

COÖS, SS.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Kristen McGuire

vs.

Suzanne Collins, Superintendent

No. 09-E-117

ORDER

On Friday, November 6, 2009, the petitioner filed an Ex Parte Petition for Writ of Habeas Corpus, alleging that, as the result of the Order on Summary Finding of Contempt (“Contempt Order”) entered by the Berlin Family Division on November 2, 2009, she was being unlawfully detained at the Coos County House of Corrections. The Court, on an ex parte basis, suspended the Contempt Order, ordered that the petitioner be released from custody immediately, and scheduled the matter for a hearing to be held on November 9, 2009, at the Grafton County Superior Court. On November 9, 2009, the petitioner appeared at the scheduled hearing with counsel. A representative of the Coos County Attorney’s Office appeared on behalf of the respondent. For the reasons that follow, the Court finds that the Contempt Order is unlawful, REVERSES the Contempt Order, and VACATES the petitioner’s thirty-day sentence.

I. Standard of Review

Under RSA 534:25, if an individual is “imprisoned or restrained by order of a justice, or of any court or authority other than the supreme or superior court or a justice thereof, for contempt, the proceedings in the order and the cause thereof may be revised, and the order affirmed, modified or reversed by the superior court or a justice thereof.” The burden in a habeas corpus proceeding falls generally upon the petitioner

to prove the infringement of either a constitutionally protected or a statutorily enforced liberty interest. See State v. Collins, 133 N.H. 609, 612 (1990); Baker v. Cunningham, 128 N.H. 374, 378 (1986).

II. Factual Background

Unless otherwise noted, the following facts are undisputed. The petitioner is the respondent in a case before the Berlin Family Division, 2006-JV-00108, involving custody of her 13-year-old son. The petitioner has been diagnosed with alcoholism and has been unable to rehabilitate sufficiently to regain custody of her son. On or about October 16, 2009, the petitioner received notice that she was required to appear at a hearing before the Berlin Family Division at 11 a.m. on November 2, 2009.

The petitioner arrived at the courthouse approximately thirty minutes before the scheduled hearing. While the petitioner was seated in the hallway outside the courtroom, she was approached by a court security officer who informed her that she had an odor of alcohol about her person and would need to submit to a preliminary breath test (PBT). A state trooper who was present in the courthouse performed the PBT. Neither the petitioner nor her attorney was not told the result of the PBT prior to the beginning of the hearing.

The remaining facts are memorialized on a recording of the hearing. The recording was admitted by agreement and marked as Petitioner's Exhibit 1.¹ At the beginning of the hearing, the court asked the participants to identify themselves for the record. The petitioner and her attorney identified themselves. The court then asked the petitioner to stand. The court explained that the security staff at the courthouse had reported to him that, when the petitioner arrived at the courthouse, she smelled of alcohol and that she

¹ The Court orders that Petitioner's Exhibit 1 and that portion of the record from the superior court hearing during which it was played be sealed. See RSA 170-B:23.

was given a PBT. The court stated that it was reported to him that the petitioner blew a 0.20 on the PBT. The court gave counsel for the petitioner the opportunity to speak on the petitioner's behalf. Counsel for the petitioner stated that he had not seen the results of the PBT, that the petitioner understood the purpose of the proceedings and was prepared to proceed, and that the petitioner denied having consumed alcohol on the morning of the hearing. Counsel also reminded the court that the petitioner is an alcoholic. The court stated that its concern was "the contemptuous nature of appearing in court in an inebriated state." Counsel stated that he did not believe that the petitioner had been contemptuous or intended to be contemptuous. Counsel also stated that if the court was inclined to find the petitioner in contempt, then discussion of the matter should cease and the allegations should be addressed at a criminal trial.

The court informed the petitioner that the last two individuals who had appeared in his court in an inebriated state had been found in direct contempt and sentenced summarily to thirty days of incarceration and that neither of those individuals had blown as high as a 0.20. The petitioner apologized to the court for any disrespect and stated that it "wasn't [her] intention." At that point, counsel for the petitioner interjected that, if the court was considering criminal penalties, it was not in the petitioner's interest to make statements, which could be held against her. Counsel repeated that, prior to the hearing, he and the petitioner had not been made aware of the PBT result. After counsel made this statement, the court stated that the petitioner was being found in contempt and summarily sentenced to thirty days in the Coos County House of Corrections, "effective stand committed," and that the underlying hearing would be continued.

After the court made the finding of contempt, counsel for the petitioner requested the opportunity to be heard and to make a record. Counsel for the petitioner explained that the petitioner took issue with the court relying on a PBT, which he stated is not a scientifically reliable test and is not admissible in court. Counsel requested that the petitioner at least be allowed to take a reliable test before the court made its findings. Counsel argued that the petitioner had not caused any disruptions or otherwise acted in a contemptuous manner and that she had no intention to offend the court. Counsel requested that the court reconsider its decision to incarcerate the petitioner. There was then a brief discussion on the record, initiated by the guardian ad litem, about rescheduling the hearing. Counsel for the petitioner then again asked the court to reconsider its contempt finding and the sentence it was imposing, reiterating the petitioner's struggle with alcoholism. After hearing the comments, the court modified its order only by changing the date of the rescheduled hearing. The court stated that the remaining portion of its order would stand and that the petitioner was committed to thirty days of incarceration.

After the hearing, the court issued the Contempt Order. In the Contempt Order, the court stated the information it had received from court security officers, including the security officers' observations of the odor of alcohol and the PBT result. It next stated that the petitioner had appeared before the court "flushed in the face, partially confused and unkempt in appearance compared to previous appearances" before the court, and that it was "not the first time that [the petitioner] appeared in Court with the odor of alcohol about her person." The court stated that it found the petitioner in "direct contempt due to her appearing in Court at a high level of intoxication," and sentenced her to thirty days for "direct criminal contempt."

III. Discussion

The petitioner argues that the court acted unlawfully when it summarily found her in contempt and sentenced her to thirty days of incarceration because: (1) she was not contemptuous; (2) any alleged contempt was indirect, as opposed to direct, so it could not be punished summarily; (3) even if the alleged contempt was direct, she was not afforded even the basic process due in direct contempt proceedings because the basis for the contempt finding was not set forth on the record; and (4) even if the finding of contempt was properly entered, the thirty-day sentence was excessive and an abuse of discretion. At the hearing, the petitioner agreed that the first issue is not actually before the Court at this juncture, and the Court should therefore take up the second issue first.

The Court agrees with the petitioner that the court committed legal error when it found direct criminal contempt by way of summary proceedings. The Contempt Order states plainly that the petitioner was to be incarcerated as punishment for criminal, as opposed to civil, contempt. See generally Mortgage Specialists v. Davey, 153 N.H. 764, 787 (2006) (distinguishing civil and criminal contempt). Contempt can be direct or indirect. State v. Hancock, 156 N.H. 301, 304 (2007). The court's findings on the record and the Contempt Order describe the petitioner's contempt as direct.

Direct contempt is committed in the presence of the court and in its immediate view. Indirect contempt is committed outside the presence of the judge, without the judge having personal knowledge of every element of contempt. While direct contempt may be summarily punished, indirect contempt requires procedural formalities that afford the defendant due process. Indirect criminal contempt is treated as a misdemeanor and the alleged contemnor must be accorded a jury trial if the trial court wishes to impose a sentence of greater than six months in the house of correction.

Id. at 304-05 (citations omitted).

The only reason the court offered on the record for finding the petitioner in contempt was that she appeared before the court in an inebriated state. It made this finding based on ex parte statements of court security officers and the PBT result. The court did not make this finding based only on information within its personal knowledge. The petitioner was given no opportunity to confront or cross-examine the individuals who gave evidence against her, and her objections to the reliability of the PBT were not addressed. Assuming, without deciding, that the petitioner did commit contempt, the contempt was indirect, as opposed to direct, because the court relied on outside sources and on facts of which it did not have personal knowledge (the PBT result and odor of alcohol detected by court security officers) in making its finding. See State v. Lieber, 146 N.H. 105, 107-08 (2001) (finding of direct contempt could not be based on information outside court's personal knowledge). At the hearing on this matter, counsel for the respondent admitted that the court relied on the PBT result and the high level of intoxication that the PBT allegedly showed in making its finding of contempt.

In the Contempt Order, the court gave additional reasons for its finding of contempt that were not set forth on the record. The court stated that the petitioner appeared "flushed in the face, partially confused and unkempt in appearance," and had previously appeared in court smelling of alcohol. The Court recognizes that the petitioner disputes this characterization and contends that the record does not support the court's statement that she was confused. Even if the Court assumes that the court's characterization is accurate, this characterization, standing alone, is not sufficient to support the contempt finding, and it is apparent that the court did not rely only on its personal observations of the petitioner's appearance and conduct at the November 2 hearing and its observations from previous

hearings in entering its finding. The court stated explicitly in the Contempt Order that its decision was based on the petitioner's "appearing in Court at a high level of intoxication." The court relied on the PBT test result, which was outside the court's personal knowledge, in determining the level of intoxication. The court did not rely only on the petitioner's appearance and the petitioner's odor of alcohol at prior hearings to determine the level of intoxication on which it expressly based its direct criminal contempt finding.

Moreover, even if the court could have relied on the petitioner's appearance and prior odor of alcohol as the bases for a direct contempt finding, the court was required to give the petitioner oral notice of the conduct that it thought constituted contempt and an opportunity to speak in her defense. State v. Martina, 135 N.H. 111, 119 (1991). The court did not inform the petitioner of the additional observations set forth in the Contempt Order or that those observations formed part of the basis for its finding until after it entered a finding of contempt and ordered incarceration. The petitioner therefore had no opportunity to defend herself with respect to these factors. Even if the petitioner's appearance and prior odor of alcohol provided a sufficient basis for a finding of direct contempt, the petitioner was entitled to notification of the conduct the court observed that would constitute the contempt.

Because the court did not have personal knowledge of all of the elements of the contempt, the court could not lawfully enter a finding of direct contempt and sentence the petitioner to thirty days of incarceration by way of summary proceedings. Moreover, even if summary proceedings were appropriate, the court did not fulfill its legal duty to notify the petitioner of all of the conduct it observed that it thought constituted contempt. For these two independent reasons, the court acted unlawfully by making a finding of direct criminal

contempt and sentencing the petitioner to thirty days of incarceration. The Contempt Order is REVERSED and the petitioner's sentence is VACATED. The Court need not reach the petitioner's remaining arguments in reaching its decision.

SO ORDERED.

11/10/09
Date

Peter H. Bornstein
Presiding Justice