STATE OF MICHIGAN

COURT OF APPEALS

CEMETERY COMMISSIONER,

Plaintiff-Appellee,

v

ALVIN BURCHAM,

Defendant-Appellant,

and

FLORAL LAWN MEMORIAL GARDENS, INC. and DEBRA BURCHAM,

Defendants.

UNPUBLISHED
November 17, 1998

No. 201437
Ingham Circuit Court
LC No. 95-081956-CZ

Before: Jansen, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Defendant Alvin Burcham appeals as of right from a February 24, 1997 order holding him to be in criminal contempt for intentionally violating a permanent injunction dated November 4, 1996 and a temporary restraining order dated September 6, 1996. The trial court's sentence for the criminal contempt was thirty days in jail and a fine of $12,750. We affirm in part, and modify the fine amount to $250.

On December 13, 1995, plaintiff commenced an action in the Ingham Circuit Court seeking to require defendant to operate his cemetery, Floral Lawn Memorial Gardens, in accordance with the Cemetery Regulation Act, MCL 456.521 *et seq.;* MSA 21 820(21) *et seq.* Plaintiff essentially alleged that defendant had knowingly made false representations to plaintiff's auditor with respect to the value and financial status of certain statutorily required trust funds. Plaintiff alleged that beginning in January 1988, defendant had falsified certain business records to conceal the fact that he had failed to make deposits into the trust funds as required by law. Pursuant to the Cemetery Regulation Act, cemeteries licensed thereunder are required to open and maintain two types of trust funds into which the proceeds

of “pre-need” sale of cemetery goods and services must be deposited. Because defendant had failed to make the required

deposits into the trust funds, he had unfunded liabilities of over $800,000 through December 31, 1994, and additional unfunded liabilities from January 1, 1995 until the filing of the action against him.

The complaint resulted in a temporary restraining order (September 6, 1996) and later a permanent injunction (November 4, 1996), both of which were negotiated by and consented to by the parties. The injunctions enjoined defendant (with certain specified exceptions) from the sale or assignment of burial rights, entombment rights, columbarium rights, cemetery merchandise, or cemetery services. On November 13, 1996, two agents employed by the Department of Consumer and Industry Services posed undercover as an uncle and niece to determine whether the cemetery was acting in compliance with the injunctions. Ultimately, the end result of the undercover operation was an installment contract in which the agents offered to purchase a plot, vault, and memorial, and gave a cash deposit of $75.40. Defendant's signed sales agreement and payment book were later received by one of the agents.

Because of this sale, on December 18, 1996, plaintiff filed a motion to show cause why Alvin and Jeffrey Burcham (defendant's son) should not be held in criminal contempt. The order to show cause and a search warrant were issued on December 18, 1996, and the warrant was executed on December 19, 1996. The agent executing the search warrant seized fifty-three contracts that had been entered into by defendant after the issuance of the preliminary and permanent injunctions. A show cause hearing was held before the trial court in January 1997. The court's decisions finding defendant to be in criminal contempt, sentencing him to thirty days in jail, and fining him $12,750 were memorialized in an order dated February 24, 1997.

On appeal, defendant raises three issues. He argues that the trial court erred in denying his motion to adjourn, that he was not provided with adequate notice that he could be fined $250 for each contract that he entered into in violation of the injunctions, and that the trial court erred in "stacking" each violation for a total fine of $12,750.

Defendant first argues that the trial court erred in denying his motion to adjourn the show cause hearing. Defendant was originally represented by attorneys from the firm of Hubbard, Fox, Thomas, White & Bengstrom in the underlying action that led to the injunctions. Defendant was served with the order to show cause on December 19, 1996. On January 6, 1997, defendant was informed that those attorneys could not represent him at the show cause hearing. Attorney Kenneth McIntyre was hired by defendant three days before the show cause hearing. The show cause hearing was held on January 16, 1997, January 17, 1997, and January 21, 1997. Defendant's attorney moved for an adjournment at the January 16 hearing, contending that because of his late hire, he was not prepared to adequately cross-examine the witnesses.

The trial court denied the motion to adjourn, stating the following:

> In fact, from December 17th, which was a Tuesday, to Monday, the 13th, which is when Mr. McIntyre was contacted, is one day short of being four weeks. Four weeks is a long time to figure out whether your existing attorney is going to

> represent you and, if not, to get another attorney. Waiting until Monday, January 13th to obtain counsel for a hearing on January 16th appears to be a choice that the [defendant has] made.

The standard of review for a trial court's decision regarding a motion for an adjournment, whether in a criminal or civil proceeding, is for an abuse of discretion. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997); *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). A motion for an adjournment must be based on good cause as shown by the moving party, and a court, in its discretion, may grant an adjournment to promote the cause of justice. *Id.*

The trial court did not abuse its discretion in denying the motion to adjourn. Defendant has not set forth good cause sufficient to warrant granting the motion. Defendant has never given any explanation regarding why his original attorneys could not represent him at the show cause hearing or why defendant did not know until three weeks after being served with the order to show cause that he knew that such would be the case. As noted by the trial court, defendant apparently waited until the last moment to find new counsel. Under these circumstances, we cannot say that the trial court abused its discretion.

Next, defendant argues that he did not receive adequate notice that he could be fined $250 for each contract entered into, thus resulting in a finding by the trial court of fifty-one counts of criminal contempt and a total fine of $12,750. We find that defendant was given adequate notice at least for the November 13, 1996 violation (the undercover operation). However, we find that the trial court improperly "stacked" each finding of criminal contempt (as being each contract entered into) such that defendant was fined $250 for each contract in violation of the injunctions.

Punishment for any contempt proceeding committed outside the presence of the magistrate may be imposed only after proof of the facts charged are made by affidavit or other method and an opportunity has been given to defend. MCL 600.1711(2); MSA 27A.1711(2); *In re Contempt of Robertson*, 209 Mich App 433, 438; 531 NW2d 763 (1995); see also MCR 3.606(A). When a contempt is committed outside the presence of the court, the accused must be apprised of the charges, afforded a hearing regarding those charges, and given a reasonable opportunity to meet the charges by defense of explanation. *Robertson, supra*, p 438. An individual charged with contempt is entitled to be informed of whether the contempt proceeding filed is criminal or civil and also the specific offenses with which the accused is charged. *In re Contempt of Rochlin*, 186 Mich App 639, 649; 465 NW2d 388 (1990). The individual so charged is also entitled to be informed of the nature of the charge and to be given adequate opportunity to prepare his defense and to secure the assistance of counsel. *Id.*

The ex parte motion to show cause is specifically labeled as being criminal contempt and the November 13, 1996 violation is alleged with specificity in paragraph nine. The two paragraphs which follow also allege that defendant and his agents or employees engaged in similar transactions violative of the injunctions by entering into other contracts for the sale of cemetery goods or services. Therefore, we find that defendant was given adequate notice of the November 13, 1996 violation as being criminal contempt and that the trial court properly held that defendant was guilty of criminal contempt beyond a reasonable doubt based on that specific violation.

However, even were we to agree that the other contracts entered into constituted separate acts of criminal contempt and that defendant was given adequate notice of each of those charges[1] of criminal contempt, we would still find that the trial court erred in "stacking" each charge of criminal contempt such that he was found guilty of fifty-one counts of criminal contempt and could be fined $250 for each contract wrongfully entered into.

The relevant statute in this regard is MCL 600.1715(1); MSA 27A.1715(1), which provides:

> Except as otherwise provided by law, punishment for contempt may be a fine of not more than $250.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 30 days, or both, in the discretion of the court.

Our Supreme Court has stated that the above statutory provision limits a court's sentencing discretion in all contempts, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform, to thirty days imprisonment, or a fine of $250, or both. *In re Contempt of Dougherty*, 429 Mich 81, 91;413 NW2d 392 (1987); see also *Rochlin, supra*, p 646 (§ 1715 implicitly recognizes the difference between civil contempt and criminal contempt and the punishment for criminal contempt, or the committing of an act forbidden by the court, is limited to a $250 fine, thirty days imprisonment, or both).

We believe that § 1715(1) limits the trial court's authority to impose a maximum fine of $250 in this case. Contrary to plaintiff's contention, §1715 is not an unconstitutional infringement on the judiciary. Our Supreme Court has recognized that the *power* to punish for contempt is an inherent power of the courts and that statutory provisions, such as § 1715, are merely declaratory of the court's contempt powers and do not restrict or abridge those rights. *Dougherty, supra*, pp 91-92, n 14; *Cross Co v UAW Local 155*, 377 Mich 202, 210, n 3; 139 NW2d 694 (1966); *In re Scott*, 342 Mich 614, 618; 71 NW2d 71 (1955); *Langdon v Wayne Circuit Judges*, 76 Mich 358, 367; 43 NW 310 (1889). While courts have the *power* to punish for contempt, §1715 does not infringe on the court's *power* to punish for contempt; it merely prescribes what punishment may be imposed for a finding of contempt. See *Cross Co, supra*, p 223; *Catsman v Flint*, 18 Mich App 641, 648; 171 NW2d 684 (1969).

Further, we find that the plain language of § 1715(1) compels the result that a maximum fine of $250 may be imposed in this case. Defendant argues and plaintiff concedes that § 1715(1) is silent with respect to whether a court may impose a fine of $250 for each act of contempt as a result of a single hearing. This Court has held that §1715 limits the amount of a fine imposable for a single finding of contempt to a maximum of $250. *Catsman, supra*, p 649; *Ann Arbor v Danish News Co*, 139 Mich App 218, 236; 361 NW2d 772 (1984); *Acorn Bldg Components, Inc v UAW Local 2194*, 164 Mich App 358, 368; 416 NW2d 442 (1987); *In re Contempt of Johnson*, 165 Mich App 422, 428-429; 419 NW2d 419 (1988).

In *Catsman, supra,* p 650, this Court stated, "We do not, of course, suggest that a court could not make a subsequent finding of a reiterated or continuing contempt and impose the maximum statutory fine for such subsequent contempt." We do not believe that this language permits the trial court to "stack" each alleged violation such that the fine could be multiplied by each count (here, fifty-one). Rather, we read this to mean that the trial court may make a *subsequent* finding at a new, separate hearing and impose the maximum fine for each subsequent finding of contempt. The problem with "stacking" fines arising from a single proceeding was noted in *Ann Arbor, supra,* pp 236-237:

> If the City of Ann Arbor were correct that the fine could be $250 for each day [that defendants violated the court's order], it would also follow that the jail term could be 30 days for each day the store remained open. If that were true, this would not be a petty criminal contempt and [defendant] Shoultes would have been entitled to a jury trial. Since we have held that this was a petty criminal contempt, logic compels us to conclude that both penalties provided for in the statute indicate a maximum penalty and that, therefore, the fine imposed upon Shoultes cannot exceed $250.[2]

In *Ann Arbor,* the trial court fined Shoultes $250 for each day of the nineteen days that his bookstore remained open in violation of the court's order; however, this Court held that a maximum fine of $250 total could be imposed. Similarly, in *Johnson, supra,* pp 428-430, this Court found that the trial court erred in fining Johnson $100 a day for each day that he violated the court's order, for a total of $500. Again noting that there was no subsequent finding of a reiterated or continuing contempt, this Court held that § 1715 limited the total fine amount to $250. *Id.,* p 429.

There is really no authority to permit the trial court to "stack" the fines in this case. This Court has consistently rejected such attempts to "stack" fines in such a manner. *Johnson, supra,* pp 428-429; *Acorn, supra,* p 368; *Ann Arbor, supra,* pp 235-237; *Catsman, supra,* pp 649-650. Accordingly, we hold that the trial court erred in "stacking" each alleged violation found at a single hearing.[3] MCL 600.1715(1); MSA 27A.1715(1) limits the maximum fine to be $250. We, therefore, modify the sentence by reducing the fine under § 1715(1) to $250. In all other respects, the trial court is affirmed.

Affirmed in part, and modified in part as set forth in this opinion.

/s/ Kathleen Jansen
/s/ Janet T. Neff

[1] It is highly questionable that defendant did indeed receive adequate notice of the other acts of criminal contempt, those being the contracts entered into other than the November 13, 1996 contract. If an accused in a criminal contempt proceeding is entitled to be informed of the *specific* offenses with which he is charged, *Rochlin, supra,* p 649, then defendant was not specifically informed of the other fifty offenses because the motion to show cause only states that that defendant and his agents or employees

have on more than one occasion since November 13, 1996, engaged in similar acts violative of the injunctions by entering into contracts precluded by the injunctions.

[2] At this point, we note that the trial court initially sentenced defendant to 520 days in jail (ten days for each finding of contempt). The trial court later amended its sentence because, if the penalty exceeds six months imprisonment, then a defendant is entitled to a jury trial. *Ann Arbor, supra*, p 233; *People v Goodman*, 17 Mich App 175; 169 NW2d 120 (1969). Defendant did not receive a jury trial in this case. Accordingly, if the trial court could not "stack" the jail provision (ten days times each of the violations) without violating defendant's right to a jury trial, then the same principle applies where the court could not "stack" the fine because there is a constitutional right to a jury trial for "serious" criminal contempt. *Bloom v Illinois*, 391 US 194; 88 S Ct 1477; 20 L Ed 2d 522 (1968).

[3] Plaintiff's argument that a $250 maximum fine would permit defendant to profit from his contemptuous conduct was addressed, and rejected, in *Catsman, supra*, p 649 ("We recognize the problem that this limited amount may not in given cases carry sufficient compulsion against a contumacious individual before the court. But at the same time we recognize the potential for abuse where the imposable fine is not subject to limitation.").