

DAWN PERKERSON, )  
 )  
 Petitioner/Appellee, )  
 )  
 VS. )  
 )  
 MICHAEL FREDERICK PERKERSON, )  
 )  
 Respondent/Appellant. )

Appeal No.  
01-A-01-9602-CV-00059

Davidson Circuit  
No. 93D-2998

**FILED**

**July 31, 1996**

**Cecil W. Crowson  
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF DAVIDSON COUNTY  
AT NASHVILLE, TENNESSEE

THE HONORABLE MURIEL ROBINSON, JUDGE

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:  
LEWIS, J.  
KOCH, J.

## OPINION

The appellant, Michael Perkerson, was convicted by the Circuit Court of Davidson County on four counts of criminal contempt and sentenced to a total of forty days in jail. On appeal he asserts that he did not receive the procedural safeguards required in a criminal proceeding, that he was denied a jury trial, and that the trial judge applied the wrong standard of proof for a finding of guilt. The appellee asserts that this is a frivolous appeal. We affirm the trial court. We also find that this is not a frivolous appeal.

### I.

On the same day the parties were divorced by the circuit court, a separate agreed order was entered containing the following:

The parties have further agreed that the Husband shall be permanently enjoined from becoming intoxicated while the minor child of the parties is in his presence, and further, from operating a vehicle while he has the child with him and while he is under the influence of alcohol or illegal drugs.

In subsequent proceedings Mrs. Perkerson charged Mr. Perkerson with contempt for bringing the child home while intoxicated on July 30, 1994; for repeating that conduct on July 31, 1994; for causing an altercation in the presence of the child while intoxicated on November 22, 1994; and for coming around the child on Christmas Day 1994 while intoxicated.

On February 7, 1995 the appellant was ordered to appear and show cause why he should not be held in criminal contempt for violating the court's orders as alleged in the petition. After a hearing on the contempt charge, the court found Mr. Perkerson guilty of four separate violations of the court's injunction.

## II.

Mr. Perkerson asserts that the proceedings leading up to his conviction violated the provisions of Rule 42(b) of the Tennessee Rules of Criminal Procedure.

The rule states:

### **Disposition upon Notice and Hearing. --**

(b) A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment.

We think the notice in this case complies with the rule, which is obviously designed to give the respondent notice of the charges and a reasonable amount of time to prepare his defense. In this case a detailed description of the offending conduct was filed by Mrs. Perkerson. The record does not indicate whether the petition itself was served on the defendant along with the show cause order, but the record does show that a copy of the petition was served on his attorney. The order notified Mr. Perkerson that he was facing a criminal contempt charge, thus satisfying the rule's requirement that the notice "describe it as such." See *Storey v. Storey*, 835 S.W.2d 593 (Tenn. App. 1992).

Mr. Perkerson also asserts that the notice must be given orally in open court. That is one way the rule may be satisfied but it seems to us that a written notice detailing the charges is preferable and is provided for in the rule. Therefore, we hold that the procedure complied with Rule 42(b), Tenn. R. Crim. Proc.

### III.

Next, Mr. Perkerson argues that he was denied a trial by jury on the contempt charge. Although he did not demand a jury, he relies on Rule 23, Tenn. R. Crim. Proc., which provides that in all criminal cases except small offenses “trial shall be by jury unless the defendant waives a jury trial in writing with the approval of the court and the consent of the district attorney general.”

Admittedly, criminal contempt is a crime in the ordinary sense, and certain constitutional provisions apply to the punishment proceeding. *Bloom v. Illinois*, 391 U.S. 94, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); *Strunk v. Lewis Coal Co.*, 547 S.W.2d 252 (Tenn. Crim. App. 1976). And we have held that the Rules of Criminal Procedure must be followed. *Storey v. Storey*, 835 S.W.2d 593 (Tenn. App. 1992). Since Rule 23, Tenn. R. Crim. Proc. requires a written waiver of the jury in all cases except small offenses, and a small criminal offense in Tennessee is defined as one that does not impose any incarceration as punishment, see *State v. Dusina*, 764 S.W.2d 766 (Tenn. 1989), we must decide if a charge of criminal contempt under Tenn. Code Ann. § 29-9-103 (maximum punishment of a fifty dollar fine and/or ten days in jail) is a major criminal offense to which the right to a trial by jury attaches.

In *Brown v. Latham*, 914 S.W.2d 887 (Tenn. 1995), the Supreme Court decided that an accused did have the right to a jury trial in a prosecution for violating Tenn. Code Ann. § 36-5-104(a) which carried a possible sentence of six months in jail. But the court recognized the right to a jury because Tenn. Code Ann. § 36-5-104 is a “general criminal statute.” The court reserved judgment on “the constitutional limitations on a court’s authority to punish for contempt” and “the distinction between a criminal offense and a criminal contempt.” 914 S.W.2d at 889.

In this court’s opinion in *Brown v. Latham*, we said:

Although criminal contempt is a crime, for constitutional purposes, it is not the same as a violation of the criminal law. . . . “The proceeding in contempt is for an offense against the court as an organ of public justice, and not for a violation of the criminal law.” *State v. Howell*, 80 Conn. 668 at ----, 69 A. 1057 at 1058 (1908). “Contempt proceedings are sui generis--neither a civil action nor a criminal prosecution as ordinarily understood.” *Bowdon v. Bowdon*, 198 Tenn. 143 at 146, 278 S.W.2d 670 at 672 (1955). Thus, a defendant may be jailed for criminal contempt without a trial by jury, but the same defendant may demand a jury trial in a charge of violating a criminal statute if the statute provides that incarceration is one of the choices for punishment.

Appeal No. 01-A-01-9401-CV-00008 (Filed in Nashville, October 19, 1994).

We adhere to the principle stated in that case and hold that for the violation of a court order, punishable by a fifty dollar fine and/or ten days in jail under Tenn. Code Ann. § 29-9-103, the accused is not entitled to a trial by jury. Therefore, the failure to get Mr. Perkerson’s written waiver was not a violation of Rule 23, Tenn. R. Crim. Proc.

#### IV.

Finally, Mr. Perkerson argues that the trial judge applied the wrong burden of proof in finding him guilty of the charges. He arrives at that conclusion because the court ordered him to appear and show cause why he should not be held in contempt. Mr. Perkerson argues that the terms of the court’s order placed the burden on him to prove his innocence.

One accused of criminal contempt is presumed to be innocent, and guilt must be proved beyond a reasonable doubt. *Strunk v. Lewis Coal Co.*, 547 S.W.2d 252 (Tenn. Crim. App. 1976). On the face of it the court’s order does seem to misplace that burden. Perhaps the time has come to change the wording in the traditional show cause order. But the proceedings should be viewed as a whole, and we find that the trial judge properly applied the burden of proof in this case. Beyond

a reasonable doubt Mr. Perkerson violated the court's order on the four occasions described in the petition.

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Davidson County for enforcement of its order and for any further proceedings that may become necessary. Tax the costs on appeal to the appellant.

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BEN H. CANTRELL, JUDGE

CONCUR:

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SAMUEL L. LEWIS, JUDGE

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WILLIAM C. KOCH, JR., JUDGE

