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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001841-MR

CHRISTOPHER HENSON

APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CR-00461

COMMONWEALTH OF KENTUCKY

APPELLEE

TO BE HEARD WITH: NO. 2001-CA-002752-MR

CHRISTOPHER HENSON

APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CR-00461

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING APPEAL NO. 2001-CA-001841-MR AND
REVERSING APPEAL NO. 2001-CA-002752-MR

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BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Christopher Henson (hereinafter "Henson") has appealed from two orders of the Kenton Circuit Court, the first being the August 9, 2001, order of contempt¹ and the second being the December 3, 2001, order denying his motion to remove the sex offender registration requirements.² Having reviewed the parties' briefs, the certified records and the applicable case law, we affirm the circuit court's order holding Henson in contempt, but reverse the circuit court's order denying Henson's motion to remove the sex offender registration requirements and remand for further proceedings.

On October 22, 1999, the circuit court entered a judgment and sentence on a plea of guilty and an order of conditional discharge following its acceptance of Henson's guilty plea to an amended charge of sexual abuse, second degree. Henson was sentenced to twelve months' imprisonment, which the circuit court conditionally discharged for two years provided that he abide by several conditions. Although Henson did not appeal from this judgment, he did appeal from a post-judgment ruling ordering him to pay the fee for the guardian *ad litem* appointed to represent the child victim during his prosecution

¹ Appeal No. 2001-CA-001841-MR.

² Appeal No. 2001-CA-002752-MR.

for the charge. This Court affirmed the circuit court's order in an opinion rendered January 18, 2002.³

On July 30, 2001, the circuit court held a "status hearing" that was apparently based upon Michelle Price's (hereinafter "Price") assertion that Henson had violated the terms of his conditional discharge. Price, who is also Henson's niece, had been attempting, unsuccessfully, to obtain an emergency protective order against Henson through the Commonwealth Attorney's office. During the hearing, Judge Summe informed Price that she needed to discuss the situation with a Crime Victim's Advocate, and instructed her to remain in the courtroom so that she could speak with a victim's advocate. Judge Summe then informed Henson that he could leave the courtroom. Henson turned to leave, walked halfway down the middle aisle when, according to his own testimony, he paused and said, "Come on, let's go" to his brother sitting in the gallery. According to Price, who was sitting in the row in front of Henson's brother, Henson bumped up against her and said, "You f'ing b, I'm prosecuting you."⁴ Thereupon, Price raised her hand and informed the circuit court that Henson was already harassing her. Judge Summe had the bailiffs place Henson in custody.

³ The Supreme Court denied Henson's motion for discretionary review of that decision on February 12, 2003.

⁴ The video record, which clearly shows Henson, did not pick up Henson's voice or reveal any physical contact between Henson and Price.

After noting that Henson had acted in an inappropriate manner in her courtroom, she appointed him an attorney and scheduled a contempt hearing for August 6, 2001. Although the situation was one of direct criminal contempt, Judge Summe opted to hold a hearing and allowed witnesses to testify as to what they observed and heard in the courtroom. Following the introduction of testimony, Judge Summe found that Henson harassed Price in her courtroom and that he was in contempt of court. Accordingly, Judge Summe sentenced Henson to six months and ordered him to serve seven days, with the remainder probated for two years. In the order of contempt entered August 9, 2001, Henson was placed on active supervision with conditions for the two-year period. It is from this order that appeal No. 2001-CA-001841-MR was taken.

Following the completion of his service of seven days, Henson reported to Probation and Parole, where he was required to register as a sex offender. On August 30, 2001, Henson moved the circuit court to remove his name from the sex offender registration list because the version of the statute in effect at the time he entered his plea and was sentenced did not require registration for his offense of sexual abuse, second degree. A hearing was held on the motion on September 17, 2001, and the circuit court took the matter under advisement.

On October 1, 2001, Henson appeared in court after having been arrested due to violations of his probation on the contempt sentence. The circuit court held a probation violation hearing on November 5, 2001, following which Henson's probation was revoked. The circuit court found that Henson had violated the terms of his contempt probation by possessing alcohol, a deadly weapon,⁵ ammunition,⁶ a police scanner,⁷ and pornographic material, including mail-order bride and Immunization and Naturalization Service documents. Accordingly, the circuit court sentenced him to serve the remainder of the six-month sentence pursuant to the order of contempt.

During the November 5, 2001, hearing and at a subsequent November 19, 2001, court appearance, counsel for Henson again raised the still-pending motion to remove his name from the sex offender registry. The circuit court indicated that the Commonwealth would be able to choose whether Henson needed to register after the completion of his six-month sentence. However, she would not have him unregister prior to that time. Finally, on December 3, 2001, the circuit court entered an order overruling Henson's motion to remove his name

⁵ Box cutters.

⁶ No firearms were recovered as Henson had apparently pawned his gun a few years before.

⁷ The scanner was tuned either to the Covington Police Department, as the circuit court found, or to the weather channel, but was not set up to transmit.

from the sex offender registration requirements without any further elaboration. It is from this order that appeal No. 2001-CA-002752-MR was taken.

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The Supreme Court of Kentucky thoroughly discussed the issue of contempt in Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1997):

Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court. "Contempts are either civil or criminal." Gordon v. Commonwealth, 141 Ky. 451, 133 S.W. 206, 208 (1911). Civil contempt consists of the failure of one to do something under order of court, generally for the benefit of a party litigant. Examples are the willful failure to pay child support as ordered, or to testify as ordered. While one may be sentenced to jail for civil contempt, it is said that the contemptuous one carries the keys to the jail in his pocket, because he is entitled to immediate release upon his obedience to the court's order. Campbell v. Schoering, Ky.App., 763 S.W.2d 145, 148 (1988).

Criminal contempt is conduct "which amounts to an obstruction of justice, and which tends to bring the court into disrepute." Gordon, supra, 141 Ky. at 463, 133 S.W. at 208. "'It is not the fact of punishment but rather its character and purpose, that often serve to distinguish' civil from criminal contempt." Shillitani v. United States, 384 U.S. 364, 369, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622, 627 (1966) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797, 806 (1911)). If the court's

purpose is to punish, the sanction is criminal contempt.

Criminal contempt can be either direct or indirect. 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. In re Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888). Indirect criminal contempt is committed outside the presence of the court and requires a hearing and the presentation of evidence to establish a violation of the court's order. It may be punished only in proceedings that satisfy due process. Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925).

"When contempt is criminal in nature, it is necessary for all elements of the contempt to be proven beyond a reasonable doubt. Brannon v. Commonwealth, 162 Ky. 350, 172 S.W. 703 (1915).

Evidence necessary for a finding of contempt must show willful disobedience toward, or open disrespect for, the rule or orders of a court. Burge, supra." Pace v. Commonwealth, Ky.App., 15 S.W.3d 393, 396 (2000).

In the case before us, the act of harassment Price complained of occurred in the courtroom in the presence of the judge, bringing it under the direct criminal contempt category. We agree with the circuit court that such disrespectful behavior exhibited by Henson in the courtroom while the court was in session would tend to harm the dignity and authority of the

court, as well as bring it in disrepute. Although the circuit court was not required to hold a hearing as the contemptuous behavior occurred in the judge's presence, Henson was nevertheless afforded a hearing and the opportunity to present a defense. Based upon the witnesses' testimony, in particular that of the bailiff, the circuit court had sufficient evidence before it to find Henson in criminal contempt of court. The sentence was not excessive, especially as the majority of the six-month sentence was probated.

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This particular appeal concerns the application of the sex offender registration laws of KRS 17.500, et seq. This Court placed the appeal in abeyance pending the Supreme Court's rendition of its decision in Hyatt v. Commonwealth, Ky., 72 S.W.3d 556 (2002). However, Hyatt did not resolve the issue in this appeal as to whether Henson should have been required to register as a sex offender following his service of seven days pursuant to the order of contempt. We now hold that Probation and Parole should not have required Henson to register as a sex offender and that the circuit court should have granted his motion and ordered his information removed from the registry.

In the current version of the chapter, KRS 17.500(4)(a) provides that a "registrant" is "any person eighteen (18) years of age or older at the time of the offense

. . . , who has committed: 1) A sex crime; or 2) A criminal offense against a victim who is a minor." KRS 17.510(3) provides that "[a]ny person required to register pursuant to subsection (2) of this section shall be informed of the duty to register by the court at the time of sentencing and by the official in charge of the place of confinement upon release."

In the present matter, it is undisputed that Henson was convicted in 1999 of the offense of sexual abuse, second degree. At the time he pled guilty and the circuit court entered the judgment, the version of the sex offender statute in effect did not require him to register as a sex offender and therefore he did not do so. However, the offense for which Henson was jailed in this appeal was criminal contempt of court, which is neither a sex crime nor a criminal offense against a minor victim. Furthermore, the circuit court, correctly, never informed Henson that he had a duty to register. Accordingly, Probation and Parole should not have required him to complete a sex offender registration form and should not have posted his information on the web site maintained by the Kentucky State Police. Therefore, the circuit court erred in denying Henson's motion to remove the sex offender requirements.

Although the issue is not before us, we have noted in the record that the circuit court revoked Henson's probation on the order of contempt on November 7, 2001, and ordered him to

serve the full six-month sentence. At the revocation hearing, the circuit court mentioned that it would be up to the Commonwealth to decide whether Henson would be required to register as a sex offender following his release. This is precisely the situation that is presently before us. Henson was ordered to complete a six-month term for an offense that was neither a sex crime nor a criminal offense against a minor victim, so that the provisions of KRS 17.500, et seq., would have no application to him. Therefore, Henson should not be required to register as a sex offender once released from the service of his six-month sentence.

CONCLUSION

For the foregoing reasons, the circuit court's order of contempt in appeal No. 2001-CA-001481-MR is affirmed, and the circuit court's order denying Henson's motion to remove the sex offender requirements in appeal No. 2001-CA-002752-MR is reversed, and the matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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