

RENDERED: NOVEMBER 30, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002375-MR

DEBORAH KAY RISNER BURNS

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 06-CI-00042

ROBERT EUGENE BURNS, JR.

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: Deborah Kay Risner Burns appeals from the Mason Circuit Court's order of November 9, 2006, in which the trial court held her in contempt and sentenced her to seven-days' incarceration. On appeal, Deborah argues that her contumacious conduct was not proved beyond a reasonable doubt, that the trial court should have held her in civil contempt rather than criminal contempt, that her seven-day sentence was cruel and unusual punishment, and that the trial court failed to make a specific finding that she

willfully disobeyed one of the court's orders. Finding that the trial court did not abuse its discretion, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Deborah and Robert were married in 1994 and had one child, Izabellah. Robert filed a petition for dissolution in early 2006. Pursuant to a domestic violence order Deborah had custody of Izabellah.¹ By court order dated August 11, 2006, Robert had unsupervised visitation with Izabellah on weekends.

Not long after the trial court entered the visitation order, Robert filed a motion with the trial court seeking to hold Deborah in contempt. In Robert's affidavit filed in support of his contempt motion, Robert averred that he was scheduled for visitation with Izabellah on the weekend of September 22, 2006. He further averred that he and Deborah were to exchange the child at the Maysville Police Station as previously ordered by the trial court; however, Robert alleged that Deborah failed to appear at the police station. On that day, the Maysville Police dispatcher generated a document, which Robert attached to his motion, memorializing that Deborah had failed to appear for the exchange of Izabellah.

The trial court held an evidentiary hearing on November 9, 2006, regarding Robert's allegation of contempt. After being placed under oath, Robert testified that he

¹ Although not relevant to the issues at hand, at one point, Deborah filed a motion to suspend Robert's visitation with Izabellah, supported by Deborah's affidavit that included an accusation that Izabellah had been sexually abused while in the care of Robert. These allegations were not against Robert but apparently were aimed at relatives. Based on Deborah's allegations, a guardian *ad litem* was appointed for Izabellah, as well as a child psychologist to evaluate her. Izabellah's contact with certain relatives of Robert's was limited. It is apparent that the parties' divorce proceedings were very bitter.

was to have weekend visitation on September 22 with Izabellah. According to Robert, he waited at the Maysville Police Station until 6:00 p.m., but Deborah never appeared. Before leaving, Robert requested the police dispatcher to note in his log that Deborah had failed to appear. During his testimony, Robert insisted that he did not have physical possession of Izabellah at any time during the weekend in question.

After Robert's testimony, his attorney called Deborah to testify. Upon cross-examination, Deborah claimed that Robert had physical possession of Izabellah on the weekend of September 22. Robert's counsel asked Deborah this question: if an officer testified that he saw Deborah driving by the police station on that day with a child and a yellow balloon in the vehicle, then would that be a fabrication? Instead of answering the question, Deborah testified that she could not recall all that transpired on September 22. Robert's counsel asked her if she had taken Izabellah to a birthday party on that day, and she replied that she could not recall.

According to Deborah, she wrote Robert's visitation schedule on a calender, and she claimed that she followed the calender carefully. She attested that when she and Robert exchanged possession of Izabellah, she did not enter the police station near dispatch but through another door where the dispatcher would be unable to see her. Deborah speculated that Robert could easily claim that she had failed to deliver Izabellah because the dispatcher would not have been able to see her. Deborah admitted that she could not honestly say what happened but remembered she went to Maysville on the weekend of September 22 because that was the weekend of the barbecue festival. She

insisted that she remembered that on the weekend of the barbecue festival she did not have possession of Izabellah. Deborah then claimed that she and Robert had exchanged possession of Izabellah at the police station but on the side of the building away from the dispatcher's view.

After Deborah testified, Robert's mother, Peggy Burns, testified.

According to Peggy, Robert told her that he was supposed to have visitation, but Deborah did not appear. Upon cross-examination, Deborah's attorney asked Peggy how she knew this. Peggy replied that Robert told her this on September 22.

After Peggy testified, Deborah called a friend, Betsy Baltser, to testify.

Betsy attested that she was with Deborah on the weekend of September 22 and claimed that Deborah did not have Izabellah with her. According to Betsy, she recalled a conversation with Deborah on September 22 in which Deborah told Betsy that Deborah had to take Izabellah to meet Robert for his scheduled visitation; therefore, Deborah and Betsy would get together after that. Betsy claimed that, after Deborah delivered the child to Robert, Deborah and she went downtown to an event.

After hearing the testimony of the various witnesses, the trial court made findings from the bench. It found that a visitation order existed at the time at issue and that it required Izabellah's visitation with Robert on September 22, 2006. Based on the testimony, the trial court found that Deborah had failed to deliver Izabellah as required. Thus, the trial court sentenced Deborah to seven days in the Mason County Detention Center for contempt. The trial court subsequently entered a written order. In its written

order, the trial court specifically and unequivocally found, “that the Respondent [Deborah] willfully disobeyed the Court's order by failing to deliver the parties' child for the Petitioner's [Robert's] visitation for the weekend of September 22, 2006.”

II. STANDARD OF REVIEW

When a court exercises its contempt powers, it has nearly unlimited discretion. *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986).

Consequently, we will not disturb a court's decision regarding contempt absent an abuse of its discretion. “The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

III. ANALYSIS

A. DEBORAH'S CLAIM THAT THE TRIAL COURT GROSSLY ERRED WHEN IT HELD HER IN CRIMINAL CONTEMPT

It has long been recognized that the courts of this Commonwealth have the inherent power to punish individuals for contempt. *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001). The Supreme Court of Kentucky has defined contempt as the willful disobedience of or the open disrespect for the court's orders or its rules. *Id.* Contempt falls into two categories: civil and criminal. Civil contempt is distinguished from criminal contempt not by the punishment meted out but by the purpose for imposing the punishment. *A.W. v. Commonwealth*, 163 S.W.3d 4, 10 (Ky. 2005). If a court is seeking to coerce or compel a course of action, then the appropriate

sanction is civil contempt; however, if the court is seeking to punish conduct that has already occurred, then the appropriate sanction is criminal contempt. *Id.*

Criminal contempt falls into two further categories: direct or indirect. *Commonwealth v. Pace*, 15 S.W.3d 393, 395 (Ky. App. 2000). Direct criminal contempt is committed in front of the court and constitutes an insult to the court's dignity. *Id.* The court may summarily punish direct criminal contempt because the court witnessed and, thus, has personal knowledge of all the elements that comprise the contumacious behavior. *Id.* Indirect criminal contempt is committed outside the court's presence. *Id.* Thus, in order to establish whether or not an order of the court was violated, the court must hold an evidentiary hearing that comports with due process. *Id.* With indirect criminal contempt, all the elements of the contempt must be proved beyond a reasonable doubt. *Id.* at 396.

On appeal, Deborah notes that she testified that she appeared on September 22, 2006, for Robert's visitation, and she points out that Betsy Baltser testified that during the weekend of September 22, Deborah did not have Izabellah with her. Deborah claims that Betsy was the only uninterested party who testified at the evidentiary hearing. Although she denies violating the court's order, Deborah also argues that her allegedly contumacious behavior was not so bad as to have justified a finding of criminal contempt. Finally, she claims that her contumacious behavior was not proved beyond a reasonable doubt because the evidence adduced at the evidentiary hearing did not show that she

willfully disobeyed the trial court's visitation order. Thus, she concludes that the trial court abused its discretion.

Deborah labors under the misconception that the trial court was required to believe her and her witness over Robert and his witness. The trial court was acting as the finder of fact; thus, it had the sole responsibility to weigh the evidence and judge the credibility of all witnesses. Furthermore, the trial court was not bound to accept the testimony of any witness as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (Ky. 1941). It was the trial court's duty to weigh the probative value of the evidence and to choose whose testimony it found most convincing. *Commonwealth, Dep't of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971). The trial court was free to believe all of a witness's testimony, part of a witness's testimony or none of it. *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (Ky. 1926).

It is apparent that the trial court believed Robert's version of events. This was soundly within the trial court's discretion. Thus, Robert's testimony constituted substantial evidence to prove beyond a reasonable doubt that Deborah had violated the visitation order. *See Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971), and *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Accordingly, we can find no abuse of discretion on the part of the trial court.

B. DEBORAH'S CLAIM THAT THE TRIAL COURT SHOULD HAVE FOUND HER IN CIVIL CONTEMPT INSTEAD OF CRIMINAL CONTEMPT

Deborah insists that a finding of criminal contempt is inappropriate in a civil case dealing with visitation. According to Deborah, had the trial court found her in

civil contempt, instead of criminal contempt, she would have had an opportunity to purge herself of the contempt. Deborah reasons that criminal contempt would have no deterrent effect in this case because she has always diligently complied with the visitation order. She insists that civil contempt would have been better than criminal contempt because civil contempt would have benefited Robert and would have allowed her immediate release.

To reiterate, a trial court has nearly unlimited discretion when it exercises its contempt powers, and we will not disturb a trial court's decision regarding the exercise of its contempt powers absent an abuse of the trial court's broad and nearly unlimited discretion. *City of Loyall*, 702 S.W.2d at 839. It goes without saying that a trial court has wide latitude in deciding how to deal with violations of its orders and must frequently deal with contemptuous conduct in domestic relation cases. The trial court had the option of punishing Deborah's violation of the visitation order with criminal contempt, and it chose, within its discretion, to do so.

C. DEBORAH'S CLAIM THAT HER SEVEN-DAY SENTENCE WAS DISPROPORTIONATE AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT

Citing *Covington v. Commonwealth*, 849 S.W.2d 560, 563 (Ky. App. 1992), Deborah points out that there are three factors for an appellate court to consider in deciding if a criminal statute has imposed a punishment that is so disproportionate to the crime charged that it constitutes cruel and unusual punishment. According to Deborah, those factors are:

- (1) The gravity of the offense and harshness of the penalty;
- (2) The sentences imposed on other criminals in the same jurisdiction; [and]
- (3) The sentences imposed for commission of the same crime in other jurisdictions.

Id.

Deborah goes on to claim that she could

find no law-no showing of any type-wherein criminal contempt was found for a first violation of a visitation order resulting in a seven-day [sic] jail sentence. While there is ample case law demonstrating the court's civil contempt power for child support arrearages and custody matters, there is apparently no law suggesting the order herein was appropriate by any stretch of the imagination.

Thus, relying on this lack of caselaw, Deborah argues that her sentence was entirely disproportionate to her violation of the visitation order and was so shocking to the conscience that it constituted cruel and unusual punishment.

Deborah is arguing that because she could not find any caselaw holding that seven-day's incarceration for the first violation of a visitation order was not cruel and unusual punishment, then the contrary must be true. We find her theory unpersuasive.

When a trial court holds a bench trial to resolve an allegation of contempt, the trial court may punish the contemnor by imposing a fine not to exceed \$500.00 and/or by sentencing the contemnor to incarceration for a period of time not to exceed six months. *Miller v. Vettiner*, 481 S.W.2d 32, 35 (Ky. 1972); *see also Albers v. Townes*, 532 S.W.2d 443, 445 (Ky. App. 1976) and *Newsome*, 35 S.W.2d at 839-840. The trial

court chose, within its discretion, to sentence Deborah to seven-day's incarceration, approximately four percent of the maximum sentence that the court could have imposed. Accordingly, we do not find her punishment amounted to cruel or unusual punishment.

D. DEBORAH'S CLAIM THAT THE TRIAL COURT VIOLATED HER DUE PROCESS RIGHTS BY HOLDING HER IN CRIMINAL CONTEMPT WITHOUT MAKING A SPECIFIC FINDING OF WILLFUL DISOBEDIENCE

Deborah argues that the criminal contempt charge required a hearing to satisfy her due process rights. Deborah admits that the trial court provided her notice of the contempt allegation, an opportunity to confront witnesses who testified against her, and an opportunity to present proof. Deborah insists, however, that the trial court made no findings of fact supporting its conclusion that her actions amounted to criminal contempt. According to Deborah, the trial court, in its written order of contempt, merely stated, “[t]he Court finds that the Respondent willfully disobeyed the Court's order by failing to deliver the parties' child for the Petitioner's visitation for the weekend of September 22, 2006.” Deborah claims that this statement was “not sufficient to order [her] in criminal contempt.” According to Deborah, in order to hold her in contempt, the trial court was required to demonstrate a finding of willfulness on her part.

Contrary to Deborah's protestations, the trial court did make this finding. As Deborah even noted, the November 9, 2006, order included that she “willfully disobeyed” the court's order. Given the fact that the trial court made a specific finding of willful disobedience, Deborah's argument lacks all merit.

Because the trial court has nearly unfettered discretion when it exercises its contempt orders, we will not routinely overturn a trial court when it exercises that discretion. In the case at hand, it is apparent that the parties had bitter divorce proceedings. Apparently, the court believed it needed to maintain control over the parties to ensure that they complied with its orders. Deborah, having failed to do so and the court's obviously disbelieving her story at the hearing, suffered the imposition of penalties well within the court's discretion.

Because Deborah has failed to demonstrate that the trial court abused its discretion, we affirm the trial court's order of November 9, 2006, in which it held Deborah in contempt.

ALL CONCUR.

BRIEF FOR APPELLANT:

Delores Woods Baker
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BRIEF FOR APPELLEE:

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