RENDERED: October 31, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001140-MR

SAMUEL MANLY — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 94-FC-02190

HUGH SMITH HAYNIE, JUDGE
OF JEFFERSON DISTRICT
COURT DIVISION 18 AND OF
JEFFERSON FAMILY COURT
DIVISION TWO(2), IN HIS
CAPACITY AS A SPECIAL JUDGE
OF JEFFERSON CIRCUIT COURT;
PATRICIA VAN HOUTEN,
ASSISTANT JEFFERSON COUNTY
ATTORNEY; AND
COMMONWEALTH OF KENTUCKY — APPELLEES

OPINION

REVERSING

** ** ** ** **

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; AND MILLER, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE. Samuel Manly (hereinafter “Manly”) appeals from an order of the Jefferson Family Court finding him guilty

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of two counts of criminal contempt and sentencing him to one day in jail on the first count and imposing a $1.00 fine on the second count. We reverse.

This matter arose as a result of Manly's representation of a client in a child support matter. Patricia Van Houten, (hereinafter "Van Houten"), Assistant Jefferson County Attorney, had intervened in the domestic action to assist the former spouse in collecting child support and to recoup benefits previously paid to her in lieu of support. On January 25, 2001, Manly, Van Houten, and their clients met for a settlement conference. The settlement conference became contemptuous. At one point Van Houten chuckled or laughed at a response given by Manly's client. Thereupon Van Houten and Manly got into a verbal dispute which culminated with Van Houten requesting or demanding that Manly produce certain documents to which she believed she was entitled. Manly responded to her request by stating, "I wouldn't give you the sweat off my balls". The settlement conference was then terminated.

The following day, Manly produced the requested material, as well as, filing objections to some of the documents and interrogatories Van Houten requested. The matter was set for motion hour on January 29, 2000, before Judge Hugh Haynie. When the case was called before Judge Hugh Haynie, Van Houten attempted to explain to the judge why she could not and would

not go to Manly's office to copy certain requested documents. Van Houten's explanation included a paraphrase of Manly's statement from the failed settlement conference to the effect that she would receive "the sweat from his genitals" before she would receive the requested discovery. At that point, Manly interrupted Van Houten and the following ensured:

> Manly: No, I told her I wouldn't give her the sweat off my balls after she insulted me and I still won't give her the sweat off my balls if she wants to insult me today.
>
> Court: Counsel, a little decorum.
>
> Manly: What I said to this young lady outside the presence of the court is none of your business.
>
> Van Houten: Judge, it is the court's business because he has refused to produce the tax returns. He wants to only give. . .
>
> Manly: I did no such thing.
>
> Van Houten: Judge would you ask counsel to let me finish?
>
> Court: Mr. Manly, this is my courtroom and I would ask that you comport yourself with some degree of dignity and decorum.
>
> Manly: I thought I was.
>
> Court: Well, using that sort of language in the tone of voice is not my idea. . . .
>
> Manly: I did not bring it up, she did.
>
> Court: It doesn't matter who brought it up, it's the way you addressed it. Now let's play nice here. Let's deal with the issue at hand.

Thereafter, the parties continued discussing the motion to produce and the hearing was completed without incident. No action was taken by Judge Haynie against Manly at any time during the hearing and no mention of contemptuous behavior was made.

The parties were again in court on the same domestic matter on February 19, 2001. According to numerous pleadings filed by Manly subsequent to the contempt charge being filed against him, the following events took place. Before the hearing, Judge Haynie told Manly that he would like to see him in chambers later that day, and advised Van Houten that she need not be present as the matter was of no concern to her client. Manly presented himself at Judge Haynie's chambers later that day, and an off-the-record discussion ensued regarding Manly's conduct at the hearing on January 29, 2001. Only Manly and Judge Haynie were present during this meeting. Judge Haynie told Manly that he had determined that Manly's profane statements and aggressive behavior before the court that day constituted civil contempt, but that he did not wish to place Manly in jail. Instead, according to Manly, Judge Haynie proposed that if Manly would admit that his behavior was contemptuous, apologize in open court to the court and Van Houten in a closed hearing, and pay $500 to the Louisville Home

for the Innocents, he would suspend the execution of a ten-day jail sentence. In the alternative, Judge Haynie stated that if Manly did not agree to such a resolution of the matter, he would proceed to cite Manly for contempt in a public hearing and imposed the ten-day jail sentence. According to Manly, Judge Haynie further reminded Manly that such an open hearing might place Manly's law license in jeopardy.

Manly responded that he did not feel that anything he said or did before Judge Haynie during the hearing of January 29 was contemptuous or obstructed the administration of justice on Judge Haynie's court. Manly stated that his use of strong language before Judge Haynie was merely in response to Van Houten's having misquoted Manly on the record, and showed no disrespect for the court. Manly further advised Judge Haynie that he did not believe he could be held in civil contempt for his conduct, and that if he were charged with criminal contempt, he would require notice, the opportunity to be heard, and a hearing before an impartial judge.

A day or two later, Manly again spoke to Judge Haynie about the contempt matter. Judge Haynie told Manly that he had done some research and determined that the contempt was not civil in nature but was criminal. Judge Haynie offered Manly the same terms to purge himself of the criminal contempt and granted Manly time to make a decision. Manly thereafter

consulted with counsel and decided that he would not admit to the criminal contempt.

On March 5, 2001, Manly appeared before Judge Haynie to set a date for the contempt hearing. Judge Haynie asked Manly if he wanted a "short hearing" or a "long hearing". Manly responded that he wanted a "long hearing" but that he had yet to find a date that was good with his counsel. On March 7, 2001, Judge Haynie entered an order requiring Manly to appear before him to show cause why he should not be held in contempt for his actions at motion hour on January 29, 2001.

On April 23, 2001, Manly's criminal contempt hearing was held before Judge Haynie and was closed to the public. Manly was represented by attorney Aubrey Williams, who, on that date, filed a memoranda alleging lack of jurisdiction, insufficient notice of the charges, and that Manly's conduct on January 29, 2001, did not constitute contempt. The court then clarified that the comments it considered contemptuous were the two remarks that Manly would not give Van Houten the "sweat off his balls," although the court recognized that the subsequent comment that it was none of the court's business what Manly said to Van Houten outside the courtroom was also contempt-worthy. Williams then requested leave to call Judge Haynie, Van Houten, and Manly as witnesses. Judge Haynie denied the request. Judge Haynie further denied Williams' request to present said

testimony by avowal. Judge Haynie reiterated that he was only interested in arguments as to why Manly's conduct did not constitute contempt.

Judge Haynie permitted Manly and Williams to both make statements. Williams asserted that Manly lacked the requisite *mens rea* for criminal contempt because Manly did not intend to show disrespect to the court. Manly attempted to explain his conduct and argued why the comments were not contemptuous. Manly also asserted that he never intended any disrespect to the court and apologized for the offensive remarks.

Judge Haynie adjudged Manly guilty of two counts of criminal contempt and imposed a sentence of one day in jail as to count one. He further ordered Manly to return the following day for sentencing on count two. The following morning Manly apologized for his conduct. Judge Haynie then imposed a $1.00 fine on count two. This appeal by Manly followed.

Manly argues that his conduct and statements before the court on January 29 2001, did not constitute criminal contempt. "Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court." Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1997). "Criminal contempt is conduct 'which amounts to an obstruction of justice, and which tends to bring the court into disrepute.'" Id. (quoting

Gordon v. Commonwealth, 141 Ky. 461, 463, 133 S.W. 206, 208 (1911).

Manly admits that his statement that he wouldn't give Van Houten "the sweat off my balls," was vulgar and uncivil, but maintains that he did not intend any disrespect to the court by its utterance. Rather, he claims he was merely correcting Van Houten's misquotation of the remark on the record. While we may not agree with Manly's basis for arguing his statements were not contemptuous, we do agree that, under the circumstances presented herein, the trial court erred in finding Manly in contempt. As previously stated, the actual statement was made to Van Houten during a settlement conference outside the courtroom. When Van Houten attempted to paraphrase Manly's rude remarks to her, Manly interrupted her and stated the exact words he had previously used. A review of the video tape of the proceedings shows that the trial judge did not show any indication that he was shocked or offended by the statement or that he had lost control over the parties or lost decorum in the courtroom. In fact, Judge Haynie exhibited complete control of the proceedings and no loss of composure.

In Cooke v. United States, 19 L.Ed. 767 (1925), the United States Supreme Court addressed the issue of when contempt occurs "under the eye or within the view of the court" as follows:

> We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice," as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it.

Id. at 774. See also In Re Oliver, 33 U.S. 257; 68 S.Ct. 499; 92 L.Ed. 682 (1948). In the case of Eaton v. Tulsa, 39 L.Ed.2d 693 (1974), the United States Supreme Court addressed a case similar to this in that the attorney used offensive and vulgar language. In that case, the Court stated:

> This single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the conviction of criminal contempt. "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice." Craig v. Harney, 331 US 367, 376, 91 L. Ed. 1546, 67 S. Ct. 1249 (1947). In using the expletive in answering the question on cross-examination "[i]t is not charged that [petitioner] here disobeyed any valid court order, talked loudly, acted boisterously, or

> attempted to prevent the judge or any other officer of the court from carrying on his court duties." (Citations omitted). In the circumstances, the use of the expletive thus cannot be held to "constitute an imminent . . . threat to the administration of justice."
>
> In affirming, however, the Court of Criminal Appeals rejected petitioner's contention that the conviction must be taken as resting solely on the use of the expletive. Rather, that court concluded from its examination of the trial record that, in addition to the use of the expletive, petitioner made "discourteous responses" to the trial judge. The court therefore held that the conviction should be affirmed because "[c]oupling defendant's expletive with the discourteous responses, it is this Court's opinion there was sufficient evidence upon which the trial court could find defendant was in direct contempt of court." (Emphasis in original).

In Justice Powell's concurring opinion, he stated:

> As noted in the Court's opinion, it was not directed at the trial judge or anyone officially connected with the trial court. But the controlling fact, in my view, and one that should be emphasized, is that petitioner received no prior warning or caution from the trial judge with respect to court etiquette. It may well be, in view of the contemporary standards as to the use of vulgar and even profane language, that this particular petitioner had no reason to believe that this expletive would be offensive or in any way disruptive of proper courtroom decorum. Language likely to offend the sensibility of some listeners is now fairly commonplace in many social

> gatherings as well as in public performances.
>
> I place a high premium on the importance of maintaining civility and good order in the courtroom. But before there is resort to the summary remedy of criminal contempt, the court at least owes the party concerned some sort of notice or warning. No doubt there are circumstances in which a courtroom outburst is so egregious as to justify a summary response by the judge without specific warning, but this is surely not such a case.

39 L.Ed.2d. 696, 697.

As can be seen from the cases cited thus far, direct criminal contempt is committed in the presence of the court and is an affront to the dignity of the court. See Burge, supra at 808. It is normally punished immediately by the court so as to maintain the court's dignity and decorum. In the case before us, the actions of Manly occurred before the court and the court gave no notice to Manly that his statements were contemptuous or even being considered as such. The court maintained control over the proceeding and resolved the issue before it without having to utilize its contempt powers. It was only several weeks later and after the trial judge admitted speaking to others (according to Manly's version of his off-the-record conversations with Judge Haynie) that the judge informed Manly that his in-court statements on January 29, 2001, were being considered as contempt. We do not believe such reflection and

afterthought is normally necessary when contempt actually occurs in the courtroom. When direct criminal contempt occurs the judge knows it and must act accordingly to protect the "very hallowed place of justice" and that if "not instantly suppressed and punished, demoralization of the court's authority will follow." Cooke, supra. That did not occur in this case. While we do not condone Manly's behavior at the settlement conference or in the courtroom, we do not believe that under the facts as presented to us, that he could be held in contempt of court.

For the foregoing reasons, the order of the Jefferson Family Court holding Manly in contempt of court is reversed.

MILLER, SENIOR JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING: I agree with the lower court that appellant's statements were criminally contemptuous and that appellant's due process rights were satisfied. I would affirm the trial court.

Judge Haynie adjudged Manly guilty of two counts of criminal contempt and imposed a sentence of one day in jail as to count one. The following morning Manly apologized for his conduct and acknowledged that he had a problem. Judge Haynie then imposed a $1.00 fine on count two.

Manly's first argument was that Judge Haynie abused his contempt power by failing to use the least stringent means

to achieve his objective in holding Manly in contempt. It has been held as a general rule that trial courts are to use the "least possible power adequate to the end proposed" in punishing a contemnor. Harris v. United States, 382 U.S. 162, 165, 86 S. Ct. 352, 354, 15 L. Ed. 2d 240 (1965). In holding Manly in contempt, Judge Haynie sought to elicit from Manly recognition that his conduct was contemptuous and an apology to the court and Ms. Van Houten, and to punish Manly for his contemptuous conduct. In attempting to achieve these goals, Judge Haynie first offered Manly the opportunity to purge the contempt by admitting the impropriety of his conduct, apologizing, and making a specific charitable donation. It was only after Manly declined the offer that Judge Haynie adjudged the stricter penalty of one day in jail and a $1.00 fine, which I do not believe to be unduly harsh, nor an abuse of Judge Haynie's contempt power in punishing Manly.

Manly next argued that his conduct and statements before the court on January 29, 2001, did not constitute criminal contempt. "Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court." Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1997). "Criminal contempt is conduct 'which amounts to an obstruction of justice, and which tends to bring the court into disrepute.'"

Id. (quoting Gordon v. Commonwealth, 141 Ky. 461, 463, 133 S.W. 206, 208 (1911)).

Manly made the statement before the court that he wouldn't give Van Houten "the sweat off his balls." Manly admits that the statement was vulgar and uncivil, but maintains that he did not intend to disrespect the court by its utterance. Rather, he claims he was merely correcting Van Houten's misquotation of the remark on the record. I do not buy it! There was no need for Manly to correct Van Houten's version of the remark because Manly surely knew that Van Houten was merely paraphrasing the remark for sanitization purposes. I see Manly's conduct in "clarifying" the remark and thereafter repeating it as willful disregard and disrespect for the court. Breaches of decorum and the use of profanity are properly within the court's criminal contempt power. See Sacher v. United States, 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 2d 717 (1952); Kentucky Bar Association v. Waller, Ky., 929 S.W.2d 181 (1996), cert. denied, 519 U.S. 1111, 117 S. Ct. 949, 136 L. Ed. 2d 837 (1997). Unlike Eaton v. Tulsa, 415 U.S. 697, 94 S. Ct. 1228, 39 L. Ed. 2d 693 (1974), as cited by Manly, this was not a single use of street vernacular by a non-lawyer party in reference to a witness. Rather, this was a willfully profane vulgar comment directed at an officer of the court. His repetition of the

remark before the court only served to underscore its willfulness.

I also agree with the trial court that the remark, "what I said to this young lady outside the presence of the court was none of [the court's] business" was likewise criminally contemptuous, although the court indicated at the contempt hearing that said remark was not the basis for the contempt charges. At that point, Manly had been warned by the court to use some decorum. This remark was clearly disrespectful of the court's authority and demonstrated Manly's intent to provoke the court. See United States v. Schiffer, 351 F.2d 91 (6th. Cir. 1965), cert. denied, 384 U.S. 1003, 86 S. Ct. 1914, 16 L. Ed. 2d 1017 (1966).[2]

Manly contends that in order to find him in contempt, the court was required to first warn Manly that it considered his conduct contemptuous. I favor the holding of 6th Circuit of the United States Court of Appeals that prior notice that the court considers the conduct contemptuous is not required when the conduct is clearly contemptuous. Schiffer, 351 F.2d 91. Here, Manly's statements were profane, vulgar, and blatantly contemptuous. Although Judge Haynie did not immediately hold Manly in contempt in this case when the contemptuous statements

[2] I would also note that I view the language used by Manly in his affidavit likening his interest in co-counsel to that of a cow as contempt-worthy. It was maliciously insulting and in complete disregard for the dignity of the court and our legal system.

were made, I believe the courts have and need the power to immediately squelch such blatantly contemptuous behavior before it is repeated and taints the proceedings.

Manly argued that the trial court denied him his constitutional rights by summarily denying his pretrial motions and holding summary contempt proceedings. Because Manly's contemptuous statements were made in the presence of the court, it constituted direct criminal contempt which can be punished summarily by the court since the court personally witnessed all of the elements of the offense. Commonwealth v. Pace, Ky. App., 15 S.W.3d 393, 395 (2000). This is in contrast to indirect criminal contempt which "'is committed outside the presence of the court and requires a hearing and the presentation of evidence' in order to 'establish a violation of the court's order. It may be punished only in proceedings that comport with due process.'" Id. (quoting Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1996)). Speaking to the necessity of a court to take immediate action against direct criminal contempt, the United States Supreme Court has stated:

> To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's

> dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law.

Cooke v. United States, 267 U.S. 517, 534, 45 S. CT. 390, 394, 69 L. Ed. 2d 767 (1925).

In the instant case, although Manly's conduct clearly constituted direct criminal contempt, the court waited until long after the contemptuous conduct occurred to find him in contempt. It has been held that a court can delay a finding of direct criminal contempt until after the proceeding wherein the contemptuous conduct occurred. Sacher v. United States, 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 2d 717 (1952). In Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974), defense counsel in a jury trial made numerous contemptuous remarks during trial, and each time, the trial judge made it known during the trial that he considered the remarks contemptuous and sometimes allowed counsel to respond and other times did not. After the trial had concluded but while the jury was still present, the judge summarily adjudicated counsel in contempt without allowing counsel an opportunity to be heard. The Supreme Court reversed and remanded the contempt citation, holding that where the final adjudication of contempt is postponed, the contemnor is entitled to notice and an opportunity to be heard:

> [W]here conviction and punishment are delayed, 'it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable (the court) to proceed with its business.' [Groppi v. Leslie, 404 U.S. 496, 504, 92 S. Ct. 582, 587, 30 L. Ed. 2d 632 (1972)]. . . . Groppi counsels that before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full-scale trial is appropriate. Usually the events have occurred before the judge's own eyes, and a reporter's transcript is available. But the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court. Cf. Groppi v. Leslie, [404 U.S.] at 503, 506 n. 11, 92 S. Ct., at 586, 588.

Taylor v. Hayes, 418 U.S. at 498-499, 94 S. Ct. at 2703.

In the case at bar, the contempt proceedings were not adjudicated summarily. Manly was given notice of the contempt proceedings and an opportunity to be heard by himself and counsel. Manly and his counsel had the opportunity to and did argue the very things contemplated in Taylor – that Manly's conduct did not constitute criminal contempt, mitigating factors, as well as offering an apology.

As to the court's denial of Manly's pretrial motions to dismiss, for notice of intent to present KRE 404(c) evidence,

for discovery and inspection, and for exculpatory and impeachment materials, I do not believe the court erred in so denying these motions. As stated above in Taylor, given the fact that the contempt was committed directly in the court's presence, Manly was not entitled to a full-scale trial and all of its concomitant rights.

Moving on to Manly's contention that he was not given notice that he was being charged with two counts of contempt, Manly maintains that the first time he realized he was being charged with two counts of contempt was during the court's ruling at the contempt hearing. The court's show cause order of March 7, 2001, stated as follows:

> Upon motion of the Court, counsel for the Petitioner, the Honorable Samuel Manly, shall appear in Jefferson Family Court. . . to show cause why he should not be held in Contempt of this Court for his actions at motion hour on January 29, 2001.
>
> Counsel has been orally advised of the basis for the Court's Order and a video tape copy of the above referenced events was provided for him to review. Should counsel wish to obtain his own copy of the video tape to prepare his defense, he may contact the Family Court Video Tape Office. The Court will also keep the above-styled case at the secretaries desk should counsel wish to review it prior to the hearing.

In Paul v. Pleasants, 551 F.2d 575 (4th Cir. 1977), cert. denied, 434 U.S. 908, 98 S. Ct. 310, 54 L. Ed. 2d 196 (1977), the contemnor argued that he received inadequate notice

of the contempt charges against him. In that case, the judge gave the contemnor a verbatim transcript of the remarks the court found objectionable and was informed when the contempt hearing was to be held. The Court found that such notice was sufficient to comport with due process. Id. at 578-579.

In the instant case, the show cause order reflects that Judge Haynie verbally advised Manly of the basis of the contempt charge. Further, the order informed Manly that the conduct the court considered contemptuous occurred during motion hour on January 29, 2001, and was contained in the videotape of said proceeding. Given the short duration of the January 29, 2001, proceeding, the exchanges that occurred during that hearing, and the fact that the judge admonished Manly more than once during the exchange, I believe Manly surely knew which statements/conduct were contempt-worthy and the fact that he may be subject to more than one contempt charge. Accordingly, I believe the notice was sufficient.

Manly also maintains that the trial court erred in closing the contempt hearing to the public. It is not disputed that Manly did not object to the closed contempt hearing at anytime during the hearing. In his brief, Manly claims that he and his counsel were not aware that the hearing was closed until after the fact, thus, they did not have the opportunity to preserve the alleged error. I find that hard to believe.

Footnote 1 of Manly's contempt hearing memorandum stated, "Payne [v. Commonwealth, Ky. App., 724 S.W.2d 230 (1986)] also expressly disapproves of contempt hearings that are closed to the public, as this court has proposed that this hearing be." However, Manly never requested or otherwise argued he was entitled to a public contempt hearing in this memorandum. Further, during his ruling in the contempt hearing, Judge Haynie expressly stated that he closed the hearing to protect Manly from further embarrassment and public humiliation regarding the matter. I believe the matter was unpreserved because Manly never asked for a public hearing, nor objected to the fact that the hearing was closed at anytime during the hearing. See McDonald v. Commonwealth, Ky., 554 S.W.2d 84 (1977); Levine v. United States, 362 U.S. 610, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960).

Manly next takes issue with the fact that the lower court did not make written findings in the case. Manly contends that the lack of written findings renders meaningful appellate review impossible. I disagree. There is no requirement that the judge make written findings so long as the findings are dictated somewhere in the record. Skelton v. Roberts, Ky. App., 673 S.W.2d 733 (1984). Judge Haynie made extensive oral findings of fact supporting his ruling at the conclusion of the contempt hearing which were contained in the videotape of those

proceedings and which were clearly audible. Hence, there was no error in the manner of the court's findings.

Finally, Manly argues that Judge Haynie should have been disqualified from presiding over the contempt hearing. Manly cites numerous factors which purport to demonstrate that Judge Haynie was biased in the case, including: the fact that Judge Haynie was the judge in the proceeding wherein the contemptuous conduct occurred and, thus, was a material witness in the matter; that Judge Haynie had an interest in the subject matter in controversy pursuant to KRS 26A.015(2)(c); that Judge Haynie engaged in *ex parte* communications with Manly and Van Houten; and that Judge Haynie's statements and conduct toward Manly indicated a personal bias against Manly.

There is no rule of law that the judge before whom the contemptuous conduct occurred cannot make the final determination of criminal contempt. Cooke v. United States, 267 S.W.2d 517, 45 S. Ct. 390, 69 L. Ed. 2d 767 (1925). Unless there is such a "likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused," the judge in whose presence the contemptuous conduct occurred should not be disqualified from adjudicating the contempt. Taylor v. Hayes, 418 U.S. 488, 501, 94 S. Ct. 2697, 2705, 41 L. Ed. 2d 897 (1974) (quoting Ungar v. Sarafite, 376

U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)). In the present case, I believe Judge Haynie successfully balanced the interests of the court and the interests of Manly so as to avoid the appearance of personal bias against Manly. Judge Haynie acknowledged during the contempt proceedings that Manly was a brilliant attorney, that he had always liked Manly, and that he harbored no animosity towards Manly. Judge Haynie, however, went on to characterize Manly as a "bully" with regard to his conduct toward the court and Van Houten in the domestic case at issue. Given Manly's behavior in the case, I cannot say that such a characterization was unwarranted. Judge Haynie stated that in order to ensure the level of civility in his courtroom, he could not tolerate such conduct and felt he had to punish Manly therefor. From my review of the videotapes of the January 29, 2001, motion hour and the contempt hearing, although Judge Haynie was direct and stern, he remained composed and did not assume a malevolent or argumentative posture with Manly. Unlike the judge in Taylor v. Hayes, 418 U.S. at 501, 94 S. Ct. at 2705, Judge Haynie did not allow himself to become "embroiled in a running controversy" with Manly.

Contrary to Manly's view, I believe that Judge Haynie's *ex parte* communications with Manly in offering a fine in lieu of jail time demonstrated his fairness and willingness

to settle the matter without further hardship to Manly.[3] Moreover, Judge Haynie displayed some matter of restraint in not holding Manly in contempt for the other statements/conduct which I and Judge Haynie recognized to be contemptuous. Finally, I see no merit in Manly's accusation that Judge Haynie had a subject matter interest in the controversy pursuant to KRS 26A.015(2)(c).

For the reasons stated above, I would affirm the Jefferson Circuit Court.

BRIEF FOR APPELLANT:

Christopher N. Lasch
Louisville, KY

Samuel Manly
Louisville, KY

Aubrey Williams
Louisville, KY

ORAL ARGUMENT FOR APPELLANT:

Christopher N. Lasch
Louisville, KY

Aubrey Williams
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BRIEF FOR APPELLEE:

A. B. Chandler
Attorney General

Bill Pettus
Assistant Attorney General
Frankfort, KY

ORAL ARGUMENT FOR APPELLEE:

Morgain Mary Sprague
Frankfort, KY

[3] For future reference, I would point out to the court that KRS 533.030(5), which previously allowed fines to be paid to D.A.R.E. or other local government-sponsored programs, was amended effective August 1, 2002, to eliminate this provision.