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AUGUST 19, 2009
(2008-SC-000924-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002062-MR

DONALD LEE SHOBE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 07-CI-008119

HON. SHEILA COLLINS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Donald Lee Shobe appeals from an order of the Jefferson Circuit Court denying his petition for a writ of prohibition seeking to

[1] 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 KRS 21.580.

prevent Jefferson District Court Judge Sheila Collins from proceeding with a hearing to require appellant to show cause why he should not be held in contempt for failing to pay a $100.00 public defender fee assessed by order pursuant to Kentucky Revised Statutes (KRS) 31.211, or, alternatively, to prevent her from revoking his conditional discharge for failure to pay the fee. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 25, 2007, Shobe was charged with possession of drug paraphernalia, first offense. At his May 19, 2007, arraignment he was appointed a public defender from the Department of Public Advocacy. In connection therewith, the district court ordered him to pay a $100.00 public defender fee pursuant to KRS 31.211(1).

In due course Shobe entered into a plea agreement with the Commonwealth under which he would plead guilty to a misdemeanor count of possession of drug paraphernalia and would be sentenced to a term of incarceration of 365 days, conditionally discharged for two years. At the June 19, 2007, sentencing hearing it came to light that Shobe had not yet paid his public defender fee obligation. Upon learning this, the district court imposed as a condition of conditional discharge that Shobe pay the fee by July 5, 2007.

Upon Shobe's failure to pay the fee by the required date, the district court scheduled a hearing to address the matter. A written order is not contained in the record, and it is unclear if the hearing was to address only the possibility of

holding Shobe in contempt, or whether the hearing may have also or alternatively addressed the failure to pay as a violation of the terms of conditional discharge. Thus it appears that possible outcomes of the hearing could have been (1) the initiation of revocation of conditional discharge for failure to pay the fee, or (2) the district court's holding of Shobe in contempt for failure to comply with its order to pay the fee.

On August 21, 2007, Shobe filed a petition for a writ of prohibition in the Jefferson Circuit Court seeking to prevent the district court from proceeding with the August 23, 2007, hearing. He argued that (1) the district court improperly and without jurisdiction imposed payment of the public defender fee as a condition of conditional discharge and thus the revocation of his conditional discharge for violating the condition would be improper,[2] and (2) that the court was without jurisdiction or authorization to invoke its contempt power to enforce payment of the fee. On October 3, 2007, the circuit court entered an order denying the petition. This appeal followed.

STANDARDS FOR WRIT OF PROHIBITION

A writ of prohibition may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and

[2] The Commonwealth argues that this aspect of Shobe's appeal is not preserved for review. However, Shobe raised the issue in his petition for a writ of prohibition, and we will accordingly address this aspect of his appeal on the merits.

there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted. *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004). The standard of review applied by an appellate court upon the appeal of the lower court's decision is stated in *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803 (Ky. 2004), as follows:

> [T]he proper standard actually depends on the class, or category, of writ case. De novo review will occur most often under the first class of writ cases, i.e., where the lower court is alleged to be acting outside its jurisdiction, because jurisdiction is generally only a question of law. De novo review would also be applicable under the few second class of cases where the alleged error invokes the "certain special cases" exception or where the error involves a question of law. But in most of the cases under the second class of writ cases, i.e., where the lower court is acting within its jurisdiction but in error, the court with which the petition for a writ is filed only reaches the decision as to issuance of the writ once it finds the existence of the "conditions precedent," i.e., no adequate remedy on appeal, and great and irreparable harm. If [these] procedural prerequisites for a writ are satisfied, "whether to grant or deny a petition for a writ is within the [lower] court's discretion."
>
> But the requirement that the court must make a factual finding of great and irreparable harm before exercising discretion as to whether to grant the writ then requires a third standard of review, i.e., clear error, in some cases. This is supported by the fact that the petition for a writ is an original action in which the court that hears the petition . . . acts as a trial court. And findings of fact by a trial court are reviewed for clear error. Therefore, if on appeal the error is alleged to lie in the findings of fact, then the appellate court must review the findings of fact for clear error before reviewing the decision to grant or deny the petition.

Id. at 810 (Citations, footnotes, and some quotation marks omitted).

As further discussed below, the trial court acted within its jurisdiction in imposing payment of the public defender fee as a term of conditional discharge, and would not be acting erroneously within its jurisdiction in either revoking Strobe's conditional discharge or holding him in contempt for failure to pay the fee. Thus, Shobe is not entitled to a writ of prohibition to prevent the district court from proceeding with a hearing on the matter.

DISCUSSION

Shobe contends that KRS 31.211(2) provides the exclusive means for collection of an unpaid public defender fee. We first note that KRS 31.211(1) provides as follows:

> (1) At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs. The court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments to recover money for representation provided under this chapter. This partial fee determination shall be made at each stage of the proceedings.

There is no contention that this provision was not complied with, and it was the application of this provision which resulted in the order to pay a $100.00 public defender fee. KRS 31.211(2), the provision relied upon by Shobe, provides as follows:

> (2) If the partial fee, or any portion thereof, is not paid by the due date, the court's order is a civil judgment subject

> to collection under Civil Rule 69.03[3] and KRS Chapter 426.[4]

Shobe argues that

> [o]ne of the most basic rules of statutory construction is that the enumeration of particular items in a statute precludes inclusion of other items not mentioned. *Kearney v. City of Simpsonville*, 209 S.W.3d 483, 485 (Ky.App. 2006). The legislature provided for collection as a civil judgment. It did not authorize collection by any other means. It most certainly did not provide for the judge to become involved in collecting the fee. The Court of Justice must presume from the failure of the legislature to authorize any other method of collection that the legislature did not intend any other means of collection.
>
> . . . . The 2002 General Assembly provided no role in KRS 31.211(2) for the judge who imposes the fee. [] An order entered pursuant to Subsection (1) of the statute is made a civil judgment if not complied with by the termination of the case. The only possible conclusion to draw from this omission is that the legislature intended to remove the issue of collection from the criminal case. A civil judgment is collected by the person or party in whose favor it is entered. In this case, the judgment is held by the Public Advocate.

If the language of a statute is clear and the application of its plain meaning would not lead to an unreasonable result, then further interpretation is unnecessary. *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129, 131 (Ky. App.

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[3] KRS 69.03 provides as follows: "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the Kentucky Revised Statutes. In aid of the judgment or execution, the judgment creditor, or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these Rules."

[4] KRS Chapter 426 is entitled "Enforcement of Judgments."

1990). Furthermore, our interpretation of the statute should not produce a result that is absurd, impractical or unreasonable. *See Walker v. Kentucky Dept. of Education*, 981 S.W.2d 128, 130 (Ky. App. 1998).

By its plain language KRS 31.211 provides simply that upon the defendant's failure to pay the public defender fee, the court's order is transformed into a civil judgment collectible under the normal procedures for enforcing a judgment. The language does not purport to set up this method of enforcing collection as exclusive, nor does it purport to preempt, limit, or restrain any other provisions contained in any other statute which may facilitate collection of the fee, nor does it purport to infringe upon a court's inherent power to enforce its own orders. Thus, as further discussed below, we disagree with Shobe that KRS 31.211(2) vitiates a court's power to set reasonable terms of conditional discharge pursuant to KRS 533.030, or inhibits its well-established contempt powers to enforce its orders.

Moreover, the statute is not ambiguous, and thus an examination of legislative intent is unnecessary. However, in this regard, the mechanism devised by the statute for enforcing collection of the fee reflects the legislature's view that collection of the fee is an important public policy, and, if anything, by not including language purporting to preempt other avenues of collection, the legislature has evidenced an intention that it would not want to inhibit other ways and means of doing so, including the potential methods addressed herein.

Further, we believe Shobe's application of the legal maxim *inclusio unius est exclusio alterius*, meaning the inclusion of one thing is the exclusion of another, is misplaced. Again, KRS 31.211(2) simply provides that if a public defender fee is not paid, the order is transformed into a judgment. The provision in no way purports to interfere with other means of collection which may be available.

IMPOSITION OF PAYMENT OF FEE AS A CONDITION OF CONDITIONAL DISCHARGE

Strobe contends that the trial court acted outside of its jurisdiction by imposing the requirement that he pay the public defender fee as a condition of conditional discharge. We disagree.

KRS 533.030 provides, in part, as follows:

> (1) The conditions of probation and conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so. The court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation.
>
> (2) When imposing a sentence of probation or conditional discharge, the court may, in addition to any other reasonable condition, require that the defendant:
>
> (a) Avoid injurious or vicious habits;
>
> (b) Avoid persons or places of disreputable or harmful character;
>
> (c) Work faithfully at suitable employment as far as possible;

> (d) Undergo available medical or psychiatric treatment and remain in a specific institution as required for that purpose;
>
> (e) Post a bond, without surety, conditioned on performance of any of the prescribed conditions;
>
> (f) Support his dependents and meet other family responsibilities;
>
> (g) Pay the cost of the proceeding as set by the court;
>
> (h) Remain within a specified area;
>
> (i) Report to the probation officer as directed;
>
> (j) Permit the probation officer to visit him at his home or elsewhere;
>
> (k) Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment; and
>
> (l) Submit to periodic testing for the use of controlled substances or alcohol, if the defendant's record indicates a controlled substance or alcohol problem, and to pay a reasonable fee, as determined by the court, which fee shall not exceed the actual cost of the test and analysis and shall be paid directly to the agency or agencies responsible for testing and analysis as compensation for the cost of the testing and analysis, as specified by written order of the court, performed under this subsection. For good cause shown, the testing fee may be waived by the court.

Further, the Commentary to KRS 533.030 provides that:

> It is not intended that the list be exhaustive or that it limit in any way the discretion of a trial court in tailoring the

> conditions of probation or conditional discharge to the rehabilitative needs of individual offenders. . . . The only limitation on the trial judges with respect to such conditions is contained in subsection (1). This provision requires that conditions imposed upon a convicted offender be considered 'reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.'

The imposition of a term of conditional discharge that the defendant pay the public defender's fee as ordered is a reasonable condition. Such is consistent with the good-conduct provisions specifically listed in the statute, and the requirement may reasonably be considered "reasonably necessary to insure the defendant will lead a law-abiding life." After all, the condition simply requires the rather unremarkable conduct that a probationer pay his lawful debts and obey court orders.

In summary, we reject Strobe's argument that the trial court either acted outside of its jurisdiction in imposing payment of the fee as a condition of his conditional discharge, or acted erroneously in so doing.

ENFOREMENT OF ORDER BY CONTEMPT POWER

Strobe contends that though a court may order the payment of a public defender fee pursuant to KRS 31.211(1), upon the disobedience of the order by a defendant, the court may not thereafter enforce its order through the use of its contempt power. We disagree.

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). When a court exercises its contempt powers, it has nearly unlimited discretion. *Smith v. City of Loyall*, 702 S.W.2d 838, 838-39 (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).

The Supreme Court of Kentucky has defined contempt as "the willful disobedience toward, or open disrespect for, the rules or orders of a court." *Commonwealth v. Burge,* 947 S.W.2d 805, 808 (Ky. 1996). 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.*[5]

It appears the type of contempt at issue here would be civil. Were the trial court to undertake contempt proceedings its purpose would be to compel

[5] 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 affront 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.

Shobe to pay the fee as ordered. A trial court's power to do this (enforce its own orders) is so well established that its authority to do so under the present circumstances is beyond question. KRS 31.211(2) does not purport to infringe upon this inherent power, and thus we reject Shobe's argument that it does. Moreover, we further note that if it did purport to so infringe, its constitutionality would be doubtful under the separation of powers doctrine.

CONCLUSION

For the foregoing reasons we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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