

Contempt: From the Basics to Recent Developments



PRESENTED BY
JUDGE STEVE STAFFORD
&
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The Power of Contempt



O, it is excellent

To have a giant's strength, but it is
tyrannous to use it like a giant.

William Shakespeare,
Measure for Measure

The Power of Contempt



Someone is always going to be in control of the courtroom. If it is not you, you already have a problem.

Judge Julian Gwinn

Judges always have to be the adult in the room at all times. The judge must always be the bigger person.

Why?

Failure to avoid becoming personally involved in contempt issue will many times turn into demeanor and temperament complaints with the Board of Judicial Conduct.

Marshall Davidson, Disciplinary Counsel, Tennessee Board of Judicial Conduct

A Very Simple Answer to a Very Simple Question



Authority



- In Tennessee, court's authority to punish certain acts as contempt derives from statute, and is limited to forms of conduct set forth in contempt statute.
 - *State v. Turner*, 914 S.W.2d 951 (Tenn. Crim. App. 1995).
- Tennessee Code Annotated Section 29-9-102.
 - The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:
 - ✦ (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice;
 - ✦ (2) The willful misbehavior of any of the officers of such courts, in their official transactions;
 - ✦ (3) The willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts;
 - ✦ (4) Abuse of, or unlawful interference with, the process or proceedings of the court;
 - ✦ (5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them; or
 - ✦ (6) Any other act or omission declared a contempt by law.

Criminal Contempt v. Civil Contempt

	Civil Contempt	Criminal Contempt
Burden of Proof	Preponderance.	Beyond a Reasonable Doubt.
Immediate Appeal	Probably.	Yes.
Appellate Review	De novo with a presumption of correctness to factual findings.	Only overturn criminal contempt convictions “when the evidence is insufficient to support the trier-of-fact's finding of contempt beyond a reasonable doubt.” Individuals lose presumption of innocence on appeal.
Willful Action	Acts or failures that are “intentional or voluntary rather than accidental or inadvertent.”	“A willful act is one undertaken for a bad purpose.”
Remedy	As any imprisonment ordered in civil contempt case is remedial, coercive, and designed to compel contemnor to comply with court's order, compliance will result in immediate release from prison. Cannot order a suspended sentence.	Circuit/Chancery/Appellate/Juvenile Courts: 10 days in jail and/or fine of \$50.00 per violation General Sessions: Same as above if judge is licensed to practice law; fine of \$50.00 Municipal: 5 days in jail and/or \$10.00 fine per violation

Constitutional Protections

Civil Contempt

Criminal Contempt

Right to Counsel

Yes, if facing incarceration

Yes.

Notice

Civil contempt only requires that the contemnor be notified of the allegation and be given an opportunity to respond.

Parties facing a criminal contempt charge must be given explicit notice that they are charged with criminal contempt and must also be informed of the facts giving rise to the charge.

Freedom from Double Jeopardy

No. Can be retried for the same offense unless res judicata.

Cannot be retried for the same offense after a witness has been sworn in and jeopardy has attached. No appeal of acquittal on criminal contempt charges.

Trial by Jury

No.

Typically no.

State Funded Court Reporter

No.

No.

Right against Self-incrimination

Maybe.

Yes.

Indictment

No.

No. But see Child Support Issues.

Indirect Contempt



- If the contempt is committed outside of court or is not witnessed by the judge, it is an “indirect contempt.”
- This type of contempt usually involves the violation of a court order.
- The order alleged to have been violated must be “lawful.”
 - A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties.

More about a “lawful order”

- An order is not rendered void or unlawful simply because it is erroneous or subject to reversal on appeal.
- Erroneous orders must be followed until they are reversed.
- However, an order entered without either subject matter jurisdiction or jurisdiction over the parties is void and cannot provide the basis for a finding of contempt.
- The determination of whether a particular order is lawful is a question of law.

Indirect Contempt: Other Requirements



- The order alleged to have been violated must be clear, specific, and unambiguous
 - For an individual to be held in contempt, the order allegedly violated must be unambiguous, not susceptible to more than one reasonable interpretation and leave no basis for doubt. In addition, any ambiguity will be construed in favor of the person facing the contempt charge.
- The person alleged to have disobeyed the order must have actually disobeyed or otherwise resisted the order
- The person's violation of the order must be "willful"
- No requirement that the order violated be final or reduced to writing
- Error or irregularity does not excuse violation of an order
- However, if the order is void *ab initio*, the order cannot be the basis for a finding of contempt

Direct and Summary Contempt



- **Direct Contempt**

- Direct contempt is based upon acts committed in presence of court and may be punished summarily.

- **Summary Contempt**

- “A judge may summarily punish a person who commits criminal contempt in the judge's presence if the judge certifies that he or she saw or heard the conduct constituting the contempt. The contempt order shall recite the facts, be signed by the judge, and entered in the record.”

Direct Contempt is often Summary Contempt

- A trial judge has the authority to punish direct contempt summarily when necessary to protect the authority and integrity of the court and to prevent obstruction of the administration of justice. Direct contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting contempt.

But What About Recusal?



- When the charged acts of contempt involve disrespect to the trial court or criticism of the judge, that judge is disqualified from presiding over the contempt hearing unless the defendant consents; recusal is preferred except where it would cause prejudicial or injurious delay.

Does the Summary Contempt procedure conflict with this rule?

Sentencing in Criminal Contempt



- ***State v. Wood***, 91 S.W.3d 769 (Tenn. Ct. App. 2002).
 - While the law allows multiple convictions for criminal contempt to be served consecutively, the court still must consider the severity of the violations and determine the least severe measure necessary to properly punish the contempt.
- ***Baker v. Baker***, No. M2010-01806-COA-R3-CV, 2012 WL 764918 (Tenn. Ct. App. March 9, 2012).
 - Court of Appeals may modify sentence for contempt that it deems excessive.

How does this square with the abuse of discretion standard of review adopted by the Tennessee Supreme Court in *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012), for sentencing in criminal cases?

- “[S]entences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a ‘presumption of reasonableness.’”
- See ***Reynolds v. Reynolds***, No. M2013-01912-COA-R3-CV, 2014 WL 7151596, at *9 (Tenn. Ct. App. Dec. 12, 2014), for a case applying both standards.

Suspended Sentences



- ***Coffey v. Coffey***, No. E2012-00143-COA-R3-CV, 2013 WL 1279410 (Tenn. Ct. App. March 28, 2013).
 - Husband also argued that the trial court erred in “unsuspending” certain criminal contempt sentences by waiting too late to do so. Husband was previously held in criminal contempt, but with the consent of Wife, that sentence was suspended. When Husband was again found in contempt, the trial court ordered Husband to serve the suspended sentences, in addition to the new sentence. Husband argued that Tenn. Code Ann. § 40-35-310(a) deprived the court of jurisdiction to revoke the suspension beyond the maximum term to which he could have been sentenced.
 - The Court of Appeals disagreed, noting that a finding of criminal contempt is not a finding that the defendant committed a crime. Thus the Court concluded that Tenn. Code Ann. § 40-35-310(a) “does not come into play when criminal contempt is at issue, and, therefore, it does not affect the court’s ability to suspend its ten-day sentence.”
 - Bottom line: A court may “unsuspend” criminal contempt convictions outside the time in which the defendant was to have served the maximum sentence for his contemptuous acts.

Child Support



- Tennessee Code Annotated Section 36-5-104.
 - Failure to comply with child support order may be punished by:
 - ✦ Six months in jail; and/or
 - ✦ Picking up litter on the highways for *any* prescribed period of time
 - Includes an inference that the obligor has the ability to pay the amount previously ordered as child support.

Important Notes on Child Support Enforcement



- Failure to pay must be willful. Trial court must make sufficient finding that obligor parent has present ability to pay to be found in criminal contempt for failure to make support payments.
 - But what about inference that the obligor has the ability to pay in Tenn. Code Ann. § 36-5-104?
 - Also does the inference in § 36-5-104 comply with *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423 (U.S. 1988), which held that a statute that required the defendant to prove a present inability to pay child support as an affirmative defense is unconstitutional as applied in criminal contempt cases?
- Must specifically cite Tenn. Code Ann. § 36-5-104 in order to invoke child support statute and obtain sentence of up to six months
- Individuals charged with violations of the child support statute are entitled to:
 - jury trials
 - indictments from the grand jury

Subject to Collateral Attack?



- ***Baker v. State***, 417 S.W.3d 428 (Tenn. September 6, 2013).
 - Contempt is criminal in nature but is not considered a crime under Title 39, Chapter 9 of the TCA.
 - The Post-Conviction Procedure Act applies only to constitutional claims arising from a conviction for a criminal offense.
 - Therefore, the Post-Conviction Procedure Act is not applicable to the Petitioner's criminal contempt convictions.
- The plain language of the Post-Conviction Procedure Act provides a mechanism for seeking relief from criminal convictions. A finding of criminal contempt pursuant to T.C.A. section 29-9-102 is not a criminal conviction. Thus, the petitioner was not entitled to seek post-conviction relief from the criminal contempt findings in the Agreed Order.

Contempt for Violation of an Ethical Rule



- ***State v. Beeler*, 387 S.W.3d 511 (Tenn. 2012).**
 - Unethical conduct may amount to criminal contempt, but only if the conduct also “embarrasses, hinders, or obstructs a court in its administration of justice or derogated the court’s authority or dignity, thereby bringing the administration of law into disrepute.”

Knowledge of the Order that was Violated



- ***Mawn v. Tarquinio***, No. M2019-00933-COA-R3-CV, 2020 WL 1491368 (Tenn. Ct. App. Mar. 27, 2020).
 - In order to show the essential element of willfulness to sustain a criminal contempt conviction, the defendant must have knowledge that his or her actions were unlawful. And in order to show knowledge, the court cannot conclusively presume that knowledge to counsel was imputed to the client.

Recent Contempt Cases



- ***Gibbs v. Gibbs***, No. E2015-01362-COA-R3-CV, 2016 WL 4697433 (Tenn. Ct. App. Sept. 7, 2016).
 - Contempt is a proper remedy for breach of an MDA even where the contract did not merge with the court's order.
- ***Dodd v. Dodd***, No. M2011-02147-COA-R3-CV, 2012 WL 3193339 (Tenn. Ct. App. Aug. 6, 2012).
 - The Court may enforce its prior orders by reducing an arrearage to judgment without first finding a party in contempt.
- ***Miller v. Miller***, No. M2014-00281-COA-R3-CV, 2015 WL 113338 (Tenn. Ct. App. Jan. 7, 2015).
 - Tennessee courts retain jurisdiction over petitions for contempt of orders entered in the state. Regarding the requirement of willfulness, contempt is not willful if it occurs pursuant to an alleged contemnor's good faith efforts to comply with another state's court orders

Discussion Question



The parties were involved in a divorce. The case was scheduled for trial, but the day before the hearing the attorney for the wife filed a motion to continue, citing the death of wife's uncle. Husband objects; the court grants the motion. Later, husband filed a pleading stating that wife's uncle did not die and the court was only told this so that the wife could continue the case. At a subsequent evidentiary hearing, the court finds that the wife's uncle did not die and that the wife lied to the court about the entire incident.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



During a custody dispute the trial court entered a temporary order naming the mother as temporary primary residential parent and granting the father shared parenting time. Pursuant to the temporary parenting plan, father was to have the child for a continuous period of 4 days to take the child with him on a trip. The mother did not want the child to go and asked her attorney what to do. The attorney told the mother not to allow the child to go, which she did.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



The parents of 2 minor children under the age of 10 get divorced. As a result, they enter a permanent parenting plan resolving all issues between the parties. Both parents attend church but the churches they attend are of different faiths. The permanent parenting plan states that all parties agree that the parties would jointly make all decisions regarding the religious upbringing of the children. Father, without consulting mother allows the oldest child to be baptized at his church.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



During a bond hearing, the trial judge increased the amount of the defendant's bond from \$2000 to \$75,000. The attorney for the defendant protested the increased bond and during his argument to the court called the amount of increase as well as the court's reasoning for increasing the bond ridiculous.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



During a deposition in a personal injury case, the defendant became angry and began cursing the plaintiff and her attorney. The attorney for the defendant refused to call his client down stating that he was an adult and could say what he wanted and that he agreed with what his client had said.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



Defendant earns \$1400 gross monthly. He has a child support obligation of \$400 per month for three children. He also has another child by his new wife. His monthly expenses not including his child support obligation are conservatively \$1100 per month. He is in arrears on his child support payments in the amount of \$4000.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



During a jury trial plaintiff's attorney told the judge that he was on pace to set a world record for reversible error in this case. She also said that she was not worried about the \$50 that the court wanted to threaten her with. She further called opposing counsel a liar and the court bizarre.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



A pro se plaintiff had several cases pending in federal court. The plaintiff was habitually late for the majority of his scheduled hearings. The judge warned the plaintiff that if the behavior continued she would take action which might include dismissing his case. The plaintiff was late again and the judge dismissed the case. Both the judge and the plaintiff left the courtroom. Moments later the plaintiff returned and stated to the courtroom clerk that the judge should get the f*** off all of my cases.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



5 men were indicted for aggravated assault resulting from a bar fight. One defendant is represented by the public defender. Two defendants were able to hire private counsel. The remaining 2 defendants were appointed counsel by the court. During the preliminary hearing a police officer is testifying about his part in the investigation. He is being cross examined by one of the private attorneys. during the cross exam the public defender walks over and starts talking with the defendant that is represented by the private attorney conducting the cross examination.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

Discussion Question



The defendant was indicted for theft and was represented by private counsel. The defendant was arraigned and the COVID pandemic occurred. The defendant was free on bond. Several months passed before the defendant had his next appearance date which was scheduled as a video appearance. The defendant appeared but his attorney did not. The hearing was rescheduled for an in person appearance. At the next scheduled appearance the defendant again appeared but his attorney did not. In frustration the court entered an order requiring the defendant and his attorney to appear for a new in person appearance date. The order was mailed by the clerk to the attorneys law office and the home address of the defendant. On the next scheduled appearance date the defendant appears but his attorney does not.

- A. Direct Contempt
- B. Civil Contempt
- C. Criminal Contempt
- D. Not Contempt

True or False?



- The standard of proof for civil and criminal contempt are the same.
- A determination of direct contempt is not appealable by the contemnor.
- Civil contempt may be punished by imposing a damages award rather than requiring the contemnor to comply with the court's order at issue.
- Attorney fees may be awarded in a contempt action.
- A contemnor is entitled to bond after a finding of contempt.
- An attorney's failure to appear or appear timely for a court proceeding is punishable as direct contempt.

True or False?



- The opposing party has the burden of proof that a contemnor has the present ability to perform the court's order.
- In multiple contempt findings during one proceeding, sentencing is calculated by multiplying the number of contempt findings by ten days each to reach an appropriate effective sentence.
- An attorney's violation of an ethical rule is the commission of contempt.
- Post-conviction collateral attack is available for a contempt conviction.