

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000309-ME

ROBERT DERMODY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DONNA L. DELAHANTY, JUDGE  
ACTION NO. 93-D-502350

PATRICIA DERMODY

APPELLEE

OPINION AND ORDER  
REVERSING AND REMANDING

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BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Robert Dermody (“Robert”) appeals two orders of the Family Division of the Jefferson Circuit Court finding him in contempt for having unsupervised contact with his daughter and physically attacking his estranged wife, Patricia Dermody (“Patricia”). In addition to seeking reversal on the merits,

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Robert has also moved this Court pursuant to CR<sup>2</sup> 76.12(8)(c) to accept his version of the facts and issues as true and reverse the judgment of the circuit court due to Patricia's failure to file an appellate brief. After careful review of the record, we deny Robert's CR 76.12 motion but reverse and remand the circuit court's orders due to due process concerns.

We begin with a recitation of relevant facts. A domestic violence order ("DVO") was issued to Patricia in May of 2004. The order awarded temporary custody of the couple's four children to Patricia; restrained Robert from having any contact or communication with Patricia except for telephone calls to discuss child care; prohibited Robert from coming within six hundred feet of Patricia except at their children's events when he was allowed to be within twenty-five feet of her; allowed Robert to have only supervised visitation with his children until completing domestic violence offender treatment (DVOT); required Robert to vacate the marital residence but pay the mortgage, utilities, insurance and children's private school tuition in lieu of child support; prohibited Robert from having a firearm; and required him to participate in counseling. Robert completed DVOT classes on October 9, 2004. The DVO was to expire May 23, 2007, but over Robert's objection it was extended until May 13, 2008.

On June 13, 2007, Robert asked the court to set a parenting schedule. On June 25, 2007, the trial court entered an amended DVO requiring Robert to attend counseling and directing the parties to submit an agreed parenting order.

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<sup>2</sup> Kentucky Rules of Civil Procedure.

That same day, Patricia and Robert signed an agreed order specifying Robert's visitation with the children would be supervised until he entered an acceptable counseling program. Once counseling was underway, and Patricia was apprised of this fact, Robert's visitation would become unsupervised despite Patricia's concerns for their children's safety. Robert was already in counseling, but was to begin counseling with a new therapist on June 27, 2007.

On June 26, 2007, the couple's ten-year-old daughter telephoned Robert repeatedly saying she was upset and lonely. Her last call to Robert was made from the neighborhood pool. Knowing he was not to have unsupervised contact with any of his children until he began counseling, and knowing his first counseling session would not occur until the next day, Robert brought sandwiches to the pool to comfort his daughter. Patricia was not there, but she received a phone call alerting her Robert was at the pool with their daughter without supervision. When Patricia arrived at the pool with Nathan Pitt ("Pitt"), her nephew/bodyguard, her daughter was sitting at a table eating as Robert exited the restroom. Patricia photographed Robert with their daughter and grabbed Robert's keys from the table. According to Pitt, Robert attacked Patricia and forced her to the ground. When a witness called police, Robert took his keys and fled the scene.

According to the circuit court, Robert petitioned to dissolve the volatile marriage on June 28, 2007.<sup>3</sup> That same day, without specifying any

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<sup>3</sup> The petition for dissolution of marriage was not included in the appellate record.

grounds, Patricia filed a *pro se* motion in circuit court to alter, amend or vacate<sup>4</sup> the parenting order the court entered on June 25, 2007.<sup>5</sup> She also asked that a guardian *ad litem* (GAL) be appointed for the children. The next day she filed a *pro se* motion asking the circuit court to hold Robert in contempt due to the alleged assault on her at the pool on June 26, 2007; a complaint filed with the DVO Intake Center on June 14, 2007; and the alleged interruption of Patricia's home mail delivery in mid-May, 2007. All of Patricia's circuit court motions were scheduled to be heard on July 9, 2007, but were ultimately heard on July 27, 2007. At some point, a contempt motion based on the same pool incident was filed in district court.<sup>6</sup>

On July 27, 2007, the circuit court convened a hearing on Patricia's *pro se* contempt motion. At the outset, Patricia's attorney clarified there were two separate actions before the circuit court, one being compliance with the DVO and the other being dissolution of the marriage. He was under the impression this particular hearing was limited to his client's motion to modify the visitation schedule because the contempt issue was being heard in district court. He argued his client had improperly filed the *pro se* contempt motion in circuit court because JFRP<sup>7</sup> Rule 402(B) permits only DVO violations "pertaining to visitation, child

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<sup>4</sup> CR 59.05.

<sup>5</sup> The circuit court signed the agreed parenting order on June 28, 2007.

<sup>6</sup> Documents pertaining to the district court case are not before us. Robert stated in the memorandum supporting his CR 59.05 motion that the contempt motions were filed in district court and circuit court on the same day.

<sup>7</sup> Jefferson Family Court Rule.

support, counseling, or firearms provisions” to be initiated in family court.

Recognizing that KRS 403.760(5) prohibits a party from maintaining both a civil and a criminal proceeding for the same violation of a protective order, and

admitting Robert had already been arrested and arraigned on the contempt charge in district court,<sup>8</sup> Patricia’s attorney stated his client had no desire to see Robert punished by the circuit court. Her desire was for the circuit court to resolve her motion to modify the visitation schedule to ensure the safety of her children.

During the hearing, Robert’s attorney agreed a contempt proceeding could not go forward in both circuit and district court, but argued circuit court had jurisdiction because that is where the first motion was filed. Thereafter, Patricia’s attorney remanded the contempt motion filed in the circuit court, but urged the circuit court to address the pending visitation issue for the protection of the children.

After hearing argument from both parties, the following exchange occurred:

THE COURT: Originally the court was asked to find contempt. But if you’re remanding your motion, then we no longer

MR. HARRELL (FOR PATRICIA): That’s right.

THE COURT: have a motion for contempt, it’s gone, it’s finished, it’s over with. We still have the one over in district court that has nothing to do with this court. You’ve noticed [Robert’s attorney] that we’re going to take up the timesharing schedule today. So, I am going

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<sup>8</sup> Robert’s attorney on the district court contempt proceeding attended the hearing on July 27, 2007.

to allow you to remand your motion for contempt and we're going to use this time to hear, have a hearing on the timesharing schedule, the modification of it, or whatever we need to do or that you're wanting to do with it.

The court then heard testimony from Patricia, Robert, Pitt, and Louisville Metro Police Officer John Martin regarding Patricia's motions to modify the parenting schedule, appoint a GAL, and appoint a new counselor for the children. After hearing about two hours of evidence, the court declined to hear oral argument from the attorneys, but stated she would leave the case file open for seven to ten days. She also appointed a GAL for the children and ordered the parties to share the cost.

On August 10, 2007, Robert filed a brief regarding the July 27, 2007, hearing. He argued, among other points, that his parenting time should not be restricted to redress his alleged assault on Patricia at the pool. He asserted Patricia lacked credibility and had tried to entrap him. He specifically argued the court could not limit his visitation with his children unless it found under KRS 403.320(3) that such visitation "would endanger seriously the [children's] physical, mental, moral or emotional health." Other than mentioning Patricia's *pro se* contempt motion was the vehicle that prompted the hearing, Robert did not discuss the contempt motion.

Patricia also filed a post-hearing memorandum.<sup>9</sup> She alleged Robert was more likely to seriously endanger their children because he was willing to hurt her in the children's presence. Patricia moved the court to find Robert had engaged in an act of domestic violence when he attacked her at the swimming pool on June 26, 2007, and thereby negate Robert's appeal of the court's order extending the DVO. Patricia did not mention the circuit court contempt motion in her memorandum.

The circuit court entered its written order on the hearing on December 3, 2007. In the opening paragraph it stated, "[t]his matter came before the Court for a hearing on the Petitioner's<sup>10</sup> motion for a finding of contempt." Thereafter, the order made no reference to Patricia having remanded the motion for contempt or the court's ruling from the bench in which it stated, "I am going to allow you to remand your motion for contempt." In stating its findings, the court said, "Robert is in contempt of the Court's Orders for no unsupervised contact with any of the children until he attended counseling and Patricia could be noticed of his attendance." As a result of its findings, the court granted Patricia's motion finding "Robert Dermody, in contempt of the Court's Orders for having contact with the parties' child prior to his appointment with a therapist or notification of the

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<sup>9</sup> This document was filed in the appendix to Robert's brief, however, it was not included in the appellate record provided to us. CR 76.12(4)(c)(vii) states in relevant part, "Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs."

<sup>10</sup> This is an error as Robert is listed as the Petitioner in the style of the case but the motion for contempt was filed by Patricia.

appointment having reached Patricia Dermody.” The court went on to order Robert to donate \$1,000.00 to a women’s shelter; pay Patricia’s legal fees associated with the contempt motion; and advance Patricia’s attorney \$5,000.00<sup>11</sup> for representing her in the circuit court action. The court reserved ruling on any of the motions pertaining to the children until the GAL filed his report. The court also denied Patricia’s motion that a July 2, 2007, restraining order<sup>12</sup> against her be dissolved.

On December 5, 2007, Robert moved the court for financial relief from its order of May 14, 2007. On December 12, 2007, he filed a motion to alter, amend or vacate the court’s order entered on December 3, 2007. He argued there was no reason to hold him in contempt because he had not committed any acts of domestic violence and he believed he had remained compliant<sup>13</sup> with the court’s orders by notifying Patricia of his counseling appointments. He also argued the financial circumstances of both parties, for which there had been no hearing or submission of evidence, did not justify an award of attorney’s fees to Patricia. Robert argued the \$1,000.00 fine was unreasonable because he lacked the ability to pay it and he was already paying the marital home mortgage, utilities, insurance

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<sup>11</sup> \$15,000.00 had been requested.

<sup>12</sup> On July 2, 2007, a restraining order was issued at Robert’s request to prevent Patricia from distributing disparaging or defaming flyers against him; contacting anyone at his place of employment; changing the children’s medical providers without his written consent; limiting the children’s telephone contact with him; and remaining at least six hundred feet away from him, except at the children’s activities when she could come within twenty-five feet of him.

<sup>13</sup> Robert maintains he was already in counseling when he went to the pool on June 26, 2007, however, he was to begin seeing a new therapist the following day.



and security fees, even though he was ordered to live elsewhere; his oldest child was living with him exclusively and the three other children had recently resided almost exclusively with him; and he was paying private school tuition for the children plus their medical insurance and counseling fees. Furthermore, while Patricia had portrayed herself as a student without income, Robert believed she was earning about \$40,000.00 annually and asserted Patricia had listed income in excess of \$35,000.00 on her 2006 tax return. In the memorandum supporting his CR 59.05 motion, Robert argued Patricia could not pursue the contempt charge in both district and circuit court even though she filed both motions the same day. Patricia objected to Robert's motion to alter, amend or vacate.

On January 17, 2008, the circuit court entered an order denying Robert's CR 59.05 motion, but amending some aspects of the order it entered on December 3, 2007. The court gave Robert the choice of paying the \$1,000.00 fine or serving seven days in jail and also found Robert had committed an act of domestic violence at the pool on June 26, 2007, and had admitted he violated the court's order by having unsupervised contact with his daughter prior to beginning counseling. This appeal followed. We reverse and remand.

Robert alleges three errors on appeal. First, the circuit court lacked jurisdiction to hear the contempt motion. Next, once Patricia remanded her *pro se* motion, there was no such motion pending when the court found him to be in contempt. Finally, there was no factual basis for holding him in contempt and the punishment imposed was excessive. Since Patricia chose not to file a brief, we do

not have the benefit of any argument she might have advanced. In reviewing a court's order of contempt, we look for an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). After reviewing the record and specifically the videotape of the hearing that occurred on July 27, 2007, we conclude the circuit court abused its discretion in holding Robert in contempt and deem reversal of the court's orders is required.

Kentucky recognizes two types of contempt, civil and criminal. When a court's sanction is intended to coerce compliance with a court's order, it is civil. When a court's intention is to impose punishment, it is criminal. *See Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996); *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993). Criminal contempt may be either direct or indirect. Direct criminal contempt occurs while a party is before the court and may be punished summarily since all elements of the offense are within the court's personal knowledge. *Burge, supra*, 947 S.W.2d at 808; *Brockman v. Commonwealth*, 185 S.W.3d 205, 208 (Ky.App. 2005). Indirect criminal contempt occurs outside the court's presence and requires a due process hearing and evidence showing willful disobedience toward, or open disrespect for, a court's rule or order. *Burge, supra*, 947 S.W.2d at 808; *Brockman, supra*, 185 S.W.3d at 208.

Here, the court's orders of December 3, 2007, and January 17, 2008, found Robert in contempt for an incident at a neighborhood swimming pool on June 26, 2007. Since Robert was not in the court's presence on June 26, and the alleged unsupervised contact with his daughter had already occurred, the court's

sanction was one of criminal contempt for purposes of punishment, rather than civil contempt for purposes of coercing compliance with its prior DVO. Since the offending behavior occurred outside of court and involved indirect rather than direct criminal contempt, Robert was entitled to an evidentiary due process hearing, as well as findings as to whether he willfully disobeyed or openly disrespected the court's order, before any sanction was imposed. *Burge, supra*, 947 S.W.2d at 808; *Brockman, supra*, 185 S.W.3d at 208. We recognize the pool incident was discussed during the hearing on July 27, 2007, but the court had already allowed Patricia to remand her motion for contempt and the court's statements from the bench clearly indicated the issue of contempt was no longer being considered. Without some notice the court was still considering holding Robert in contempt, he had no opportunity and no reason to present evidence or argument to the court in an attempt to sway it otherwise. Therefore, the circuit court's finding of contempt is vacated and this matter is remanded for further proceedings consistent with this Opinion.

Robert's motion, made pursuant to CR 76.12, is hereby denied.

ALL CONCUR.

ENTERED: October 24, 2008

/s/ C. Shea Nickell  
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Justin R. Key  
Allen McKee Dodd  
Louisville, Kentucky

BRIEF FOR APPELLEE:

No brief filed.