

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002420-MR

LAYMON RIGGS

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 90-CI-00224

COMMONWEALTH OF KENTUCKY, EX
REL. DEBRA S. CALFEE

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Laymon Riggs was found to be in civil contempt of a Barren Circuit Court's order directing him to pay child support arrearages. He was sentenced to 25 days in jail, which sentence was suspended but

¹ Senior Judge David C. Buckingham 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.

later reinstated. Riggs argues he was denied legal counsel and the opportunity to prove his indigency. We affirm.

Riggs and Debra S. Calfee were divorced in Cook County, Illinois, in 1980. There was no child support ordered by that court. Calfee later began receiving public assistance and medical benefit payments through Kentucky. On April 30, 1990, the Commonwealth commenced a civil action against Riggs in Barren County, requesting that he be ordered to pay child support and provide medical insurance for the child of the former marriage. A default judgment ordering him to pay was entered on July 3, 1990.

Riggs acknowledges that his payment history is far from stellar. The trial court entered orders on June 15, 1993, March 15, 1994, January 24, 1995, June 22, 1999, and February 21, 2000, all finding Riggs in contempt of court for his failure to pay child support. On July 3, 2003, the Barren County Attorney filed a motion seeking to have Riggs show cause why he should not be found in contempt of court again for failure to pay the arrearage owed.

On August 18, 2003, a hearing was held before the circuit court. Riggs was present but was not represented by counsel. He informed the court that he was self-employed. The court found Riggs in arrears and sentenced him to serve 25 days in jail, but suspended that sentence provided he pay \$471.36 before November 1, 2003, and \$30 per week toward the arrearage. The court additionally instructed him that if he failed to make those payments, he would be required to serve that sentence or would need “to show indigency.”

On January 10, 2005, on motion of the county attorney, the trial court entered another order finding the arrearage to be \$2,460.74 and ordering Riggs to serve 25 days in jail for contempt. Riggs was not present at that hearing, although notice had been sent to his last known address. The order provided he could avoid that jail sentence if he paid \$1,250 before May 1, 2005, and \$130 per month toward the arrearage.

On December 16, 2005, the county attorney filed another motion seeking to determine Riggs's indigency status and to reinstate the suspended sentence. Riggs filed an affidavit of indigency, and on January 23, 2006, the court appointed the Department of Public Advocacy to represent him.

Finally, on November 8, 2006, a hearing was held, but Riggs again was not present, although his counsel was. The court ordered Riggs to serve 25 days in jail for civil contempt, and a bench warrant for his arrest was issued. The order noted an arrearage in the amount of \$1,756.34 as of October 31, 2006. The order also provided that Riggs could purge himself of contempt by making a payment of \$1,020.

Riggs's trial counsel argued to the court at the hearing that pursuant to *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), the suspended sentence could not be revoked because Riggs was not represented by counsel at the time it was imposed in January 2005. The court asked whether counsel intended to file a motion pursuant to Kentucky Rules of Civil Procedure

(CR) 60.02 collaterally attacking the January 10, 2005, order. No motion was forthcoming, and this appeal followed.²

“Civil contempt consists of the failure of one to do something under order of court, generally for the benefit of a party litigant.” *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996). Willful failure to pay child support is an example of civil contempt. *Id.* One who is found in civil contempt “carries the keys to the jail in his pocket, because he is entitled to immediate release upon his obedience to the court’s order.” *Id.*

Riggs argues that he was denied counsel when the court found him in contempt and sentenced him to 25 days in jail (which sentence was suspended) at the August 18, 2003, hearing. In *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993), the Kentucky Supreme Court held that “the statutes of the Commonwealth require that an indigent person has a right to appointed counsel in civil contempt proceedings prior to the execution of an order of incarceration.” *Id.* at 864.³ Riggs also contends that the fact that his 25-day sentence was suspended at the 2003 hearing is not relevant to whether or not he was entitled to counsel. He cites the *Shelton* case, wherein the U.S. Supreme Court held that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless

² Riggs is apparently free on a surety bond pending this appeal.

³ The Commonwealth acknowledges this language in the *Lewis* case, but it maintains that the court in *Fraser v. Commonwealth*, 59 S.W.3d 448, 456 (Ky. 2001), while not specifically overruling *Lewis*, suggested that Kentucky statutes do not mandate the appointment of counsel in a civil contempt proceeding.

the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.” *Shelton*, 535 U.S. at 658, *quoting Argersinger v. Hamlin*, 407 U.S. 25, 40, 92 S.Ct. 2066, 32 L.Ed.2d 530 (1972).⁴

The Commonwealth argues that Riggs was punished for contempt in the January 2005 order, not the August 2003 order. We agree. The November 2006 order revoking his suspended sentence stated this. Further, while it is true that the court found Riggs in contempt and sentenced him to 25 days in jail at the January 2005 hearing, what is overlooked is that Riggs did not appear at that hearing even though proper notice of the hearing was sent to him at his last known address. Once Riggs was finally before the court, he was appointed counsel and was given the opportunity to prove his indigency. When he failed to convince the court of his indigency, his suspended sentence was revoked.⁵ Under these circumstances, we cannot say that Riggs was denied the right to counsel or the right to prove his indigency. In short, we find no error.

The order of the Barren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia K. Pearson
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

⁴ *Shelton* did not involve the revocation of a suspended sentence for civil contempt. Rather, it involved the revocation of a suspended sentence for a criminal misdemeanor conviction.

⁵ The court noted in its bench notes that its procedures were in substantial compliance with the requirements of the *Lewis* case.

Frankfort, Kentucky

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