

RENDERED: September 4, 1998; 2:00 p.m.

NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-002561-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, SPECIAL JUDGE
ACTION NO. 94-CR-0094

MARK DUNAGAN (FORMERLY
ROBERTS)

APPELLEE

OPINION

VACATING AND REMANDING

* * * * *

BEFORE: COMBS, DYCHE, and SCHRODER, Judges.

COMBS, JUDGE. The Commonwealth appeals from an order of the Bullitt Circuit Court dismissing an indictment against Mark Dunagan for flagrant nonsupport, Kentucky Revised Statute (KRS) 530.050. The sole issue is whether the double jeopardy doctrine prevents prosecuting a defendant for flagrant nonsupport after a civil court has sentenced him to jail for contempt for failing to pay child support. After a review of the record, the applicable

law, and the arguments of counsel, we conclude it does not and vacate and remand.

The Jefferson Circuit Court dissolved the marriage of Dunagan and his former wife in 1987. The court ordered Dunagan to pay child support in the amount of \$65.00 per week. In October 1994 a Bullitt County grand jury indicted Dunagan for flagrant non-support. According to his former wife's figures, Dunagan owed over \$10,000.00 in child support at that time. In the Spring of 1996, the Jefferson Circuit Court held Dunagan in contempt for failing to pay child support. It sentenced him to serve ninety (90) days in jail but discharged the sentence on the condition that he pay the court-ordered child support and make payments on the arrearage. Dunagan moved the Bullitt Circuit Court to dismiss the criminal indictment on double jeopardy grounds in August 1996. The court granted the motion, and this appeal followed.

The Commonwealth argues that criminal prosecution for flagrant nonsupport after a civil contempt proceeding is not double jeopardy. It contends that the civil contempt proceeding did not place Dunagan in jeopardy in the first place. Dunagan responds by characterizing the Jefferson Circuit Court contempt order as criminal contempt, arguing that double jeopardy bars prosecution because the elements of the contempt charge are the same as the charge of flagrant nonsupport.

We recently addressed this issue in Commonwealth v. Bailey, Ky. App., ___ S.W.2d ___, 45 Ky. L. Summ. 7 (May 29, 1998). We held that a person convicted of flagrant nonsupport may also be subjected to civil action -- even though both the criminal and the civil actions are based upon the same failure to pay support -- as long as the purpose of the civil action is coercive rather than punitive.

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). 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." Blakemen v. Schneider, Ky., 864 S.W.2d 903 (1993).

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, 113 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. Blakeman, supra. If the court's purpose is to punish, the sanction is 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.

Id. Bailey also held that if the contemnor shows that he is

financially unable to comply with the court's order, the imprisonment for contempt is punitive. Id.; see Lewis v. Lewis, Ky., 875 S.W.2d 862, 864 (1993).

In Bailey, the motion for civil contempt followed the conviction for flagrant nonsupport. In the case before us, the reverse sequence of events occurred; the order of contempt was imposed before the criminal charge was resolved. However, the principle is the same. A person subjected to civil action may also be convicted of nonsupport or flagrant nonsupport based upon the same failure to pay support -- as long as the underlying purpose of the civil action was coercive and not punitive. Bailey, supra.

The crucial question is whether the Jefferson Circuit Court contempt order was for civil or criminal contempt. By order of this Court, the Commonwealth supplemented the record with a copy of the order. Jefferson Circuit Court Judge Potter found Dunagan in contempt of court and sentenced him to ninety (90) days in jail. The sentence was discharged on the condition that he pay all court-ordered child support and \$25.00 per week toward the arrearage. According to Dunagan, when he attempted to pay monthly rather than weekly, the court required him to spend thirty (30) days in jail and probated the remaining sixty (60) days on the condition that he comply with the court order.

We construe the order to be one of civil contempt.

Dunagan's release from jail was conditioned upon compliance with previous court orders seeking to compel action for the benefit of a party litigant. Burge, supra. Significantly, Dunagan has not argued that he lacked the financial ability to comply with the order. Lewis, supra. Since the Jefferson Circuit Court order was for civil contempt, Dunagan can be prosecuted for flagrant nonsupport without violating the prohibition against double jeopardy. Bailey, supra.

For the foregoing reasons, the order of the circuit court is vacated and the case is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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