

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE**

MARY MILBOURN SANDERS,)
)
Plaintiff/Appellee,)
)
VS.)
)
STEVE HERBERT SANDERS and)
JANET RIGGINS SANDERS,)
)
Defendants/Appellants.)

Sumner General Sessions
No. 94-G

Appeal No.
01A01-9601-GS-00021

FILED

January 17, 1997

Cecil W. Crowson
Appellate Court Clerk

APPEAL FROM THE GENERAL SESSIONS COURT
FOR SUMNER COUNTY
AT GALLATIN, TENNESSEE

THE HONORABLE BARRY R. BROWN, JUDGE

For the Plaintiff/Appellee:

No Appearance

For the Defendants/Appellants:

Whitney Kemper
KEMPER & McLEMORE
Nashville, Tennessee

VACATED AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

OPINION

This appeal involves a contempt proceeding for failure to pay child support in a timely manner. Following the father's failure to meet a court-imposed deadline for paying his child support arrearage, the Sumner County General Sessions Court summarily found him in contempt and sentenced him to forty-eight hours in jail and eighty hours of community service work. The father has appealed.¹ We have determined that the proceeding was one for criminal contempt and, therefore, that the judgment of contempt must be vacated because of the trial court's failure to comply with the requirements of Tenn. R. Crim. App. 42(b).

I.

Steve H. Sanders and Mary Milbourn Sanders were divorced in June 1983. Ms. Sanders received custody of their two children, and Mr. Sanders was ordered to pay \$116 per week in child support. The parties have had frequent judicial skirmishes over their respective support obligations ever since. In 1988, the trial court increased Mr. Sanders's child support obligation to \$225 per week and approved his agreement to pay even more support voluntarily. The voluntary child support payments ceased when Mr. Sanders remarried in 1989.

Several years later Ms. Sanders again requested an increase in child support. The trial court increased the amount of Mr. Sanders's child support to \$4,537 a month. Mr. Sanders appealed this decision, and while the appeal was pending,²

¹This court has direct appellate jurisdiction over decisions of Division II of the Sumner County General Sessions Court in domestic relations cases because it has concurrent jurisdiction in these matters with the circuit and chancery courts. Act of Feb. 25, 1982, ch. 236, §§ 3 & 9, 1982 Tenn. Priv. Acts 89, 90-91. We also have subject matter jurisdiction over all decisions in contempt proceedings arising out of civil matters. Tenn. Code Ann. § 16-4-108(b) (1994). Since the wife elected not to file a brief in this court, we are considering this case based on the record and the appellant's brief in accordance with Tenn. R. App. P. 29(c).

²On July 30, 1993, this court vacated the portion of the trial court's order increasing Mr. Sanders's child support to \$4,537 per month and remanded the case for further consideration in (continued...)

Ms. Sanders filed a contempt petition alleging that Mr. Sanders had violated the 1983 divorce decree by not paying his child support on time, by failing to provide health insurance for the children or to pay their medical expenses, and by participating in a wrongful execution on her automobile.³ The trial court dismissed Ms. Sanders's contempt petition in August 1994 because Ms. Sanders had obstructed pre-trial discovery regarding her contempt petition.

On April 11, 1995, the trial court entered an order purporting to resolve all pending post-divorce disputes. The order stated that Mr. Sanders owed \$32,830 in child support for the period from February 1992 to June 1995⁴ and directed Mr. Sanders to pay this amount by “[n]o later than September 15, 1995, at 1:00 p.m..” It also provided that “[i]f the \$32,830.00 is not paid in full by this date and time, an immediate attachment order will be issued by this Court against Steve Sanders who will immediately begin serving ten (10) days in jail for contempt of this Order.”

Mr. Sanders paid the balance of the required amount on September 15, 1995 but missed the 1:00 p.m. deadline by several hours. Accordingly, the trial court, apparently on its own initiative and without notice to Mr. Sanders, issued an order on September 15, 1995, directing that Mr. Sanders be arrested and incarcerated for ten days in the Sumner County jail. Mr. Sanders immediately moved to quash and to stay the order. During a hearing on September 19, 1995, Mr. Sanders explained that he had been unable to make the required payments until he received his paycheck and that he did not receive his paycheck until mid-afternoon on September 15, 1995. Based on this proof, the trial court quashed its original order

²(...continued)

light of *Nash v. Mulle*, 846 S.W.2d 803 (Tenn. 1993). See *Sanders v. Sanders*, App. No. 01A01-9209-GS-00368, 1993 WL 286013, at *1-2 (Tenn. Ct. App. July 30, 1993). In December 1993, the trial court ordered Mr. Sanders to pay \$2,000 in monthly child support and to pay an additional \$800 per month into a college education trust fund for the two children.

³The dispute concerning the execution on Ms. Sanders's automobile precipitated additional judicial proceedings involving these two parties. *Sanders v. Sanders*, 01A01-9601-CV-00006, 1996 WL 426770 (Tenn. Ct. App. July 31, 1996).

⁴This amount represented the total amount of Mr. Sanders's possible monthly child support obligation. He was not required to pay monthly child support after June 1995 because by that time both his children would be over eighteen years of age.

and entered a new order requiring Mr. Sanders “to serve forty-eight hours in the county jail and to perform eighty hours of community service over a five month period for contempt.” Mr. Sanders has appealed from this judgment.

II.

There are significant substantive and procedural differences between civil and criminal contempt proceedings. Accordingly, an appellate court’s initial inquiry in contempt cases must be to determine whether the contempt was criminal or civil. The scope of our review depends on the actual nature of the proceeding, not on what the parties or the trial court might have labeled it. *Sherrod v. Wix*, 849 S.W.2d 780, 786-87 (Tenn. Ct. App. 1992) (action treated as a criminal contempt proceeding even though the trial court characterized it as a civil contempt proceeding).

The fundamental distinctions between civil and criminal contempt sanctions are well understood. Judge Tatum has pointed out that

[t]he punishment in a civil contempt is remedial, compelling the doing of something by the contemnor, which, when done, will work his discharge. Civil contempt judgments coerce the contemnor into complying with an order of the court. It is often said that in civil contempt cases, the contemnor has the keys to the jail in his own pocket. (citation omitted)

On the other hand, criminal contempts are punitive in character. These proceedings are to vindicate the authority of the law and the court as an organ of society. In criminal contempt cases, the contemnor must serve the sentence imposed whether or not he purges himself by complying with the court order. One convicted of criminal contempt does not carry the key to the jail in his pocket. (citation omitted)

Robinson v. Gaines, 725 S.W.2d 692, 694 (Tenn. Crim. App. 1986). Stated another way, criminal contempt sanctions are intended to restore the dignity and authority of the court, while civil contempt sanctions are intended to benefit a litigant. *State ex rel. Agee v. Chapman*, 922 S.W.2d 516, 519 (Tenn. Ct. App. 1995).

Criminal contempt sanctions serve as punishment for failing to comply with a court's order. *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993); *Storey v. Storey*, 835 S.W.2d 593, 599 (Tenn. Ct. App. 1992). They normally require confinement for a definite term. *Black v. Black*, 50 Tenn. App. 455, 457-58, 362 S.W.2d 472, 474 (1962). Civil contempt sanctions, on the other hand, are coercive, not punitive, and thus are not for a definite term. While the courts may impose criminal contempt sanctions on their own initiative, they may not impose civil contempt sanctions unless a party has requested them. *State ex rel. Agee v. Chapman*, 922 S.W.2d at 519.

The sanctions in this case bear all the earmarks of criminal contempt sanctions. They were imposed solely to punish Mr. Sanders for failing to pay off his child support obligation by the deadline in the April 11, 1995 order. They could not have been intended to coerce him into complying with the payment deadline in the April 11, 1995 order because that deadline had already passed.⁵ The incarceration was for a definite term and required community service work which is normally a condition of criminal probation.⁶ In addition, they were imposed by the trial court on its own motion without a request by Ms. Sanders. Thus, despite Mr. Sanders's characterization of the proceeding as a civil contempt proceeding, we find that it was a criminal contempt proceeding.

III.

Appellate courts review a trial court's decision to impose contempt sanctions using the more relaxed "abuse of discretion" standard of review. *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn. 1993). Notwithstanding the discretionary nature of the decision to impose criminal sanctions, courts must abide strictly by the "absolute provisions of the law." *Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. 30, 37, 377 S.W.2d 908, 912 (1964). The procedural regulation of judicial power of this magnitude is necessary to ensure that its exercise conforms to the

⁵Similarly, the purpose of the order could not have been to induce Mr. Sanders to pay the balance of the child support arrearage because he had already done so several days earlier.

⁶See Tenn. Code Ann. § 40-35-303(d)(3) (Supp. 1996); Tenn. Code Ann. §§ 41-9-101-103 (1990).

rule of law and to the requirements of procedural fairness. Phillip A. Hostak, Note, *International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 Cornell L. Rev. 181, 222 (1995). Accordingly, as Justice White has pointed out:

We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.

Bloom v. Illinois, 391 U.S. 194, 208, 88 S. Ct. at 1477, 1486 (1968).

The legal principles surrounding the imposition of criminal contempt sanctions are familiar and easily understood. Courts may summarily impose criminal contempt sanctions for acts committed in their presence. *State v. Maddux*, 571 S.W.2d 819, 821 (Tenn. 1978); Tenn. R. Crim. P. 42(a); Tenn. Code Ann. § 29-9-102(1) (1980). This power, however, should be used sparingly and should be reserved for exceptional circumstances where there is a need to act swiftly and firmly to prevent contumacious conduct from disrupting a judicial proceeding. *State v. Turner*, 914 S.W.2d 951, 956 (Tenn. Crim. App. 1995).

Courts imposing criminal contempt sanctions for acts not committed in their presence must comply with more stringent procedural standards than those required when imposing civil sanctions for similar conduct. Sanctions for criminal contempt may only be imposed after the person who committed the alleged contemptuous acts has been given notice that he or she faces sanctions for criminal contempt and has been given an opportunity to present evidence of his or her innocence or some other available defense. *Cooke v. United States*, 267 U.S. 517, 537, 45 S. Ct. 390, 395 (1925); *State v. Maddux*, 571 S.W.2d at 821; *Bradshaw v. Bradshaw*, 23 Tenn. App. 359, 362, 133 S.W.2d 617, 619 (1939); Tenn. R. Crim. P. 42(b). Persons accused of committing indirect criminal

contempt also enjoy the presumption of innocence,⁷ the privilege against self-incrimination,⁸ and the requirement that their guilt be proven beyond a reasonable doubt.⁹

Mr. Sanders's failure to meet the deadline in the April 11, 1995 order was not committed in the court's presence and therefore could not form the basis for a summary contempt proceeding notwithstanding the self-executing language of the April 11, 1995 order. Thus, the trial court's issuance of an ex parte attachment order on September 15, 1995 was improper and an abuse of discretion. The trial court's issuance of modified criminal contempt sanctions on September 20, 1995 following a hearing was also an abuse of discretion because Mr. Sanders was not provided with any of the procedural safeguards to which a person facing sanctions for criminal contempt is entitled. Accordingly, the imposition of criminal contempt sanctions against Mr. Sanders must be vacated.

IV.

The order sentencing Mr. Sanders to serve two days in the Sumner County jail and to perform eighty hours of community service work is vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion and Tenn. R. Crim. P. 42. The costs of this appeal are taxed against Steve H. Sanders and his surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE

⁷*Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. at 37, 377 S.W.2d at 912; *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993); *Storey v. Storey*, 835 S.W.2d 593, 599 (Tenn. Ct. App. 1992).

⁸*Stream v. Stream*, App. No. 01A01-9201-CV-00011, 1992 WL 184771, at *3 (party facing criminal contempt sanctions could refuse to answer questions tending to incriminate her); *Kornik v. Kornik*, 3 Tenn. Civ. App. (Higgins) 41, 44 (1913).

⁹*Gunn v. Southern Bell Tel. & Tel. Co.*, 201 Tenn. 38, 42, 296 S.W.2d 843, 845 (1957); *Thigpen v. Thigpen*, 874 S.W.2d at 53.

CONCUR:

HENRY F. TODD, P.J., M.S.

BEN H. CANTRELL, JUDGE