

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 94-20881  
Summary Calendar

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GAIA TECHNOLOGIES, INC., Plaintiff,

versus

RECYCLED PRODUCTS CORPORATION,  
ET AL., Defendants.

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GEORGE E. GORDON, Appellant,

versus

WILLIAM E. KING, Appellee.

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Appeal from the United States District Court  
For the Southern District of Texas  
(CA-H-94-2256)

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November 30, 1995

Before POLITZ, Chief Judge, KING and DENNIS, Circuit Judges.

POLITZ, Chief Judge:\*

George D. Gordon appeals the district court's finding of contempt and imposition of

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\*Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

sanctions. For the reasons assigned we reverse and vacate.

### Background

On July 21, 1994, Recycled Products Corporation, James E. Turner, Betty Rose Turner and Glyn Turner (Turner Group) filed a motion to compel George Gordon, attorney for various defendants in a pending lawsuit, to produce a tape recording of a meeting that occurred on August 25, 1993 between Richard Clark, David Gordon, Joel Holt, Donald Nichols, Ira Reimer, John Jarrett, and George Gordon. The district court issued a written order directing Gordon to produce the tape. Gordon failed to produce the tape and the Turner Group moved for contempt.

On October 17, 1994, the district court conducted a hearing on a number of pending motions, including the motion to compel production of the tape. At that time, Gordon represented to the court that there was no tape of the meeting and that he never had a tape thereof. On November 22, 1994, the court held a hearing on the motion for contempt and determined that there had been a tape of the meeting but that it was found to be inaudible and unintelligible and subsequently was recorded over. The court found that Gordon's statements on October 17, 1994 were intentional misrepresentations made for the purpose of misleading the court. Further, the court found that Gordon should have made available the person who could have verified that a tape at one time did exist. The court found that the failure to produce this person was a tactic offensive to the notion of fair play and due regard for the judicial process.

The court held Gordon in contempt, ordering that he pay the movant's attorney's fees of \$1,600.00 for preparing and prosecuting the contempt motion, and the cost of transcribing the hearing. The court sentenced Gordon to confinement in the custody of the United States Marshall, from 8:00 a.m. until 5:00 p.m, for a period of three days, and

then confinement thereafter until such time as the tape was produced. Finally the court scheduled a hearing on November 30, 1994 to consider additional sanctions against individual defendants. On November 28, 1994, Gordon was taken into custody and began to serve the punitive portion of the contempt order.

Gordon appealed and on November 29, 1994 we stayed the confinement order pending the hearing the next day. At that hearing the district court confirmed the findings of the initial contempt order but set aside the previous commitment for punitive confinement. Gordon timely appealed.

### Analysis

We review a contempt order for abuse of discretion, and we review the district court's underlying factual findings under the clearly erroneous standard.<sup>1</sup> A contempt order is characterized as either civil or criminal depending on its primary purpose.<sup>2</sup> If the primary purpose is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal. If the primary purpose of the sanction is to coerce another party for the contemnor's violation, the order is considered civil. A key determinant is whether the penalty imposed is absolute or conditional on the contemnor's conduct.<sup>3</sup> When a contempt order contains both a punitive and a coercive dimension, for purposes of appellate review it will be classified as a criminal contempt order.<sup>4</sup> While the face of this order indicates that it is civil, it contains both a punitive (the initial three day confinement) and coercive element (the \$1600 attorney's fees, cost of transcript, and the

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<sup>1</sup> Martin v. Trinity Industries, Inc., 959 F.2d 45 (5th Cir. 1992).

<sup>2</sup> Lamar Financial Corp. v. Adams, 918 F.2d 564 (5th Cir. 1990).

<sup>3</sup> F.D.I.C. v. LeGrand, 43 F.3d 163 (5th Cir. 1995).

<sup>4</sup> Lamar, 918 F.2d at 566-567.

order that Gordon remain in custody until he produced the tape). Thus, this order is classified as a criminal contempt order.

Gordon maintains that it was error for the court to order a criminal contempt sanction without honoring the procedural safeguards applicable to criminal contempt. While it cannot be gainsaid that the court has the power to issue a criminal contempt sanction for the refusal to comply with a court order,<sup>5</sup> certain procedures are mandated to protect the contemnor's constitutional rights.<sup>6</sup> One such safeguard is that the contemnor must be given notice that the proceedings are of a criminal nature.<sup>7</sup> Also, the judge may not prosecute the contempt and at the same time function as judge.<sup>8</sup> To do so deprives the defendant of an impartial decisionmaker.<sup>9</sup> Gordon was not given the specific notice that the proceeding was a criminal proceeding, and the trial judge personally prosecuted the criminal contempt portion. The punitive portion of the contempt order, accordingly, was inappropriate and must be vacated.

Gordon also challenges the civil portion of the contempt order. Several factors are to be considered in the imposition of a civil contempt sanction: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction, (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court's order.<sup>10</sup> Our review of the record does not show

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<sup>5</sup> 18 U.S.C. § 401.

<sup>6</sup> Lamar, 918 F.2d at 566.

<sup>7</sup> Fed. R. Crim. P. 42(b).

<sup>8</sup> American Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523 (5th Cir. 1992).

<sup>9</sup> Id. at 531.

<sup>10</sup> United States v. United Mine Workers, 330 U.S. 258 (1947).

that these factors were considered in the instant case. The evidence reflects that Gordon could have been more forthcoming with an explanation regarding the tape recording of the meeting. He should have done so. But there is no indication that he made “intentional misrepresentations for the purpose of misleading the court.” We find insufficient evidence to demonstrate the requisite willfulness by Gordon to mislead the court or obstruct justice. We must therefore reverse the civil portion of the contempt order.

The findings of contempt by the district court are REVERSED and its judgment thereon is VACATED.