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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000939-MR

WILLIAM DENNIS BLACK — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN W. POTTER, JUDGE
ACTION NO. 97-CR-02626

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOPF, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an order entered by the Jefferson Circuit Court adjudging appellant to be in contempt of court due to his refusal to be sworn or to testify at a co-defendant's trial and sentencing him to a consecutive sentence of five months and twenty-nine days. On appeal, appellant contends that the trial court erred by failing to find that he was guilty of civil rather than criminal contempt and sentencing him accordingly, and by ordering that his contempt sentence run consecutively to an earlier sentence. We disagree with both contentions. Hence, we affirm.

In October 1997, appellant and James Martin Mutters were indicted for various offenses relating to crimes committed in January 1992. On February 4, 1998, appellant entered a guilty plea to one count of burglary in the second degree, four counts of robbery in the second degree, four counts of unlawful imprisonment in the second degree and one count of assault in the fourth degree. A final judgment was entered on February 23, 1998, which sentenced him to ten years' imprisonment.

The trial of appellant's co-defendant Mutters was scheduled for March 31, 1998. On that date, appellant was brought from prison to testify as a witness at Mutter's trial. However, before the trial appellant indicated that he would refuse to be sworn or to testify. Thereupon, the court found appellant to be in contempt of court, sentenced him to a prison term of five months and twenty-nine days, and ordered the sentence to run consecutively to his previous ten year sentence. Later in the day, appellant's co-defendant entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). This appeal followed.

First, appellant contends that he was found guilty of civil contempt and, hence, that the court's authority to imprison him as a recalcitrant witness terminated as soon as his co-defendant entered a guilty plea. We disagree.

A panel of this court recently explained the distinction between civil and criminal contempt in Commonwealth

ex rel. Bailey v. Bailey, Ky. App., 970 S.W.2d 818, 820 (1998), as follows:

> Contempt is the willful disobedience of — or open disrespect for — the rules or orders of a court. Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996) [cert. denied sub nom. Effinger v. State of Kentucky, ___ U.S. ___, 118 S.Ct. 422, 139 L.Ed.2d 323 (1997)]. Contempt may be either civil or criminal. Civil contempt involves the failure of one to do something under order of court — generally for the benefit of a party litigant. Burge, supra. The purpose of civil contempt is to coerce rather than to punish — to compel obedience to and respect for an order of the court. The primary characteristic of civil contempt is the fact that the contemnors "carry the keys of their prison in their own pocket." Blakeman v. Schneider, Ky., 864 S.W.2d 903 (1993).
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> Criminal contempt is conduct "which amounts to an obstruction of justice and which tends to bring the court into disrepute." Gordon v. Commonwealth, 141 Ky. 461, 463, 133 S.W. 206, 208 (1911). It seeks to punish conduct which has already occurred rather than to compel a course of action. It is the purpose of the punishment (rather than the fact of punishment per se) that distinguishes civil from criminal contempt. If the court's purpose is to goad one into action or to compel a course of conduct, the sanction is civil contempt.

A court has the inherent power to punish a person for conduct which is an affront to the dignity and authority of the court. Leibson v. Taylor, Ky., 721 S.W.2d 690 (1987), overruled on other grounds, Shaffer v. Morgan, Ky., 815 S.W.2d 402 (1991). Moreover, a person's refusal to testify or to answer a question in the course of a civil or criminal proceeding has long been recognized as a criminal contempt. Ketcham v. Commonwealth, 204

Ky. 168, 263 S.W. 725 (1924). Further, a court's inherent authority to determine "the extent of punishment to be imposed upon a recalcitrant witness is a matter within the reasonable discretion of the trial court (except where a jury trial is required under Bloom v. State of Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 [1968]), which discretion is reviewable by this court." Arnett v. Meade, Ky., 462 S.W.2d 940, 948 (1971).

Moreover, KRS 421.140 was declared unconstitutional in Woods v. Commonwealth, Ky. App., 712 S.W.2d 363 (1986). KRS 421.140 states that "[i]f a witness refuses to testify, or to be sworn . . . he shall be imprisoned so long as he refuses, or until he testifies" and that "final disposition of the case in which he so refuses shall discharge him from imprisonment." The court in Woods held the statute was unconstitutional because it "binds the hands of the trial court whether its purpose is to punish a witness for refusing to testify or to coerce that witness to testify and purge himself of his contempt of court." 712 S.W.2d at 365.

Appellant argues that the purpose of the court's contempt sanction was to coerce him to be sworn and to testify at his co-defendant's trial and, therefore, he was found guilty of civil contempt. Further, he urges that the court's contempt finding was "anticipatory" in the case at bar, as opposed to an actual contempt which occurred in Woods, because the sanction was imposed before the trial. Appellant further argues that the basis for the contempt finding ceased to exist once his

co-defendant entered a guilty plea. We disagree with appellant's arguments.

Based upon our review of the record, including the videotaped proceeding during which appellant was found guilty of contempt, we are satisfied that the court intended to punish appellant for his refusal to be sworn or to testify rather than to coerce him to do so. Thus, he was found guilty of criminal contempt.

Moreover, appellant's reliance upon Hardin v. Summitt, Ky., 627 S.W.2d 580 (1982), is misplaced. Unlike the order in the instant action, the court's order in Hardin explicitly made the contemnor's imprisonment contingent upon the continued refusal to testify. Thus, unlike the situation here, the court's purpose in Hardin was not to punish but rather was to coerce the contemnor to testify. Likewise, appellant's reliance upon Campbell v. Schroering, Ky. App., 763 S.W.2d 145 (1988), is also of no avail because it is factually inapposite to the instant action.

Next, characterizing his contempt as "anticipatory" since it occurred before trial, appellant argues that he could not be punished for contempt because his testimony was no longer necessary after his co-defendant entered a guilty plea. In short, he argues that the basis for his punishment for contempt ceased to exist and should be set aside. We disagree.

Appellant essentially concedes that his conduct was contemptuous. Further, despite appellant's claims that his

contempt was "anticipatory" and that he was improperly deprived of an opportunity to purge himself of contempt, there is nothing in the record to establish that appellant intended to change his decision not to be sworn or not to testify had a trial occurred.

Clearly, the court had inherent power to punish appellant for his refusal to be sworn and to testify. The fact that appellant's co-defendant subsequently entered a guilty plea the same day did not transform the purpose of the court's punishment from criminal to civil contempt. "Witnesses cannot be allowed to freely refuse requests of the court with the certainty that their penalty will be of limited duration." Woods, 712 S.W.2d at 365. We conclude, therefore, that appellant was found guilty of criminal contempt since the purpose of the court's punishment was to penalize him for his defiance of the court. See Leibson v. Taylor, 721 S.W.2d at 692-93, n. 1. ("A workable (and poetic) description of 'criminal contempt,' as opposed to civil contempt is made in 11 Wright & Miller, Federal Practice and Procedure § 2960: Criminal contempt 'penalizes yesterday's defiance rather than seeking to coerce tomorrow's compliance.'") That being so, the court was entitled to sentence him consistent with a finding of criminal contempt.

Next, appellant contends that the court erred by ordering that his contempt sentence should run consecutively. We disagree.

True enough, KRS 532.110(1)(a) states that when a defendant receives multiple sentences of imprisonment for more

than one crime, one a definite term and another an indeterminate term, the sentences are required to run concurrently to each other. However, KRS 532.110(4) states in part as follows:

> Notwithstanding any provision in this section to the contrary, if a person is convicted of an offense that is committed while he is imprisoned in a penal or reformatory institution . . . or while he awaits imprisonment, the sentence imposed for that offense may be added to the portion of the term which remained unserved at the time of the commission of the offense.

Thus, KRS 532.110(4) creates an exception to the limitation set forth in KRS 532.110(1)(a). Cf. Devore v. Commonwealth, Ky., 662 S.W.2d 829 (1984), cert. denied, 469 U.S. 836, 105 S.Ct. 132, 83 L.Ed.2d 72 (1984).

Here, there is no dispute that appellant's ten-year sentence was an indeterminate term and that his sentence for criminal contempt was a definite term. See KRS 532.060 and KRS 532.090. However, appellant was serving a term of imprisonment when he was found guilty of criminal contempt. Thus, the court was authorized by KRS 532.110(4) to sentence him to a consecutive sentence. Indeed, the commentary to KRS 532.110(4) states that this subsection "is necessary to eliminate the possibility of a situation in which an individual under sentence would have nothing to lose by committing another offense." KRS 532.110, Commentary (1974).

The court's judgment is affirmed.

ALL CONCUR.

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