

Once-jailed attorney nabs Supreme Court victory

by Allison Retka

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Prosecuting attorneys for criminal contempt is a messy business, the Missouri Supreme Court noted last week.

Perhaps no more so than in the case of Carl E. Smith.

Smith is a Douglas County attorney jailed for four weeks last year for various degrading comments he wrote about local prosecutors and judges. Among other statements, Smith accused a prosecutor and a judge of using a grand jury to cover up judicial misconduct.

The statements weren't the first criticisms Smith has hurled at attorneys and judges in the 44th Circuit. (The circuit has been dubbed the "Fighting 44th" for years of infighting between factions of the legal community in the tri-county area in south-central Missouri.)

But they're the first of Smith's statements that have been upheld by the Missouri Supreme Court as constitutionally protected lawyer speech that posed no immediate threat to judicial proceedings.

"When the Founding Fathers thought up the First Amendment, they had the Fighting 44th in mind," said Bruce Galloway, Smith's defense attorney in the contempt proceeding.

"They lived with ... having people go to jail for their words."

In appealing his criminal contempt conviction to the state's high court, Smith had the backing of the American Civil Liberties Union and the Missouri Association of Criminal Defense Lawyers.

Attorneys for the two groups said the Supreme Court's May 11 decision created an explicit three-prong test to replace a previously vague body of law.

Under the new standard, a lawyer's vitriolic comments can't simply "offend judicial sensibilities," said Talmage Newton IV, a St. Louis attorney with Evans & Dixon who authored the amicus brief for the criminal defense attorneys' association.

But what about the lawyers back in the Fighting 44th who were deeply offended by Smith's comments and the even more tawdry comments of his client, Ron D. Jarrett Jr.?

The judges named in the Smith's court filings - Associate Circuit Judge R. Craig Carter and Circuit Judge John G. Moody - have declined to comment. The local prosecutors besmirched by Smith and his client are more vocal.

"My personal feeling of Carl Smith is that he's lower than a snake's belly," said Tom Cline, the Ozark County prosecutor. "I'd prefer him to be in jail."

Advocate or underminer?

Smith's contempt conviction arose from his representation of Jarrett, who faces several sex offense charges in Wright County.

As detailed in a November 2009 opinion from the Missouri Court of Appeals Southern District, Jarrett testified at a motion hearing in his case that he saw Cline have sexual intercourse with Cline's adopted daughter.

Jarrett later recanted the statement and other statements he made about Cline, Moody, Carter and Wright County Prosecutor Jason MacPherson, and the appellate court upheld Jarrett's perjury conviction. Jarrett claimed Smith pressured him to lie.

"Ron Jarrett got punished for lying. Carl Smith got imprisoned for advocating," said Galloway, Smith's attorney. "There's a distinct difference."

Galloway said the Supreme Court's unanimous opinion, authored by Supreme Court Judge Michael A. Wolff, offers protection for criminal defense attorneys, who often base their motions solely on a client's affidavit or testimony.

To Cline, Smith stepped over the line when Jarrett admitted his slurs were lies but Smith still pursued his client's allegations.

That pursuit led to Jarrett's unusual perjury trial in September 2008, where a short parade of local lawyers, prosecutors and judges took the witness stand to deny accusations of bribery and sexual impropriety.

No, Moody testified, Cline did not hand me a paper bag full of cash on his boat.

No, Cline testified, I did not have improper relations with my daughter.

No, MacPherson testified, I never saw Jarrett have sex with my mother, former prosecuting attorney Cynthia MacPherson, at a 2003 Arkansas blues festival.

"It was uncomfortable, the fact that you have an attorney who knows he's pushing lies and doing this for the apparent intention of trying to embarrass people," Cline said of the ordeal.

New test

It's not enough for a lawyer's speech to embarrass judicial officials, Wolff wrote in the Supreme Court opinion.

To support a finding of criminal contempt, the statements need to actually interfere with the administration of justice.

"The First Amendment requires that the threat to the court's authority must be real," Wolff wrote.

His opinion set up a three-prong test to prosecute a lawyer for contemptible statements against a judge.

First, the statements must be false.

Second, prosecutors must show the lawyer knew the statements are false or "acted with reckless disregard for whether the statements were true or false."

Third, the statements must provoke "an actual or imminent impediment or threat to the administration of justice."

The last prong will be the hardest for prosecutors to prove in future cases, said Tony Rothert, legal director of the ACLU of Eastern Missouri.

Even if the statements are lies, "intentionally false statements thrown at a judicial system do not bring it to a halt in most circumstances," Rothert said.

Wolff noted the attorney disciplinary process might be a better place to probe an attorney's knowledge about the truth or falsity of his statements.

Alan Pratzel, the state's chief disciplinary counsel, said his office can't indicate whether it has an open investigation of Smith.

However, according to court records, the Office of Chief Disciplinary Counsel requested a copy of the legal file in Smith's contempt case last October.

A legal oddity

Even with a three-part test specifically crafted for attorneys facing criminal contempt charges, it's fairly unlikely Missouri will see another case like Smith's.

"I think most attorneys would ... sleep on it before submitting such statements," Rothert said. "They would probably word them very differently, even if they believed them to be true."

It's also unlikely an attorney would face the four-month jail sentence imposed on Smith.

"If Carl Smith's conviction was followed with a five- or 10-day sentence, we wouldn't know who Carl Smith is," said Newton, the attorney with MACDL.

Smith served 28 days in the Ozark County Jail before the Missouri Supreme Court ordered his release while it considered his motion for post-trial relief.

Galloway said Smith viewed his time in jail as an "unavoidable price to pay" for the chance to set new precedent that could prevent other attorneys from facing the same consequences.

"I know Carl believes the sacrifice was worth the law that was created," he said.

As of press time, Galloway hadn't been able to reach his client to tell him about the legal victory.

Carl Smith was far away from the Ozark County Jail. He was out of the country on a cruise.

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