

RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001418-MR

DEREK KEELING

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 08-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

VANMETER, JUDGE: Derek Elwood Keeling appeals from an order of contempt
entered by the Graves Circuit Court. For the following reasons, we affirm.

¹ Senior Judge Joseph E. Lambert 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.

During the course of his competency hearing, Keeling interrupted courtroom proceedings with two short, successive outbursts in which he shouted a vulgarity specifically directed toward the court. The court warned Keeling that if his conduct continued, he would be removed from the courtroom. After his second outburst, no more were forthcoming.

At the conclusion of the hearing, the court took the matter of competency under advisement and summarily sanctioned Keeling for contempt, verbally sentencing him to 60 days' imprisonment immediately upon his release from the underlying charges, whenever that release might occur. Counsel for Keeling objected, thereby preserving the issue for appeal. Six days later, the court found Keeling competent to stand trial and reduced its order of contempt to writing. Keeling's subsequent motions to reconsider the competency and contempt orders were denied.

On appeal, Keeling does not dispute that his conduct was contemptuous; rather, he challenges the order of contempt on procedural grounds, asserting that he was denied due process of law because his competency to stand trial had not yet been determined when the court found him in contempt. In other words, Keeling argues that at the time of his outbursts, he lacked the capacity for contempt. We disagree.

In *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996), the Kentucky Supreme Court defined contempt and summarized the applicable law as follows:

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. 461, 463, 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. Schroering*, 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*, 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, 9 L.Ed. 767 (1925).

Subsequently, in *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky.App. 2007), a panel of this court described criminal contempt as including:

[T]hose acts that obstruct the court's process, degrade its authority, or contaminate its purity. *A.W. v. Commonwealth*, 163 S.W.3d 4, 11 (Ky. 2005). When a court seeks to coerce or compel a course of action, the appropriate sanction is civil contempt. *Id.* However, when a court seeks to punish conduct that has already occurred or to vindicate its authority, the appropriate sanction is criminal contempt. *Id.*; *Miller v. Vettiner*, 481 S.W.2d 32, 35 (Ky. 1972).

A trial court has considerable discretion when exercising its contempt powers, and its decision will not be disturbed on appeal absent an abuse of that discretion. *See Meyers*, 233 S.W.3d at 215. “The test for abuse of discretion is whether the trial [courts] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)(citations omitted)).

Since Keeling was punished for outbursts which occurred in the presence of the court, this situation is one of direct criminal contempt, in which the court has discretion to punish summarily, without any further proof or examination. *See In re Terry*, 128 U.S. at 307, 9 S.Ct. at 80. With regards to Keeling's argument that he lacked the mental capacity necessary to commit contempt, we note that “[t]he issue of . . . criminal responsibility for . . . the

underlying charge of contempt . . . involves different considerations from those involved in an inquiry into competence to stand trial.” *United States v. Flynt*, 756 F.2d 1352, 1365 (9th Cir. 1985). “To be competent to stand trial, ‘a criminal defendant must have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings.’” *Id.* (quoting *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981)). “In contrast, the test for capacity to commit an offense [such as contempt] inquires into whether ‘at the time of the alleged criminal conduct, as a result of mental disease or defect [the defendant] lacked substantial capacity to conform his conduct to the requirements of the law or to appreciate the wrongfulness of his conduct.’” *Flynt*, 756 F.2d at 1365 (quoting *United States v. Sims*, 637 F.2d 625, 628 (9th Cir. 1980)).

Here, the court determined that Keeling’s conduct was controllable and his outburst was deliberate. No further fact-finding was necessary in order for the court to summarily punish Keeling for his conduct. As discussed above, the determination of whether a defendant’s conduct is contemptuous is separate from the determination of whether a defendant is competent to stand trial. Thus, the fact that the court had not found Keeling competent to stand trial at the time he was found in contempt has no bearing on the validity of the contempt order. Based upon a review of the record, we hold that the court did not abuse its discretion by finding Keeling in contempt.²

² Even if we had found the court’s order of contempt to be an abuse of its discretion, such error would have been harmless since Keeling was found to be competent to stand trial by the time the

The order of contempt of the Graves Circuit Court is affirmed.

ALL CONCUR.

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written order of contempt was entered into the record.