

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 15, 2016

v

LAWRENCE LEE BYARD,

Defendant-Appellant.

No. 324870
Cheboygan Circuit Court
LC No. 01-002488-FH

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

Defendant appeals a trial court order holding him in contempt for failing to make required restitution payments. By mistakenly focusing on the order of probation, which expired on October 11, 2007, rather than on the restitution order, which remains in effect until paid in full, defendant has missed the mark with his appellate challenges. As the court had the authority to hold defendant in contempt for his failure to pay in violation of the restitution order, we affirm.

I. BACKGROUND

According to testimony given at defendant's preliminary examination, defendant became intoxicated at a bar on the evening of August 3, 2001. He left the bar at the same time as Jamie Wilson and three others. Defendant followed the foursome to a nearby gas station, driving recklessly along the way. At the gas station, defendant attempted to instigate a physical altercation with Wilson. Defendant drove away from the gas station several times, but kept returning to squeal his tires and do "donuts" in the parking lot. Wilson eventually approached to speak to defendant and then stood in front of defendant's vehicle, trying to lure him out. Instead of exiting the vehicle, defendant accelerated and ran over Wilson, causing severe injury.

On April 2, 2002, defendant pleaded no contest to operating a motor vehicle while visibly impaired causing injury in violation of MCL 257.625(5). The court sentenced defendant to 11 months of incarceration and a five-year probationary term. As part of the plea agreement, defendant stipulated that he would "make restitution in this matter." The parties heatedly debated the amount of Wilson's damages, including medical and rehabilitation costs, wage loss, and pain and suffering. At the close of the restitution hearing, the court ordered defendant to pay \$939,128.

Defendant appealed the amount of the restitution order and challenged the propriety of various elements for which restitution amounts were calculated. This Court affirmed the order, but remanded for reallocation of reimbursement for Wilson's medical and rehabilitation expenses between the responsible insurance company and the Michigan Catastrophic Claims Association. *People v Byard*, 265 Mich App 510; 696 NW2d 783 (2005).

Defendant was not dissuaded. He moved the trial court to dismiss the restitution order following this Court's opinion. Defendant contended that he had filed for personal bankruptcy the previous year and that the Bankruptcy Court had discharged his debt against the insurance company and Wilson. The trial court reviewed the Bankruptcy Court orders and concluded that they did not discharge defendant's restitution debt. Ultimately, as a result of these battles, defendant made no restitution payment until May 2005.

In December 2006, the prosecution sought relief because defendant had transferred his house to his sister via quitclaim deed without notifying the court or seeking court approval. This transfer was a fraudulent conveyance to hide assets, the prosecution asserted. At a July 2007 hearing, the court chastised defendant for his payment history and continued failure to take responsibility for his actions. However, given defendant's evidence regarding the real estate market and the value of his home, the court declined to hold him in contempt at that time.

Shortly thereafter, defendant completely stopped making restitution payments. Defendant later explained that when he was discharged from probation on October 11, 2007, his probation officer advised him that he was no longer required to pay. However, the discharge order specifically indicated that defendant had not successfully completed all conditions of his probation and that he still owed \$891,778 in restitution to be made in \$1,500 monthly installments.

For reasons unknown, no one pursued payment from defendant until April 16, 2014. At that point, the circuit court, on request from its collection clerk, issued an order directing defendant to appear and show cause why he should not be held in criminal contempt for his failure to make court-ordered restitution. Defendant complained that the pursuit of contempt proceedings against him was tantamount to a holding him in violation of his probation. The court lacked jurisdiction to take such action, defendant contended, because he had been discharged from probation more than six years earlier. Defendant further contended that the criminal contempt proceedings were untimely filed beyond the six-year statutory period of limitations provided in MCL 767.24(6).¹ Defendant therefore sought dismissal.

At the hearing on defendant's motion to dismiss, counsel urged that any proceeding going forward should sound in civil, rather than criminal, contempt. Counsel acknowledged that MCL 769.1a(13) maintains a restitution order in effect until it is paid in full. However, counsel

¹ The statute was amended by 2015 PA 324, and the relevant statutory limitations period is now found in subsection (7), which provides: "All other indictments may be found and filed within 6 years after the offense is committed." MCL 747.24(7).

argued, the statute also limits the method by which a restitution order can be enforced to those methods applicable to civil judgments, which did not include contempt proceedings.

The trial court agreed that defendant's position regarding the method of enforcement would have been accurate before the Legislature's 2005 amendment of MCL 600.1701(e). Prior to 2005, the statute granted the courts authority to hold a party in contempt "for the nonpayment of any sum of money which the court has ordered to be paid, *in cases where by law execution cannot be awarded for the collection of the sum.*" (Emphasis added.) The Legislature removed the limitation, however, leaving courts with the authority to hold a party in contempt "for the nonpayment of any sum of money which the court has ordered to be paid." *Id.* Declaring contempt a proper recourse, the court denied defendant's motion to dismiss. It also ordered defendant to make \$1,000 monthly payments into an escrow account pending resolution of the matter. Defendant sought an interlocutory appeal in this Court, which application we denied "for failure to persuade the Court of the need for immediate appellate review." *People v Byard*, unpublished order of the Court of Appeals, entered October 14, 2014 (Docket No. 322668).

At the subsequent show cause hearing, defendant conceded awareness of the restitution order, but claimed that his probation officer advised him that the order was "a civil matter" and "that there's no reason to . . . pay any more." On that advice, defendant decided to cease payment.

The court first ruled that it maintained jurisdiction to hold defendant in contempt despite that his probation had been discharged, citing MCL 769.1a(13). The court also maintained that it had the authority to continue enforcement of its restitution order against defendant. As defendant had not complied with that order for seven years, the court held him in contempt, although it did not indicate whether the contempt was civil or criminal. And the court ordered defendant to continue paying \$1,000 each month into escrow pending the result of this appeal.

II. ANALYSIS

As a general rule, we review for an abuse of discretion a trial court's decision to hold a party in contempt. *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 386; 853 NW2d 421 (2014). We review de novo underlying jurisdictional questions, *id.* at 382, as well as issues of statutory interpretation underpinning the court's ruling. *In re Contempt of Tanksley*, 243 Mich App 123, 127; 621 NW2d 229 (2000).

The trial court in this matter had inherent power to enforce its restitution order by its chosen method—holding defendant in contempt of court. See *Shillitani v United States*, 384 US 364, 370; 86 S Ct 1531; 16 L Ed 2d 622 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."); *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499; 608 NW2d 105 (2000) ("Michigan courts of record have the inherent common-law right to punish all contempts of court."). The Legislature codified that inherent right in MCL 600.1701, which since the passage of 2005 PA 326, has provided, in relevant part:

The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:

* * *

(e) Parties to actions, attorneys, counselors, and all other persons for the nonpayment of any sum of money which the court has ordered to be paid.

Indeed, our Supreme Court has held that contempt proceedings are a proper method of censuring a probationer who defaults on his restitution obligation. See *People v Music*, 428 Mich 356, 362 n 5; 408 NW2d 795 (1987).

MCL 769.1a(13) does not preclude the use of contempt proceedings against a recalcitrant restitutioner. The statute provides, in relevant part:

An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution *in the same manner as a judgment in a civil action or a lien*. [Emphasis in original.]

The statute provides that a party “may” seek enforcement in the listed manner but does not require it. See *Walters v Naddell*, 481 Mich 377, 383; 751 NW2d 431 (2008) (holding that the term “may” generally denotes a discretionary action). As such, the court was free to use another tool, such as its contempt powers, to enforce the restitution order.

Contrary to defendant's assertion, the trial court's contempt action was not a de facto violation of his probation. The court did not attempt to revoke or reinstate the expired probationary term or imprison defendant. See MCL 771.4 (governing the revocation of probation). Rather, the restitution order survived the probation discharge, as indicated on the face of the discharge order and as provided in MCL 769.1a(13): “An order of restitution entered under this section *remains effective until it is satisfied in full*.” (Emphasis added.) Defendant violated the restitution order by failing to make his restitution payments. The court's actions responded to that violation, and did not find a violation of defendant's discharged probation.

The court also did not lose jurisdiction based on the passage of time. Although the trial court did not indicate whether it found defendant guilty of criminal contempt or liable for civil contempt, the remedy suggests that the order was civil in nature. In a civil contempt action, the court uses its powers to coerce the party to comply with the court's order. This can be done with the threat of a fine or imprisonment, but coercion of that nature is not required. When faced with criminal contempt, the court issues a punishment, either monetary or by confinement. See *In re Estate of Bradley*, 494 Mich 367, 379-380; 835 NW2d 545 (2013). As described by this Court in *Porter v Porter*, 285 Mich App 450, 455-457; 776 NW2d 377 (2009):

“Criminal contempt differs from civil contempt in that the sanctions are punitive rather than remedial.” “Criminal contempt is a crime in the ordinary sense; it is a

violation of the law, a public wrong which is punishable by fine or imprisonment or both.” Criminal contempt is intended to punish the contemnor for past conduct that affronts the dignity of the court. Thus, when a court exercises its criminal contempt power it is not attempting to force the contemnor to comply with an order, but is simply punishing the contemnor for past misconduct that was an affront to the court’s dignity. On the other hand, if the court employs its contempt power to coerce compliance with a present or future obligation or to reimburse the complainant for costs incurred by the contemptuous behavior, including attorney fees, the proceedings are civil. Thus, there “are two types of civil contempt sanctions, coercive and compensatory.” Nevertheless, civil sanctions primarily intended to compel the contemnor to comply with the court’s order may also have a punitive effect. “ ‘ “If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil The order in such a case is not in the nature of a punishment, but is coercive, to compel him to act in accordance with the order of the court.” ’ ”

Differentiating between civil contempt and criminal contempt is not easy because both forms of contempt might result in the contemnor’s being imprisoned for willfully failing to comply with an order of the court. Thus, all contempt proceedings are referred to as “quasi-criminal” or “criminal in nature.” [Citations omitted, omission in original.]

Here, the trial court did not impose additional fines or incarceration, or even actually punish defendant for his past transgressions. The court merely ordered defendant to comply with the 2003 order to make restitution, and dictated a new payment schedule. This was a civil contempt order seeking to coerce cooperation, not to criminally punish the defendant. Accordingly, the six-year statute of limitations provided in MCL 767.24(7) is inapplicable.

Finally, defendant contends that the trial court violated the Ex Post Facto clauses of US Const, art 1, § 10, and Const 1963, art 1, § 10, by holding him guilty of contempt based on a 2005 amendment to MCL 600.1701, when he was convicted and sentenced in 2002.

The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence. [*People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014).]

The 2005 amendment of MCL 600.1701 did not create any Ex Post Facto implications. The amendment alters the method by which a court may enforce its existing orders for monetary payment. Previously, the court could only use contempt proceedings “in cases where by law execution cannot be awarded for the collection of the sum.” Now, contempt proceedings can be used in any case where a party fails to follow the court’s payment order. This amendment does not allow the prosecution to convict a defendant of contempt based on less evidence, it does not increase the punishment for a criminal contempt, it does not increase the punishment for a crime,

and it does not criminalize previously innocent conduct. Accordingly, defendant cannot establish an Ex Post Facto violation.

We affirm.

/s/ Elizabeth L. Gleicher

/s/ William B. Murphy

/s/ Donald S. Owens