

SUPREME COURT OF THE STATE OF DELAWARE

In re Joseph A. Hurley, Esquire

Nos. 151/152, 2020 (Del. July 28, 2021) · No. Nos. 151/152, 2020 · Decided July 28, 2021

SUMMARY

The Delaware Supreme Court affirmed a civil contempt order against attorney Joseph A. Hurley for violating a gag order governing public comments about criminal proceedings. The court held that Hurley’s comments about the prosecutor and a victim had a substantial likelihood of materially prejudicing pending proceedings, rejected his safe-h harbor and First Amendment arguments, and denied his motion for judicial notice.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Montgomery-Reeves, Justice; Valihura, Justice; Traynor, Justice
JURISDICTION	Delaware
DECIDED	July 28, 2021
DOCKET	Nos. 151/152, 2020
DISPOSITION	affirmed
PROCEDURAL POSTURE	Hurley appealed the Superior Court's order finding him in civil contempt for violating a gag order governing counsel's public comments about pending criminal proceedings.
STANDARD OF REVIEW	The contempt determination was reviewed for abuse of discretion, factual findings for clear error, and constitutional claims de novo.
PRECEDENTIAL VALUE	published; precedential Delaware Supreme Court opinion
PARTIES	Joseph A. Hurley, Esquire v. Superior Court of the State of Delaware

TOPICS

- appellate procedure
- standard of review
- first amendment
- free speech
- criminal procedure

PRACTICE AREAS

- appellate procedure
- legal ethics
- contempt
- criminal procedure
- constitutional law

QUESTIONS PRESENTED

1. Whether the Superior Court abused its discretion by finding that Hurley's public criticism of the prosecutor had a substantial likelihood of materially prejudicing pending criminal proceedings.
2. Whether Hurley's criticism of the prosecutor was protected by the self-help safe harbor in Delaware Lawyers' Rule of Professional Conduct 3.6(c).
3. Whether the Superior Court abused its discretion by finding that Hurley's victim-blaming comment had a substantial likelihood of materially prejudicing pending criminal proceedings.
4. Whether the First Amendment protected Hurley's public comments from enforcement of the gag order.
5. Whether the Supreme Court should take judicial notice of publications concerning the Conaway prosecution.

HOLDINGS

1. The Superior Court did not abuse its discretion by finding that Hurley's statement that he was horrified by the prosecutor's sentencing comments had a substantial likelihood of materially prejudicing an upcoming criminal proceeding and therefore violated the gag order.
2. The self-help safe harbor did not protect Hurley's statement because expressing horror was not reasonably necessary to correct the alleged prejudice, the statement responded to courtroom comments rather than adverse publicity, and it concerned protection of third parties rather than Hurley's client.
3. The Superior Court did not abuse its discretion by finding that Hurley's statement that the victim had put herself there had a substantial likelihood of materially prejudicing pending proceedings and violated the gag order.
4. Hurley's passing references to First Amendment protections did not demonstrate that enforcement of the gag order was unconstitutional or that the Superior Court erred.
5. The Court denied Hurley's motion for judicial notice because the extent to which the comments were more broadly published was undisputedly immaterial to the outcome.

KEY QUOTATIONS

"The extensive media coverage would likely increase the risk of harm by broadcasting problematic comments to a wider audience." (11)

"The Self-Help Safe Harbor is not designed to give lawyers an alternative to making timely objections. It is designed to allow lawyers to exercise self-help in response to comments made outside the courtroom." (12)

"For the reasons provided above, this Court AFFIRMS the judgment of the Superior Court as reflected in its March 13, 2020 order of civil contempt. Hurley's motion for judicial notice is DENIED." (16)

FACTUAL BACKGROUND

Joseph A. Hurley represented Clay Conaway in multiple rape prosecutions that received extensive media coverage. After one conviction and before sentencing, the Superior Court entered gag orders prohibiting counsel from making public comments except as permitted by Delaware Lawyers' Rule of Professional Conduct 3.6. Hurley later told a reporter that he was horrified by the prosecutor's sentencing arguments and, after a second

conviction, said there was a reasonable basis for the verdict even though the victim had put herself there. The Superior Court found both comments substantially likely to materially prejudice pending proceedings and imposed a remedial \$5,000 civil-contempt sanction.

PROCEDURAL HISTORY

The Superior Court entered a gag order limiting counsel's public comments to those permitted by Delaware Lawyers' Rule of Professional Conduct 3.6. After Hurley made two statements to reporters, the Superior Court found that both violated the order and imposed a \$5,000 remedial civil-contempt sanction, refundable after completion of the remaining trials if there were no further publicity violations. Hurley appealed, and the Delaware Supreme Court consolidated the related appeals, affirmed the contempt order, and denied his motion for judicial notice.

DISPOSITION

affirmed

CASES CITED

- State v. Conaway, 2019 WL 3431594, at *1 (Del. Super. Ct. July 30, 2019)
- In re Hurley, 237 A.3d 69, 2020 WL 4333589, at *3 n.22 (Del. July 28, 2020) (TABLE)
- In re Ramunno, 586 A.2d 1202, 1990 WL 255488, at *1 (Del. 1990) (TABLE)
- Harris v. Frank-Harris, 86 A.2d 1118, 2014 WL 1003588, at *2 (Del. Mar. 7, 2014) (TABLE)
- Guest v. Guest, 839 A.2d 665, 2003 WL 22931400, at *2 (Del. Dec. 8, 2003) (TABLE)
- Ramunno v. State, 1990 WL 140057, at *2 (Del. Sept. 11, 1990)
- Clark v. Clark, 47 A.3d 513, 516-17 (Del. 2012)
- Fink v. State, 817 A.2d 781, 788 (Del. 2003)
- Seward v. State, 723 A.2d 365, 375 (Del. 1999)
- DiSabatino v. Salicete, 671 A.2d 1344, 1348-49 (Del. 1996)
- Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 795 (1987)
- United Mine Workers v. Bagwell, 512 U.S. 821 (1994)
- Wilmington Federation of Teachers v. Howell, 374 A.2d 832, 838 (Del. 1977)
- City of Wilmington v. General Teamsters Local Union 326, 321 A.2d 123, 125-26 (Del. 1974)
- Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074 (1991)
- In re Hinds, 449 A.2d 483, 496 (N.J. 1982)
- In re Rachmiel, 449 A.2d 505, 511 (N.J. 1982)
- Banther v. State, 823 A.2d 467, 483 (Del. 2003)