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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000877-MR
&
NO. 2008-CA-001014-MR

JAMES MCMILLEN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 06-CR-03883

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: James McMillen, *pro se*, has appealed from the Jefferson Circuit Court's denial of his motion for additional jail time credit. He has also appealed from the denial of his motion pursuant to CR[1] 60.02 to vacate the trial

[1] Kentucky Rules of Civil Procedure.

court's order holding him in direct criminal contempt. The two cases have been consolidated for appellate review. Discerning no error, we affirm.

McMillen was indicted in December 2006 for possession of a handgun by a convicted felon,[2] carrying a concealed deadly weapon,[3] and being a persistent felony offender in the first degree (PFO I).[4] At his arraignment, the trial court placed McMillen in the home incarceration program (HIP) pending further proceedings. Subsequently, McMillen's motion to be released from HIP on his own recognizance was granted.

Following plea negotiations, McMillen entered guilty pleas to the amended charges of possession of a firearm by a convicted felon[5] and being a persistent felony offender in the second degree (PFO II).[6] The charge of carrying a concealed weapon was dismissed by agreement. McMillen was sentenced pursuant to the plea agreement to ten-years' imprisonment.

On November 29, 2007, McMillen filed for shock probation and a hearing was convened on January 23, 2008. The trial court denied the request. Immediately after the trial court's pronouncement, McMillen turned to the Assistant Commonwealth's Attorney, a pregnant female, and stated "I hope it dies in your belly." The trial court admonished McMillen for his comment whereupon

[2] Kentucky Revised Statutes (KRS) 527.040, a Class C felony.

[3] KRS 527.020, a Class A misdemeanor.

[4] KRS 532.080(3).

[5] KRS 527.040, a Class D felony.

[6] KRS 532.080(2).

McMillen "launched into a barrage of inappropriate comments directed at [the prosecutor] and the Court." The trial court found McMillen in direct criminal contempt and sentenced him to serve ninety-days' incarceration immediately following completion of his ten-year sentence.

On March 27, 2008, McMillen wrote a letter requesting the trial court to grant him credit for the time he spent in HIP. The trial court asked the Department of Probation and Parole to recalculate the amount of in-custody credit McMillen was due. On April 4, 2008, McMillen filed a formal motion requesting credit for all the time he had spent in custody prior to beginning his ten year sentence. The Department of Probation and Parole informed the trial court that McMillen received proper credit for all custody time he was due and that the prior calculation was correct. The trial court entered an order on April 17, 2008, finding McMillen was not entitled to any credit for his time served in HIP. McMillen timely appealed from that order.

On April 16, 2008, McMillen moved the trial court to vacate the order holding him in direct criminal contempt. He maintained his actions during the shock probation hearing were due to maltreatment by corrections staff prior to the hearing. The trial court denied McMillen's request on May 6, 2008. McMillen timely appealed and this Court subsequently consolidated the two appeals for purposes of judicial economy.

McMillen first contends the trial court erred in denying his CR 60.02 motion to vacate the order finding him in direct criminal contempt for his

disruptive courtroom behavior. He alleges his behavior resulted from being forced to dress in a jumpsuit that was too small, corrections officers withholding his medications, and being subjected to low temperatures during his transport to the January hearing. We note McMillen raised none of these complaints at the hearing, and did not appear to become upset until after hearing the trial court's ruling. He provides no citation to any authority supportive of his argument. Nevertheless, he urges reversal of the trial court's ruling.

Contempt has been defined as "the willful disobedience of or the open disrespect for the court or its rules." *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001). It is well-settled that courts have the inherent power to punish individuals for contemptuous activities. *Id*. (citing *Arnett v. Meade,* 462 S.W.2d 940, 947 (Ky. 1971); *Underhill v. Murphy,* 117 Ky. 640, 78 S.W. 482, 484 (1904)). The discretion of a trial court to exercise that inherent power is nearly unlimited. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007) (citing *Smith v. City of Loyall*, 702 S.W.2d 839, 839 (Ky. App. 1986)). Thus, "we will not disturb a trial court's decision regarding contempt absent an abuse of discretion." *Id*.

Here, upon pronouncement from the bench that McMillen's motion was denied, McMillen launched into an inappropriate tirade aimed at the prosecutor and the trial court. After making the wholly inappropriate comment to the Assistant Commonwealth's Attorney, McMillen's response to the trial court's admonition regarding his conduct and the court's contempt finding was to proclaim

"Whoop-de-doo. Look, I've got ten years. Keep on rolling. Roll 'til you're satisfied." He then turned to others in the courtroom and inquired, "You actually think I give a damn about what he's talking about? No, I don't care what you say. Go again." Clearly, this type of dialogue showed open disrespect for the court and therefore constituted direct criminal contempt.

"A direct contempt is committed in the presence of the court and is an affront to the dignity of the court. It may be punished summarily by the court, and requires no fact-finding function, as all the elements of the offense are matters within the personal knowledge of the court." *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996) (citing *In re Terry*, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888)). Although given plentiful opportunity to stop his contemptuous behavior, McMillen persisted and purposefully disrespected the court and brought the dignity of the court into question until he was forcibly removed from the courtroom. Based on these facts, we discern no abuse of discretion in the trial court's finding of contempt or in its denial of McMillen's CR 60.02 motion for relief.

Next, McMillen argues the trial court erred in denying his motion for jail time credit for the time he served on home incarceration. We disagree. In *Buford v. Commonwealth*, 58 S.W.3d 490, 491 (Ky. App. 2001), this Court held that "jail-time credit is not allowed for time spent in home incarceration where it is ordered as a form of pretrial release." It is undisputed McMillen was placed on HIP as a form of pretrial release rather than as a part of any sentence for his

crimes. Thus, as the trial court correctly held, McMillen was not entitled to custody credit for the time spent on home incarceration.

For the foregoing reasons, the judgments of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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