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NOVEMBER 18, 2009
(FILE NO. 2009-SC-0313-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002109-MR

JARROD L. NICELY — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 05-CR-00057

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM, SENIOR JUDGE.

WINE, JUDGE: Jarrod L. Nicely ("Nicely") appeals from the Magoffin Circuit Court's denial of his motion for postjudgment relief pursuant to Kentucky Rules of Civil Procedure ("CR") 60.02. Nicely contends the trial court erred when it denied

him credit for time served in the county jail while he participated in the Magoffin Drug Court Program. For the reasons stated below, we reverse.

I. PROCEDURAL AND FACTUAL BACKGROUND

On July 1, 2005, Nicely was arrested on charges contained within a sealed indictment. On July 21, 2005, he appeared before the Magoffin Circuit Court, entered a plea of not guilty and was released on a $10,000 secured bond. A pretrial was scheduled for September 15, 2005. At that pretrial, in open court, Nicely signed "Motion to Enter Guilty Plea" and "Commonwealth's Offer on a Plea of Guilty" forms. There was a discussion as to whether Nicely would be allowed to participate in the Drug Court Program ("Drug Court"). The matter was passed to September 29, 2005, for "rearraignment." On that date, the trial judge advised that she would order an evaluation to determine if Nicely qualified for Drug Court prior to going through the Plea of Guilty colloquy. The court then went off the record for approximately two minutes and the matter was passed to October 13, 2005, yet again for "rearraignment." This Court was not provided a video or written transcript of what, if anything, may have happened on October 13, 2005.

An order transferring Nicely to Drug Court was signed on November 3, 2005, but was not entered until December 27, 2005. The court issued a bench warrant for Nicely's arrest on November 15, 2005, based on Nicely's "failure to abide by drug court policy." On November 17, 2005, Nicely, now in custody, was brought before a senior status judge who was presiding in place of the assigned

trial judge. The matter was passed to December 1, 2005, and Nicely was remanded to jail. On December 1, 2005, the trial judge announced the matter was on the docket for sentencing, that a presentence investigation report had been completed and "everything had been done." The court then sentenced Nicely to five years to serve, probated for five years, with a condition of probation including participating in Drug Court. The grant of probation subject to participating in Drug Court was in compliance with Kentucky Revised Statutes ("KRS") 533.020(2) and KRS 533.030.

Shortly thereafter, on January 17, 2006, the Court issued a second bench warrant, again citing the reason as "probable cause/violation of drug court policies/probation violation." Nicely was arrested on January 18, 2006, and released on February 6, 2006.[1] There is no reference on the case history maintained by the Magoffin Circuit Court Clerk or on the video record as to this event.

On March 30, 2006, the Jailer signed a "Time Served Release" form indicating Nicely had served seven days between March 23 and March 30, 2006.[2] Between April 7, 2006, and April 16, 2007, the trial court signed six "Remand Orders" requiring Nicely to serve either between seven and fourteen days, an indeterminate amount of time, at various local detention facilities. On March 18, 2007, the trial judge ordered that Nicely be released from the Big Sandy Regional

[1] According to the "Documentation Custody Time Credit" sheet dated 10/02/2007.

[2] For Drug Court violations as per the Custody Time Credit sheet.

Detention Center on the 20th of March and "placed on modified house arrest and submit to drug testing everyday at the Magoffin County Drug Court Office until further notice."[3] Each time, the orders cited only form language for the detention – "for having violated the terms and conditions of the Knott/Magoffin County Drug Court Program."

Nicely was finally discharged from Drug Court on April 26, 2007, and was ordered to appear for a revocation hearing on May 3, 2007.[4] To allow time for a presentence investigation report to be prepared, the matter was passed to August 2, 2007. Nicely stipulated to having violated the conditions of probation by failing to complete the Drug Court Program. Nicely requested a calculation and credit for the time he served awaiting sentencing, believing he was entitled to 301 days. However, the court advised Nicely he would not receive credit for any time served while in Drug Court as he had been found in contempt of the trial court order to complete the program. The court then sentenced Nicely to serve five years and directed the Department of Probation and Parole to calculate Nicely's jail time without including any time served for the Drug Court violations.

On August 16, 2007, the court docket sheet includes a handwritten notation "Jarrod Nicely – credit 43 days." Although there is no written order or

[3] According to the 10/02/2007 Custody Time Credit sheet, Nicely had been arrested on December 18, 2006.

[4] Although the order and affidavit in the court file indicated Nicely was administratively discharged from the program, subject to the Administrative Procedures of the Court of Justice ("AP") XIII, Section 13, the court treated Nicely's discharge from the Drug Court Program as an "Involuntary Termination" pursuant to AP XIII. Sec 11.

evidence of service of this notation on any party, on September 25, 2007, Nicely filed, *pro se,* a motion to clarify the award of 43 days. The motion was passed to October 4, 2007, at which time assigned counsel tendered a written memorandum of law, challenging the court's decision not to allow jail time credit for time served as a result of Drug Court violations. The trial court denied Nicely's CR 60.02 request for credit for time served in a detention facility because each period of incarceration was treated as a punishment for contempt, and this timely appeal followed.

II. STANDARD OF REVIEW

In *Duncan v. Commonwealth,* 614 S.W.2d 701 (Ky. App. 1980), this Court noted that a motion for additional jail credit under KRS 532.120(3) and (4) falls within the requirements of CR 60.02 and is bound by those provisions. We review a trial court's ruling denying a CR 60.02 motion for an abuse of discretion. *See Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998); *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); and *White v. Commonwealth*, 32 S.W.3d 83 (Ky. App. 2000). For a trial court to have abused its discretion, its decision must have been arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

III. ANALYSIS

We are not unmindful that the trial judge exercised prodigious patience in monitoring Nicely. When Nicely was sentenced on December 1, 2005, the trial court decided not to send him to the penitentiary. Rather, Nicely was

given the opportunity to participate in the Magoffin/Knott County Drug Court Program. Although the trial court would have been justified in revoking Nicely's probation the first time he did not abide by the terms and conditions of the program, the court showed unmerited leniency. Unfortunately, Nicely treated the court's humanity with disdain, repeatedly violating the conditions of Drug Court. Nevertheless, we must evaluate the trial court's decision to deny credit for the time Nicely spent in jail while in Drug Court in light of the statutory and administrative requirements of the program. KRS 533.020(2) authorizes a court to sentence a defendant who has entered a plea of guilty:

> to probation with an alternative sentence if it is of the opinion that the defendant should conduct himself according to conditions determined by the court and that probationary supervision alone is insufficient. The court **may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence** at any time prior to the expiration or termination of the alternative sentence.

(Emphasis added). Subject to this mandate, the drug court program administered in various counties is "an alternative sentencing court program authorized by the Kentucky Supreme Court, combining case management, judicial oversight, treatment, and drug testing, including but not limited to, the implementation of curfews, sanctions, and incentives." Administrative Procedures of the Court of Justice ("AP") XIII Definitions (9).

Furthermore, AP XIII, Sec.10, authorizes various sanctions for noncompliance with drug court requirements:

> Each participant shall comply with the requirements and other conditions established by drug court. Failure to comply may result in the imposition of sanctions upon the participant by the drug court judge. **Sanctions may include, but are not limited to**, admonishments from the drug court judge, residential drug treatment, community service, phase demotion, increased group treatment, home incarceration, imprisonment in a detention facility, and termination from drug court. Graduated sanctions may be utilized for continuous noncompliance.

(Emphasis added.)

We note that Nicely does not challenge the appropriateness of finding a defendant in contempt for violating a condition of probation; rather he argues that he was entitled to credit for any time spent in custody for violating the conditions of Drug Court prior to final sentencing. However, we cannot decide if the trial court acted on sound legal principles without considering whether a court may find a defendant in contempt for violating the conditions of probation as opposed to only modifying the conditions of or revoking probation. This issue has not been directly addressed by our courts. The Kentucky Supreme Court did find that a juvenile may be subject to contempt for a probation violation. However, the majority opinion did not address the issue as to adults:

> However, we are not dealing with adult sentencing, rather a very specific Kentucky Juvenile Justice Code, which as the Court of Appeals properly observed, is replete with references to, and authority for, the appropriate use of the court's inherent contempt powers in connection with the juvenile court's enforcement of its orders.

A.W. v. Commonwealth, 163 S.W.3d 4, 6 (Ky. 2005).

Even though this is a case of first impression in Kentucky, numerous other jurisdictions have addressed this issue with varied results. In *State v. Walton*, 215 Or. App. 628, 170 P.3d 1122 (Or. App. 2007), the Oregon court found that the prosecution may charge a defendant with contempt of court based on acts that also constitute a violation of conditions of probation. Other courts have found the exclusive remedy for addressing violating conditions of probation is revocation of the probated sentence, not a finding of indirect contempt. *Cason v. State*, 604 So. 2d 928 (Fla. App. 1992). Maryland also prohibits finding contempt as opposed to revoking probation. *Williams v. State*, 72 Md. App. 233, 528 A.2d 507, 508 (1987). Tennessee has taken a middle ground, allowing the sentencing judge to choose either punishment. *State v. Williamson*, 619 S.W.2d 145, 147 (Tenn. Cr. App. 1981). Alaska allows a court to use its contempt power in such a situation only if the defendant had notice, prior to violating the condition of probation, that such a violation could result in a contempt of court charge. *Alfred v. State*, 758 P. 2d 130, 132 (Alaska App. 1988).

We find no statute, administrative procedure or Kentucky caselaw that prohibits the court's use of either its civil or criminal contempt powers as opposed to revoking a defendant's probation or modifying the previously imposed conditions of probation. Adopting the logic of the Tennessee and Alaska courts, we conclude a Kentucky court should be free to pursue either contempt or revocation proceedings as may be appropriate. However, we do not believe that a

trial court may impose contempt sanctions for the same violations of the conditions of probation which are used to revoke probation.

Before deciding how a Kentucky court should use its contempt powers when dealing with violations of conditions of probation or conditional discharge and alternative sentencing programs under KRS 533.020 and KRS 533.030, it is necessary to review the general contempt powers of the court. When a court exercises its contempt powers, it has nearly unlimited discretion. 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. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007).

Contempt falls into two categories: civil and criminal. Refusal to abide by a court's order is civil contempt. *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001). A subsequent civil contempt order is designed to coerce or compel a course of action. Criminal contempt includes obstruction of justice; obstruction of the court process; displayed disrespect for the court; degradation of the court's authority; bringing the court into disrepute; or contaminating the purity of the court. *A.W. v. Commonwealth*, *supra* at 11. A criminal contempt order is designed to punish conduct that has already occurred, or to vindicate the court's authority. *Id*. "When contempt is criminal in nature, it is necessary for all elements of the contempt to be proven beyond a reasonable doubt." *Commonwealth v. Pace*, 15 S.W.3d 393, 396 (Ky. App. 2000). "Evidence

necessary for a finding of contempt must show willful disobedience toward, or open disrespect for, the rule or orders of a court." *Id.*

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 U.S.*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925). When contempt is criminal in nature, it is necessary for all elements of the contempt to be proven beyond a reasonable doubt. *Brannon v. Commonwealth*, 162 Ky. 350, 172 S.W. 703 (Ky. App. 1915).

From the record below, it is clear the trial court was not using its civil contempt power as there is no evidence that the periods of incarceration were conditioned on Nicely's conforming his behavior to a specific standard. And, since the alleged violations of the Drug Court Program did not occur in the court's presence, any violations of the court's orders would have to be treated as indirect contempt.

Under these circumstances, if a sentencing court chooses to find a defendant in contempt for violating conditions of probation as opposed to revoking or modifying the conditions of probation, the defendant must be afforded certain due process rights, including a hearing. *Pace*, *supra* at 395. There is no evidence from the record presented to us that any hearings were held or that the trial court made a finding of contempt at any time during the course of Nicely's probation. To the contrary, each time Nicely was incarcerated, the court order clearly recited violations of the terms and conditions of the Drug Court Program. If the record were silent, we would remand this matter back to the trial court for an appropriate evidentiary hearing consistent with the holding in *Cooke*, *supra*. But, since the court previously found that Nicely violated the conditions of Drug Court, we believe the trial court abused its discretion when, *nunc pro tunc,* it found him in contempt as well.

Based on this conclusion, we must find that Nicely was clearly entitled to credit for the time he served in jail while in Drug Court. KRS 532.120(3) provides that, "[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the court imposing sentence toward service of the maximum term of imprisonment." The word "custody" is defined in KRS 520.010(2) as "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes. . . ." *Lemon v. Corrections Cabinet*, 712 S.W.2d 370, 371 (Ky. App. 1986).

When Nicely violated the terms and conditions of Drug Court, the trial court could have either found him in contempt or revoked the probation granted on December 1, 2005. Having previously incarcerated Nicely for violating the conditions of Drug Court, and the defendant having stipulated to those violations, the court failed to follow the mandates of KRS 532.120(3) and afford him the appropriate credit for time served waiting final sentencing.[5]

The judgment of the Magoffin Circuit Court is reversed and remanded for the court to order the Corrections Cabinet, pursuant to KRS 532.120(3), to recalculate the credit for the time spent incarcerated for violating the terms and conditions of Drug Court, as well as any other time spent in custody before final sentencing.

COMBS, CHIEF JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, CONCURRING: I agree with the majority to the extent it holds that the trial court erred in revoking Nicely's probation and also sentencing him for contempt for the same actions that violated the conditions of his probation. In other respects, however, I respectfully disagree. Thus, I concur in result only.

[5] We are aware in the unpublished case, *Green v. Commonwealth*, 2008 WL 4822514 (Ky. App. 2008), another panel of this court reached the conclusion that, upon a finding of contempt, credit should not be given to the original sentence for time served as a result of the finding of contempt.

The majority concludes that a trial court should be free to pursue either contempt or revocation proceedings when a defendant violates condition(s) of his or her probation. I disagree with this position. The majority adopts the position of the Tennessee and Alaska courts; I would adopt the position of the Florida and Maryland courts. *See also Jones v. United States*, 560 A.2d 513, 516 (D.C. 1989) ("When a probationer violates a condition of his probation, the only appropriate sanction is a withdrawal of the previously afforded favorable treatment rather than the imposition of an additional penalty."); *State v. Williams*, 560 A.2d 100, 104 (N.J. Sup. Ct. 1989) ("Contempt of court should not be superimposed as an additional remedy in a probation violation setting if the act that occasions the violation itself is not otherwise criminal.").

In the *A.W.* case, the Kentucky Supreme Court affirmed a juvenile court's finding of contempt and sentence to detention for violation of a condition of probation. *Id*. at 7. The Court noted, however, that it was dealing with "a very specific Kentucky Juvenile Justice Code" that was "replete with references to, and authority for, the appropriate use of the court's inherent contempt powers in connection with the juvenile court's enforcement of its orders." *Id*. at 6. In this case, AP XIII, Sec. 10, authorizes sanctions for noncompliance with Drug Court requirements. An argument may be made, based on *A.W.*, that these circumstances similarly would allow punishment for violations of probation by holding the defendant in contempt as a sanction, pursuant to AP XIII, Sec. 10, for noncompliance with Drug Court requirements. While I disagree with such a

holding, I especially disagree with adopting a rule that a court is free to choose between probation revocation and contempt punishment where there is no statute or regulation, as in *A.W.,* and as in the present case.

To illustrate the danger of such a rule, suppose a defendant was sentenced to thirty days in jail and the sentence was probated on the condition that the defendant undergo substance abuse treatment, commit no criminal offenses within the probationary period, and pay the victim $500 in restitution. If the defendant violates all three conditions of his probation, he could have his probation revoked for violating one of the conditions and also be held in contempt for violating the other two conditions. The result could be that the defendant's probation is revoked and he is jailed for thirty days for the offense, and he is also sentenced to six months on either or both of the contempt charges. This is the point made by former Justice Cooper in his dissenting opinion in the *A.W.* case. *Id.* at 8. This danger will be present whether there is a statute or regulation specifically authorizing contempt, as in *A.W.* and this case, or not.

While I recognize that the "[p]ower to punish for contempt is inherent in every court[,]" *see Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001), the Kentucky statute for revocation of probation does not contemplate that the courts would exercise such power under those circumstances. *See* KRS 533.020. The statute states that the courts may modify or enlarge the conditions of probation as an alternative to revoking probation if a defendant commits an

additional offense or violates a condition. *Id*. No mention is made of the exercise of the contempt power.

Another reason I disagree with the rule adopted by the majority is that sometimes, perhaps frequently, probation violations will not be contemptuous. I believe this is one of those cases. In my opinion, Nicely's failure to comply with Drug Court requirements does not constitute contempt, either civil or criminal.

As the majority states, civil contempt applies when one refuses to abide by a court order, and it is designed to coerce or compel a course of conduct. But a contempt proceeding was not used here to force Nicely to comply; rather, it was used to punish. Thus, civil contempt was not applicable. Furthermore, criminal contempt did not apply because Nicely's noncompliance with Drug Court requirements did nothing to obstruct justice, insult the court, degrade the court's authority, or bring the court in disrepute. Nicely's actions were simply violations of the terms of his probation.

"[T]he overwhelming majority of jurisdictions that have considered this issue have concluded that holding a defendant in contempt of court for violating conditions of probation offends fundamental principles of fairness." *A.W.* at 8 (J. Cooper, dissenting). While I agree that this case should be reversed because the trial court imposed punishment in the form of both revocation of probation and contempt, I respectfully disagree with adopting a rule that allows a court to choose between a contempt action and probation revocation when a defendant violates the conditions of his or her probation. In my opinion, a court

should not have the option of punishing a defendant for contempt for a violation of the conditions of his probation.

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