entered. However, because of our disposition with this matter, we need not address these issues.

to why the document is sufficient as an affidavit: First, the affidavit should be liberally construed to impart jurisdiction, citing *State v. Jones*, 140 Idaho 755, 758-59, 101 P.3d 699, 702-03 (2004).² Second, a deputy clerk is an officer authorized to administer oaths pursuant to I.C. § 19-1401, and therefore, a notary was not required. Third, McClure’s challenge to the document is actually a challenge to the form of the document, which must be disregarded unless it prejudices him. Fourth, since the alleged defect is imminently correctable, the objection should have been raised before trial.

In Idaho, contempt can be characterized as either direct (committed in the presence of the court) or indirect (committed outside the presence of the court). *Jones v. Jones*, 91 Idaho 578, 428 P.2d 497 (1967). Where the alleged contempt is not committed in the immediate view and presence of the court and is a violation of a court order, the contempt proceeding must be commenced by a motion and affidavit. Idaho Code § 7-603; Idaho Criminal Rule 42(c). The affidavit on which contempt proceedings are based constitutes the complaint and until the claimant can provide a sufficient affidavit, the court does not have jurisdiction to proceed. *Steiner v. Gilbert*, 144 Idaho 240, 243, 159 P.3d 877, 881 (2007). Since contempt proceedings are quasi-criminal in nature, “no intendments or presumptions may be indulged to aid the sufficiency of the affidavit.” *Jones*, 91 Idaho at 581, 428 P.2d at 500. To the extent the purported affidavit here is insufficient, it is jurisdictional and can be raised for the first time on appeal.³ *State v. Urrabazo*, 150 Idaho 158, 163, 244 P.3d 1244, 1249 (2010). Whether a charging document conforms to the requirements of the law, including whether it confers subject matter jurisdiction, is a question of law over which this Court exercises free review. *Jones*, 140 Idaho at 757, 101 P.3d at 701.

² In *Jones*, the Court held that the charging document’s failure to allege an essential element of the crime for which the defendant was being charged was cured by a liberal construction of the information and reading the applicable code section into the text of the charge. However, *Jones* is inapposite because, unlike the enumerated code provision which cured the defect in the charging document, here there is no equivalent to supply the required components of an affidavit to cure a jurisdictional deficiency. Thus, the State’s first argument is without merit.

³ Thus, the State’s third argument regarding a challenge to form, and fourth argument regarding raising the issue before trial are without merit and will not further be addressed.

As noted, I.C.R. 42(c) requires contempt proceedings to be initiated by a motion and affidavit. An affidavit is “[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” BLACK’S LAW DICTIONARY 66 (9th ed. 2009). It is undisputed that the purported affidavit initiating contempt proceedings against McClure was not sworn to before a notary public and did not include a notary stamp, but rather, it was sworn to by a deputy clerk before a second deputy clerk. However, the State argues that like a notary public, a deputy clerk is an officer authorized to administer oaths pursuant to I.C. § 9-1401,⁴ and thus the affidavit was properly verified, without a notarization compliant with I.C. § 51-109(2). We need not decide the scope of what I.C. § 9-1401 authorizes as we look to the text of I.C.R. 42(c) and what it requires to commence contempt proceedings: a motion and affidavit.

Most recently, the Idaho Supreme Court in *Fields v. State*, 155 Idaho 532, 537, 314 P.3d 587, 592 (2013), described an affidavit as subscribed and sworn to before a notary, wherein the notary provides a jurat in accordance with I.C. § 51-109(2).⁵ (“The declaration plainly is not an affidavit because it lacks notarization.”); *see also Houston v. Whittier*, 147 Idaho 900, 902, 216 P.3d 1272, 1274 (2009) (“The declaration lacked a jurat, which is necessary in order for it to constitute an affidavit.”); *Evans v. Twin Falls Cnty.*, 118 Idaho 210, 218 n.9, 796 P.2d 87, 95 n.9 (1990) (“The ‘affidavit’ filed by Mr. Evans, while in partial affidavit form, is not subscribed and sworn to as an oath or affirmation, as required of an affidavit.”). Idaho Criminal Rule 42(c) requires an affidavit in order to commence a contempt proceeding and impart jurisdiction on the

⁴ Idaho Code § 9-1401 provides: “Every court, every judge or clerk of any court, every justice and every notary public, the secretary of state, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.”

⁵ Idaho Code § 51-109(2) provides: “An oath or affirmation, which is in writing, shall be signed by the person who takes it, and the notary public shall enter thereunder substantially the following:

‘State of Idaho)
) ss
County of)
Subscribed and sworn (or affirmed) before me this day of,

..... (official signature and seal)’”

court. Consistent with the above-cited cases, the affidavit contemplated by I.C.R. 42(c) must be notarized.

III.
CONCLUSION

Because the purported affidavit lacks notarization, the contempt proceeding was not properly commenced, and thus it did not confer subject matter jurisdiction upon the district court. The district court's judgment holding McClure in criminal contempt is vacated and this case remanded to the district court.

Judge LANSING and Judge GUTIERREZ **CONCUR.**