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NOT TO BE PUBLISHED

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

NO. 2016-CA-000156-MR

SUMMER RISER BERGER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE CHRISTOPHER J. MEHLING, JUDGE  
ACTION NO. 99-CI-02201

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING

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BEFORE: CLAYTON, DIXON, AND NICKELL, JUDGES.

CLAYTON, JUDGE: The question in this case is: may a court, in a civil contempt proceeding, find a person in contempt for failing to make child support payments and sentence her to conditionally-discharged jail time and set a future arrearage amount of \$40 when, prior to the contempt hearing, she paid her child-support arrearage in full and was current on her child support payments? We

answer the question no, because rather than coerce compliance with a court order, which is the function of civil contempt, the court's order only punishes the appellant, which is the function of criminal contempt. We begin with a brief factual recitation.

Summer Berger was delinquent in making child support payments and accumulated a \$1,292.36 arrearage. The trial court issued a show cause order. Before Berger's hearing on the order, she paid her arrearage in full. At the hearing, the parties agreed the case involved only civil contempt, not criminal contempt. The parties also agreed that the arrearage was paid in full and that Berger was current on her support payments.

Because Berger had paid her arrearage in full, Berger orally objected both to finding her in contempt and to entering an order with a "remedy" to the contempt. In spite of Berger having paid her arrearage in full, the trial court nonetheless found Berger was in contempt, and it entered an order sentencing Berger to 180 days in jail, conditionally-discharged for two years provided she remain current on her child support payments and pay an additional \$40 per month toward any future child support arrears.

Berger then filed a motion to amend the court's order of contempt, asking the court to establish a purge amount. The trial court denied the motion. In its written order, the court held that, "[t]o allow a party to come to court and pay prior to a contempt hearing, with no *repercussions imposed on that party* for her

failure to pay would render the court functionally powerless to ‘coerce or compel’ future compliance.” Order, p. 2 (emphasis added).

Berger now appeals to this Court raising the same allegation of error. Because the civil contempt order was punishing Berger rather than coercing her to comply with a court order, and because punishment is the function of criminal, not civil, contempt, the trial court’s civil contempt order exceeded its authority and should be vacated.

It is clear that the instant civil contempt order was punishing Berger for past misconduct. The trial court’s order denying the motion to amend admits as much when it refers to its contempt order as “repercussions imposed” on a party for past misconduct. But “[t]he purpose of civil contempt is to coerce rather than punish.” *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993). The circuit court’s order here directly violates that principle by punishing – imposing repercussions – rather than coercing compliance. “If the court’s purpose is to punish, the sanction is criminal contempt.” *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996).

Had the court proceeded under both civil and criminal contempt, then the order’s sanctions may have been appropriate as criminal contempt sanctions. It is noteworthy that the trial court’s order cites *Meyers v. Petrie*, 233 S.W.3d 212 (Ky. App. 2007), which illustrates this principle. There, a family court held a hearing to determine if Steven Meyers was in contempt of a Domestic Violence Order (“DVO”) for failure to attend domestic violence counseling. The DVO had

expired before Meyers' contempt hearing. Meyers claimed the court could not require him to attend domestic violence counseling because the DVO had expired. The trial court disagreed and offered Meyers 180 days in jail probated under the condition that Meyers attend domestic violence counseling. Meyers told the court he would serve 180 days in jail but would not attend the counseling. The trial court then punished Meyers by ordering Meyers attend domestic violence counseling *and* be incarcerated for 181 days.

Meyers argued on appeal that because the DVO expired, the family court lost authority to force him to complete domestic violence counseling. A panel of this Court disagreed because the sanctions were imposed under criminal contempt, not civil contempt. Initially, the Court noted:

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). An individual who has refused to abide by a court's order has committed civil contempt. *Newsome v. Commonwealth*, 35 S.W.3d at 839. In contrast, an individual has committed criminal contempt where his conduct has shown disrespect for the court's procedures or has obstructed the administration of justice or has brought the court into disrepute. *A.W. v. Commonwealth*, 163 S.W.3d at 11. Furthermore, criminal contempt includes those acts that obstruct the court's process, degrade its authority, or contaminate its purity. *Id.* 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).

*Meyers*, 233 S.W.3d at 215.

The Court went on to note that Meyers' failure to attend counseling was a refusal to obey the court's order, thus constituting civil contempt. His conduct also constituted criminal contempt because he "willfully def[ied] the DVO . . . demonstrat[ing] great disrespect for the family court, bringing the family court into disrepute and degrading its authority." *Id.* at 216. Additionally, Meyers' refusal to attend the counseling in exchange for a probated sentence showed that he lacked "contrition" and was not willing to "make amends for his past contumacious behavior" by "defiantly continu[ing] to show disrespect and to further subvert the family court's authority." *Id.* Thus, even though the DVO had expired, and Meyers could not be held in civil contempt for currently violating a court order, the trial court properly utilized its criminal contempt power to sanction Meyers.

In the instant case, it is undisputed that the trial court was only conducting a civil contempt hearing on Berger's failure to make her child support payments. However, Berger was current on her child support and had no arrearage when she appeared before the trial court for the civil contempt hearing. In other words, Berger was not currently violating any court order when her hearing occurred. And because she was not in violation of any court order, the question must be asked – how was Berger to purge herself of her civil contempt?

When a court finds a party is in civil contempt and seeks to impose sanctions, "the sanction may serve either to coerce the contemnor to comply with a

court order, to compensate a party for losses caused by the contempt, or both.”  
*Com., Cabinet for Health & Family Servs. v. Ivy*, 353 S.W.3d 324, 334 (Ky. 2011).  
Daily fines or incarceration are civil contempt “punishments” that may be  
“imposed until the contempt is purged by compliance with an order.” *Id.* (citing  
*United States v. United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91  
L.Ed. 884 (1947). “For the punishment to retain its civil character, the contemnor  
must, at the time the sanction is imposed, have the ability to purge the contempt by  
compliance and either avert the punishment or at any time bring it to an end.” *Ivy*,  
353 S.W.3d at 334-335 (citing *Shillitani v. United States*, 384 U.S. 364, 86, S.Ct.  
1531, 16 L.Ed.2d 622 (1966); *Lewis v. Lewis*, 875 S.W.2d at 862)).

If the trial court elects to impose incarceration for civil contempt, it is  
axiomatic that “a civil contemnor cannot be incarcerated beyond the opportunity to  
purge himself of his contempt.” *Campbell v. Schroering*, 763 S.W.2d 145, 148  
(Ky. App. 1988) (citing *Shillitani*, 384 U.S. at 371). “If the contemnor absolutely  
has no opportunity to purge himself of contempt, then such imprisonment can be  
deemed punitive in nature and in the nature of a proceeding for criminal  
contempt.” *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993).

Because Berger was not in violation of any court order when she  
appeared for her civil contempt hearing – she owed no arrearage – she had no  
future opportunity to purge herself of her contempt by paying the non-existent  
arrearage. Her civil contempt order is thus an abuse of judicial discretion.

*Campbell, supra; Ivy, supra.*

To counter this necessary conclusion, the Commonwealth argues that *Batton v. Commonwealth ex rel. Noble*, 369 S.W.3d 722 (Ky. App. 2012), and *Schaffeld v. Commonwealth ex rel. Schaffeld*, 368 S.W.3d 129 (Ky. App. 2012), permit the imposition of a conditionally-discharged sentence without the setting of a purge amount in cases where people have failed to timely pay their child support. Neither of these cases is applicable. Each involved a conditionally-discharged sentence that was imposed while the person was still in arrearage, and it was only after the person was later found to have failed, again, to make the requisite child support payments that the conditionally-discharged sentence was revoked. Furthermore, in neither case did the contemnor seek a purge amount when the original order imposing the conditionally-discharged sentence was entered.

In contrast, Berger timely asked for a purge amount and was not in arrears when her conditionally-discharged sentence was imposed. Setting a purge amount was an impossibility, and it is that impossibility that demonstrates the trial court's error in this civil contempt case. If the trial court wanted to punish (or, as the trial court stated, "impose repercussions" on) Berger for her untimely-made child-support payments, then it needed to proceed under criminal contempt. By proceeding under civil contempt, the trial court acted outside of its discretion and punished Berger when she was no longer in violation of the trial court's order.

The Commonwealth further argues that Berger, by simply paying the arrearage at the last minute, did not "completely compensate[]" the custodial parent's losses. Appellee's Brf. at 4. "The custodial parent did not have use of the

funds when they were due, thus he did not have the opportunity to use that money as he could have if the Appellant had followed the Family Court's order." *Id.*

While this argument sounds in logic, the Commonwealth has not pointed us to any evidence of record that the custodial parent put forth evidence of any losses. Had such evidence been submitted, the trial court could have imposed as a civil contempt sanction compensation to the custodial parent for his losses caused by the contempt. *Ivy*, 353 S.W.3d at 334-35 ("The court has broad discretion to fashion compensatory remedies, but they must be based on evidence of actual loss.") (citation omitted).

But, regardless, the punishment imposed by the trial court in the instant case – a conditionally-discharged jail sentence – will not make the custodial parent whole for any past financial losses. Thus, the Commonwealth's counter-arguments fail *in toto*.

Accordingly, because the civil contempt order was punishing Berger for past contumacious behavior and set a purge amount that required Berger "to perform an impossible act[,]” *Ivy*, 353 S.W.3d at 335, the trial court's order constitutes an abuse of discretion. We, thus, vacate the Order of Contempt.

DIXON, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT AND FILES A  
SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING: I acknowledge the correctness of the majority's conclusion. However, I write separately to convey my concern that the current state of our law unreasonably limits the ability of trial courts to compel timely obedience with child support orders. The consequence is that irresponsible, intransigent, and defiant obligors may be emboldened and empowered to ignore with impunity timely compliance. Such misplaced and unrestrained civil disobedience forces our court system to expend increasingly scarce and valuable prosecutorial and judicial resources to assure enforcement and compliance, while causing principled parents and their dependent children to suffer detrimental financial impacts due to unbridled accruing arrearages.

Here, the trial court's purpose in imposing "repercussions" was to coerce the contemnor mother's future timely compliance in her payment of her child support obligation. The trial court's palpable frustration with the mother's disobedience is entirely justified in light of the full factual scenario on which this appeal is based. In short, the mother birthed the couple's son in 1999. The parents never married, but the mother rightfully demanded court-ordered child support—which our record indicates the father obediently, regularly, and punctually paid. Fifteen years later, the parents determined it would be in the child's best interest to reside with his father, and the mother correspondingly agreed to pay the father monthly child support, beginning on January 10, 2015. The trial court entered an Agreed Order on February 2, 2015, adopting the parent's agreement. Within eight months, the mother was nearly \$1,300.00 in arrears, evidencing payment of less

than \$50.00 during that entire period.<sup>1</sup> The father was forced to initiate proceedings to enforce the mother's compliance with the child support order. After obtaining a continuance, the mother finally paid the accumulated arrearage in full immediately prior to the rescheduled November 25, 2015, hearing. Because of her full—though untimely—payment, the mother argued the trial court was without legal authority to impose civil contempt penalties because there was no longer any compliance to coerce. The trial court disagreed, and imposed a conditionally discharged sentence of incarceration requiring the mother to remain current on future child support obligations. This appeal resulted.

The mother's long-overdue payment of her court-ordered child support obligations—though in full—did not erase its untimeliness, which is an essential and intrinsic element of full compliance. Though ultimately paid, her delinquent compliance deprived the father and—most importantly—her son of the intended financial benefit at the intended time, and unnecessarily required the costly intervention of our court system.

Even so, our law it is clear relative to imposition of sanctions for civil contempt. Though intentionally dilatory, placing an indefensible financial burden on the father and her son, and causing unnecessary expenditure of limited judicial

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<sup>1</sup> It is noted that pursuant to KRS 530.050, a person is guilty of the Class A misdemeanor of Nonsupport and subject to a minimum sentence of seven days in jail for a second offense and thirty days in jail for a third or subsequent offense, “when he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide to a minor[,]” and upon a finding that he is delinquent for a period of at least two months duration in meeting the full obligation established by a court order. A person is guilty under the same statute of the Class D felony of Flagrant Nonsupport when he similarly fails to provide such court-ordered support for a period of six consecutive months without payment of the support, accumulates an arrearage of not less than \$1,000.00, or places the dependent into destitute circumstances.

resources, the mother purged herself of her contemptuous behavior by making full payment of her child support arrearages immediately prior to the civil contempt hearing, and thereby removed herself from the trial court's corrective reach through civil contempt. As noted by the majority, the mother might not have escaped sanctions had the prosecutor and trial court proceeded under both civil and criminal contempt. The unfortunate result concerning untimely payment of child support presented in the present appeal arises too often within our trial courts and may invite further review and action by our Supreme Court or General Assembly.

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BRIEF FOR APPELLEE:

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