

RENDERED: APRIL 15, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000811-MR

STEPHEN H. POINDEXTER

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 09-CR-00099

COMMONWEALTH OF KENTUCKY;
AND HONORABLE JAMES G. WEDDLE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

DIXON, JUDGE: Stephen H. Poindexter, a licensed attorney, appeals from a judgment of the Adair Circuit Court holding him in contempt of court for failure to comply with a court order. 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.

Waylon D. Bradshaw was scheduled for arraignment on December 15, 2009, in Adair Circuit Court. Poindexter intended to represent Bradshaw in the matter; however, Poindexter could not attend the arraignment and asked Attorney Mike Harris to appear in his absence. The trial court advised Harris of its policy prohibiting an attorney from standing in for another attorney, noting that the attorney appearing at arraignment would be considered the attorney of record. In response, Harris asked the court to postpone Bradshaw's arraignment so Poindexter could be present. The court rescheduled Bradshaw's arraignment for January 12, 2010. On December 22, 2009, Poindexter mailed the court his notice of entry of appearance in Bradshaw's case.

On January 4, 2010, Poindexter tendered an agreed order signed by the Commonwealth rescheduling the arraignment date "due to defense counsel having previous commitments in another part of the state on January 12, 2010." When Judge Weddle received the agreed order, he marked through the signature line and handwrote the following order:

This case has been continued on one previous occasion.
The defendant and counsel shall be present on January
12, 2010 at 1:00 pm.

/s/ James G. Weddle, Judge

On January 11, 2010, Poindexter filed a "Notice of Non-Representation" advising the court that he no longer represented Bradshaw and that Bradshaw would "seek representation by Hon. Theodore Lavitt." Poindexter also filed a Revocation of Assignment of Bond Proceeds. On January 12, 2010, the court

called Bradshaw's case for arraignment. Bradshaw appeared without counsel, and upon inquiry from Judge Weddle, Bradshaw stated that Poindexter had advised him to find a new attorney because Poindexter could not be in court that day. The court noted it had ordered Poindexter to appear for the arraignment; accordingly, the court issued a criminal summons for Poindexter to show cause why he should not be held in contempt.

On January 26, 2010, the court held a show-cause hearing, and Poindexter appeared with counsel. Poindexter opined that he had a pre-existing commitment to attend an education conference in Frankfort, Kentucky, on January 12.

Poindexter asserted that he believed the Notice of Non-Representation was sufficient to notify the court he was not affiliated with Bradshaw's case.

Poindexter conceded he had been aware of his scheduling conflict at the time he filed the entry of appearance; however, Poindexter argued he did not deliberately mislead the court, and he believed he was following proper procedure. After considering Poindexter's arguments, the court ruled that Poindexter's failure to appear at arraignment was deliberate and willful, constituting contempt of court. The court assessed a \$250 fine and sentenced Poindexter to 96 hours in jail, suspended for two years. This appeal followed.

We are mindful that a trial court has broad authority when exercising its contempt powers; consequently, our review is limited to a determination of whether the court abused its discretion. *Kentucky River Community Care, Inc. v. Stallard*, 294 S.W.3d 29, 31 (Ky. App. 2008). "The test for abuse of discretion is

whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

First, Poindexter argues the court’s finding of contempt was clearly erroneous because he had withdrawn from the case and was, therefore, not obligated to appear at the arraignment on January 12. Poindexter asserts that the pleadings he filed – Notice of Non-Representation and Revocation of Assignment of Bond Proceeds – were sufficient to notify the court of his withdrawal from the case. As Poindexter notes, the 29th Judicial Circuit Rules of Procedure state in relevant part:

3. REPRESENTATION IN CRIMINAL CASES:
Once an attorney appears for a defendant in a criminal case, he/she shall not be allowed to withdraw as counsel thereafter, except upon a showing of extraordinary circumstances.

Poindexter emphasizes that he had “not yet appeared” before the court on Bradshaw’s behalf; consequently, he opines that the Notice of Non-Representation discharged his duty to appear.

We are not persuaded by Poindexter’s interpretation of the rule, and we note that he filed an entry of appearance on Bradshaw’s behalf. Poindexter was the attorney of record for Bradshaw, and the court’s handwritten order plainly mandated Bradshaw’s appearance on January 12. The language of the rule – “shall not be allowed to withdraw” – clearly contemplates that withdrawal requires

permission from the court. Furthermore, Kentucky Supreme Court Rule 3.130

(1.16(c)) states:

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Here, it is undisputed that Poindexter did not request permission from the court to withdraw as counsel; consequently, we conclude the trial court properly found that Poindexter had a duty to appear at Bradshaw's arraignment.

Next, Poindexter contends the evidence was insufficient to support the court's finding of contempt. Poindexter relies on *Commonwealth v. Pace*, 15 S.W.3d 393 (Ky. App. 2000), where a panel of this Court vacated an order of contempt due to insufficient evidence. In *Pace*, the Court set forth the following evidentiary standard:

When contempt is criminal in nature, it is necessary for all elements of the contempt to be proven beyond a reasonable doubt. Evidence necessary for a finding of contempt must show willful disobedience toward, or open disrespect for, the rule or orders of a court.

Id. at 396 (internal citations omitted). The facts of *Pace* involved an assistant prosecutor who failed to appear at a sentencing hearing due to a clerical error in his calendar. *Id.* This Court vacated the trial court's contempt order because there was no evidence the prosecutor intended "to commit a contemptuous act." *Id.*

Poindexter asserts that, like *Pace*, the evidence did not establish willful disobedience beyond a reasonable doubt. Poindexter points out that he

notified the court of his “non-representation” of Bradshaw after the court refused to sign the agreed order of continuance. Poindexter opines he believed the pleadings he filed were sufficient to withdraw from the case, and he characterizes his failure to appear as choosing “a prior commitment over the opportunity to earn a fee.” Appellant’s brief at 7.

We reiterate that a trial court has broad discretion in exercising its contempt powers. The evidence established that Poindexter knew he had a conflict with the arraignment date when he filed his entry of appearance. When the court rejected the agreed order, Poindexter was on notice the court had ordered him to appear at the arraignment. Poindexter did not attempt to contact the court to explain his circumstances; instead, he filed a Notice of Non-Representation the day before the court appearance. Poindexter did not file a motion requesting permission from the court to withdraw, and he failed to appear at the arraignment in contravention of the court’s order. Criminal defense counsel should be aware that representation of persons charged with criminal law violations is not a faucet to be turned on and off at their convenience. Upon undertaking representation, defense counsel becomes a participant in the criminal justice system, and counsel’s rights as a practitioner become subservient to the prompt and efficient administration of justice. Under the facts of this case, we believe the evidence was sufficient to support the court’s finding that Poindexter’s failure to appear for the arraignment was deliberate and willful, constituting criminal contempt.

Accordingly, the trial court did not abuse its discretion.

For the reasons stated herein, the judgment of the Adair Circuit Court
is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Russell J. Baldani
Lexington, Kentucky

BRIEF FOR APPELLEE
COMMONWEALTH OF
KENTUCKY:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky