

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4187-06T5

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HAMLET E. GOORE, JR.,

Defendant-Appellant.

Argued: December 17, 2007 - Decided: February 21, 2008

Before Judges Collester and C.L. Miniman.

On appeal from the Superior Court of New Jersey, Law Division, Criminal Part, Bergen County, 06-103.

Steven L. Menaker argued the cause for appellant (Chasan Leyner & Lamparello, attorneys; Mr. Menaker, on the brief).

Yomara Castro argued the cause for respondent (John L. Molinelli, Bergen County Prosecutor, attorney; Ms. Castro, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Hamlet E. Goore, Jr., appeals the imposition of a sanction pursuant to R. 1:2-4 in connection with his failure to appear for trial before the Presiding Judge of the Municipal Court on September 29, 2006, on a charged traffic violation.

Because R. 1:2-4 does not apply to the conduct for which defendant was sanctioned, we reverse.

The underlying facts giving rise to the alleged motor vehicle violation do not inform our decision and will not be recited here. Suffice it to say that defendant was charged with operating an unregistered motor vehicle on May 26, 2006, and driving while his operator's license was suspended. He paid the fine in connection with operating an unregistered motor vehicle, resolving that matter. The Assignment Judge transferred the charge of operating a motor vehicle with a suspended license from the Municipal Court Judge to the Presiding Judge of the Municipal Court. A case management conference was held on July 28, 2006, at which trial was specially scheduled in defendant's presence for September 29, 2006.

Two weeks before the scheduled trial date, defendant's attorney requested an adjournment of the trial because defendant would "be out of the country on prepaid vacation." Alternatively, counsel advised "we are prepared to waive our client's appearance on September 29 and argue our Motion to Dismiss the Complaint." The Presiding Judge denied the requested adjournment by letter dated September 20, 2006, because the date had been set at the case management conference and was the major case for September 29, 2006. He stated that

his court was "booked well into December" and the case would be seven to eight months old if rescheduled in January 2007, whereas Supreme Court guidelines required trial within two months. He also stated that if he put the case off, "the tax payers [sic] will pay me on September 29, 2006, to twirl my thumbs and do nothing." He expressed that he could not understand why the defendant would schedule a prepaid vacation when he sat in court on July 28, 2006, heard the date set for trial and heard his attorney seek to have the date set as peremptory. He also rejected the request to hear the motion on September 29 and then set a trial date in the future if the case was not dismissed.

Defendant sought leave to appeal to the Law Division, which was granted and the adjournment request was summarily denied on September 28, 2006. The Law Division order specifically provided that "defendant's appearance and presence [on] that date is not excused. Trial to proceed immediately after the motion is heard in the event that the motion is denied."

Defendant failed to appear on September 29, 2006. His attorney explained that he was on a prepaid vacation in Mexico and again asked to have his appearance excused. The judge expressed his displeasure and ordered the defendant to appear before him on October 6, 2006, "to argue why he should not be

sanctioned under Rule 1:2-4 for his failure to appear." He proceeded with the trial in defendant's absence. The State called one witness, Gregory Focarino, from the New Jersey Motor Vehicle Commission. He testified that defendant's license was suspended effective April 20, 2005, because of an unpaid parking ticket. He also testified that defendant paid the restoration fee on May 2, 2005, long before he was charged with driving on a suspended license. After he was charged, defendant brought the failure of the MVC to reinstate his license to its attention. The MVC conducted an investigation into its records and reinstated his license retroactive to the date he paid the restoration fee, as was its usual custom and practice in such situations.

At the conclusion of Focarino's testimony, defendant argued his motion to dismiss. The State opposed the dismissal, arguing that defendant's license was suspended at the moment he was charged on May 26, 2006, because it had not yet been restored. However, the judge granted the motion to dismiss on the ground that the Motor Vehicle Commission has exclusive power to determine restoration of licenses and that it restored defendant's license retroactively to May 2, 2005. As a consequence, the judge concluded that defendant's license was not suspended on May 26, 2006, and dismissed the charge against

him. Nonetheless, he required defendant to appear on October 6, 2006, to explain his absence. That appearance was adjourned to October 13, 2006.

On October 11, 2006, defendant certified that he mistakenly believed that the trial date had been scheduled for September 19 and, before learning of his mistake, he purchased airline tickets to Puerto Vallarta, Mexico, for a one-week vacation. He did not learn of his error until September 11, 2006. He also certified that, had he anticipated that the adjournment request would be denied, he would have submitted a certification pursuant to R. 7:12-3(a) waiving his right to be present at trial.

The hearing proceeded on October 13, 2006. During oral argument defendant's attorney questioned which rule governed the proceeding. The judge stated,

It's Rule 1:2-4 hearing, a sanction hearing. It's not contempt. It's not 1:10-1. It's not 1:10-2. 1:10-2 requires transfer to another judge. 1:10-1 doesn't, but I don't see this . . . as a contempt on the face of the Court. I see it as a sanction hearing, 1:2-4.

The judge found that R. 1:2-4 applied to attorneys and parties. He determined that R. 7:8-7(a) required the presence of the defendant at every stage of the proceeding and defendant violated this rule. He noted that, unlike R. 3:1-6 governing

Law Division criminal trials, R. 7:8-7(a) did not provide for a waiver of appearance, which he construed to mean that a defendant in a municipal court proceeding did not have the right to waive his appearance. He concluded that R. 7:12-3, which permits a statement in mitigation in lieu of appearance, had no application to this case. The judge found that the error as to the trial date stated in defendant's certification was "very difficult to believe," especially in light of defendant's driving abstract. He observed that the adjournment request was denied by facsimile on September 20, 2006, yet three days later defendant left for Mexico. The judge concluded that a sanction was appropriate under R. 1:2-4 and imposed a monetary sanction of \$500 and five days of community service under the supervision of the county probation department. Imposition of the sanction was stayed pending appeal.

On de novo appeal defendant contended the record did not support a transfer of the municipal court matter to the presiding municipal court judge because there was no finding by the municipal court judge that he was disqualified from hearing the matter, a predicate for transfer under R. 7:8-2. He also argued that R. 1:2-4 did not apply to his failure to appear for trial. The Law Division judge rejected the transfer issue and affirmed the sanction imposed. He concluded that the presiding

municipal court judge had the authority to issue an immediate bench warrant or to issue a failure-to-appear notice followed by a bench warrant. He opined that a bench warrant would have been excessive and that the sanction imposed was authorized by R. 1:2-4(d) and was "very appropriate under the circumstances."

Defendant presents the following issue for our consideration:

POINT I - VENUE WAS IMPROPERLY TRANSFERRED FROM THE FAIRVIEW MUNICIPAL COURT TO THE VICINAGE 2 COURT.

POINT II - RULE 1:2-4 WAS INAPPLICABLE TO THIS CASE.

With respect to the imposition of sanctions, Goore contends that he did not violate R. 1:2-4(a) because an appearance was made on his behalf on September 29, 2006; his absence did not delay the proceedings or waste judicial time and resources; he was only required by the rules governing the municipal courts to appear for trial and the matter was not reached for trial because it was dismissed on pretrial motion. As a consequence, he asserts that the imposition of sanctions was unjustified.

When a defendant fails to appear for trial in the municipal courts, the municipal judge may not proceed in the defendant's absence unless "the proceeding has begun in the defendant's presence or the defendant fails to appear at the proceeding after having been informed in open court of the time and place

of the proceeding." R. 7:8-7(a). If this is not the case and the matter involves a motor vehicle offense, as here, the municipal judge may not begin the trial and must follow the procedures specified in R. 7:8-9(a)(1). That is, the judge may issue a bench warrant or issue and mail a failure-to-appear notice. R. 7:8-9(a)(1). The judge did neither. Rather, he proceeded in defendant's absence quite properly because the defendant "ha[d] been informed in open court of the time and place of the proceeding." R. 7:8-7(a). As a consequence, defendant was deprived of his right to be present for the testimony of the State's witness and, had the matter not been dismissed on motion, he would also have been deprived of his constitutional right to take the stand and testify at trial in his own defense. Of course, these are the rights defendant would have waived had his waiver been accepted.

The rule under which a sanction was imposed provides:

If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party . . . on the return of a motion . . . or on the day for trial, or if an application is made for an adjournment, the court may order any one or more of the following: (a) the payment by the delinquent attorney or party or by the party applying for the adjournment of costs, in such amount as the court shall fix, to the Clerk of the Court made payable to "Treasurer, State of New Jersey," or to the adverse party; (b) the payment by the

delinquent attorney or party or the party applying for the adjournment of the reasonable expenses, including attorney's fees, to the aggrieved party; (c) the dismissal of the complaint, cross-claim, counterclaim or motion, or the striking of the answer and the entry of judgment by default, or the granting of the motion; or (d) such other action as it deems appropriate.

[R. 1:2-4(a).]

We have not found, nor has either party cited, any New Jersey reported decision construing the phrase "no appearance is made on behalf of a party" in the specific factual context presented by this case. However, the language of the rule is not ambiguous. Indisputably, counsel for defendant appeared on September 29, 2006, cross-examined the State's witness, argued the motion to dismiss and was ready to proceed to trial in defendant's absence. Certainly, there was compliance with the rule insofar as the return date of the motion is concerned. The same is true with respect to trial. Defendant's counsel was present on the day scheduled for trial and made an appearance on his behalf. Thus, the language of the rule would not seem to reach defendant's failure to appear personally on the day scheduled for trial.

It seems evident from the sanctions authorized by R. 1:2-4(a) that the rule is intended to protect the courts and attentive parties from the inconvenience and expense of an

attorney's or a pro se party's failure to appear. Where no inconvenience or expense results from the failure to appear, no sanctions should be imposed. Gonzalez v. Safe & Sound Corp., 185 N.J. 100, 115-16 (2005) (when deciding whether or not to impose sanctions, court must weigh impact of violation on opponent). Clearly, there was no inconvenience or expense inflicted on the State or the court from defendant's failure to appear because the State and the court proceeded in defendant's absence pursuant to R. 7:8-7(a). Thus, no sanction ought to have been imposed under R. 1:2-4(a).

What then of the Law Division's order of September 28, 2006, mandating defendant's appearance? Clearly, defendant disobeyed that order, which is especially egregious because defendant is a member of the bar in New Jersey. The remedy for such disobedience may be found in R. 1:10-2. See In re Callan, 66 N.J. 401 (1975); Stephenson v. Stephenson, 112 N.J. Super. 531 (Ch. Div. 1970). Yet, the judge determined on the facts of this case that "It's not 1:10-1. It's not 1:10-2." Thus, the sanctions imposed may not be justified as sanctions for contempt pursuant to R. 1:10-2.

We are satisfied that the sanctions imposed were not permitted by R. 1:2-4(a) and as a consequence the order imposing the sanctions is reversed. This disposition renders the first

issue on appeal moot because the municipal court proceedings were dismissed and the sanctions have been vacated.

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION