

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001312-MR

THOMAS W. ROBERTS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 95-CI-01974

ST. GEORGE BANK LIMITED

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Thomas W. Roberts (Roberts) appeals from an order of the Kenton Circuit Court denying his motion to lift a civil contempt order.

In February 1996, a judgment was entered in favor of St. George Bank Limited (St. George) against Roberts for \$814,281.93 plus interest. The basis for the judgment was the trial court's finding that Roberts had wrongfully converted funds

not belonging to him.¹ Roberts was subsequently served with a subpoena duces tecum by St. George, the purpose of which was for him to identify any financial assets he possessed which could be used to satisfy the judgment against him. When Roberts refused to comply with the subpoena, St. George filed a motion seeking to have Roberts held in contempt. In May 1996, the trial court issued an order holding Roberts in contempt, and further providing that if he did not produce the subpoenaed documents by a date certain, he would "be incarcerated in the Kenton County Jail until the documents are produced." Roberts did not produce the documents by the date set forth in the contempt order, and he left the trial court's jurisdiction.²

In March 1998, Roberts filed a motion to lift the contempt order, with the purported purpose behind the motion being his desire to return to Kenton County to defend an unrelated action. Roberts's motion and accompanying letter to St. George's counsel stated that he had provided all of the subpoenaed documents in question. St. George filed a response indicating that it had not had sufficient time to examine the documents to determine if they were sufficient to constitute compliance with the subpoena duces tecum, and the trial court

¹ In October 1995, funds in the amount \$8,255.07 were to be transferred from St. George to Roberts's account at the Huntington Bank in Kenton County, Kentucky. During the processing of the transfer, the decimal point became misplaced so that the amount transferred was not \$8,255.07 as expected, but was \$822,507.00 instead. As a result, Roberts received \$814,281.93 more than had been requested.

² Roberts apparently left Kentucky for Florida during this period of time.

thereafter issued an order denying Roberts's motion to lift the contempt order.

In April 1998, Roberts filed a second motion to lift the contempt order. St. George responded by stating that Roberts's production of the documents in question "is not controlling as to the lifting of the contempt citation." St. George also stated that it had not finished reviewing the documents provided by Roberts.

The trial court issued an order denying Roberts's motion in which it found that St. George's review of the documents "is irrelevant to the contempt Order issued by this Court for the failure of Thomas Roberts to follow its orders." The court refused to lift the contempt order at that time and stated that Roberts must "[a]t a minimum" personally appear before the court before consideration would be given to the lifting of the contempt order (emphasis ours). The trial court's order further stated that "[o]nce he presents himself to this Court, this Court will consider the strong possibilities of criminal contempt and incarceration for the twenty-two months of continued defiance of this Court's Order. It certainly is not sufficient to come back after it is all over." Roberts's appeal of that order followed.

Roberts argues that the trial court found him in civil contempt rather than criminal contempt and that he was purged of contempt when he complied with the trial court's order and produced the requested documents. He notes that the purpose of the contempt order was to coerce him to furnish the documents and

further notes that the language of the contempt order states that his failure to produce the documents requested by the subpoena would result in his incarceration "until the documents are produced." He maintains that his compliance with the court's order purges him of contempt and that the trial court erred in not lifting the contempt order.

"Contempt is the willful disobedience of--or open disrespect for--the rules or orders of a court" and "may be either civil or criminal." Commonwealth ex rel. Bailey v. Bailey, Ky. App., 970 S.W.2d 818, 820 (1998). "Civil contempt involves the failure of one to do something under order of court--generally for the benefit of a party litigant." Id. See also Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1996), cert. denied, ___ U.S. ___, 118 S. Ct. 422, 139 L. Ed. 2d 323 (1997). Civil contempt, unlike criminal contempt, is not intended to punish but is intended to coerce. Bailey, 970 S.W.2d at 820. The purpose and objective of civil contempt is "to goad one into action or to compel obedience to a course of conduct" Id. The "defining characteristic of civil contempt is the fact that contemnors 'carry the keys of their prison in their own pockets.'" Blakeman v. Schneider, Ky., 864 S.W.2d 903, 906 (1993). In other words, once the contemnor complies with the order of the court, he or she is purged of the contempt and may be released from incarceration.

The trial court's contempt order was clearly a finding of civil contempt meant to coerce Roberts into supplying the documents in question. If Roberts's claim that he has produced

all of those documents is true, he is purged of his civil contempt because one found in civil contempt may not be incarcerated "beyond the opportunity to purge himself of his contempt." Id. The question in this case is whether Roberts has purged himself of the civil contempt by providing all of the documents in question.

The trial court has stated that Roberts must personally appear in the Kenton Circuit Court in order to prove that he has purged himself of the contempt. We agree. Roberts has defied the court and left its jurisdiction. Now that he wants to come back, he says he is willing to comply and has furnished some documents, which he says are all the requested documents. What he wants is to require the court to make a ruling prior to his return that he has fully complied with the court's order, and thereby purge himself of the contempt, and for the court to quash the bench warrant. We wouldn't require the court to rule prior to Roberts's return. Roberts is holding all the cards; if the court finds Roberts has not complied with the discovery request fully, he won't return. Roberts must return and be served with the bench warrant - which includes incarceration. As soon as practical, the trial court can conduct a hearing as required by Regional Jail Auth. v. Tackett, Ky., 770 S.W.2d 225 (1989) to see if Roberts has complied with its order to the extent that he did purge himself of the civil contempt. If so, he will be released immediately or at least bonded out and tried on the separate criminal contempt charge. If we require the trial judge to pre-judge the case, we are in effect requiring the judge to make a

deal. The integrity of the court system is at stake and we will not allow a contemptuous person to dictate how we should run our courts.

It is understandable that the trial court is frustrated in not being able to enforce its orders to coerce compliance with a subpoena due to Roberts's absence from the jurisdiction. In most instances of this nature, the person in contempt could simply be arrested and jailed to coerce compliance. However, the inability of the trial court to have Roberts arrested and Roberts's unwillingness to personally appear before the court do not change the nature of the existing proceeding against him from one of civil contempt to one of criminal contempt. In short, if the trial court determines that Roberts has complied with the contempt order by producing all of the documents in question, then he has purged himself of the civil contempt, and the criminal contempt matter is a separate issue, which the trial court may consider pursuing as stated in its April 30, 1998 order.

Therefore, the order of the Kenton Circuit Court is affirmed.

EMBERTON, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, DISSENTS BY SEPARATE OPINION.

BUCKINGHAM, JUDGE, DISSENTING. I agree with the majority's opinion that the trial court's contempt order was a finding of civil contempt meant to coerce Roberts into supplying the requested documents. I also agree with the majority's opinion that Roberts is purged of civil contempt if he has

supplied all the documents in question, because he may not be incarcerated "beyond the opportunity to purge himself of his contempt." Blakeman v. Schneider, Ky., 864 S.W.2d 903, 906 (1993). However, I disagree with the majority's opinion that Roberts may be made to personally appear in the Kenton Circuit Court in order to prove that he has purged himself of the contempt.

The majority states that Roberts must return, be served with a warrant, and be incarcerated in jail prior to a hearing to determine whether he has purged himself of contempt. There is nothing in the contempt order which would mandate such an appearance by Roberts. Furthermore, in its motion for contempt, St. George made it plain that the subpoena duces tecum "was a subpoena for documents only and would not require the presence of Roberts." In short, as this is a civil contempt matter, I conclude that the trial court should first determine whether Roberts has purged himself of contempt and that Roberts's appearance and arrest should not be required.

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