North Dakota Law Review

Volume 43 | Number 1 Article 13

1966

Notice

North Dakota Law Review

CIVIL AND CRIMINAL CONTEMPT

WILLIAM W. KELLER*

Contempt of court has been defined as any conduct that, in law, constitutes an offense against the authority and dignity of the court.

The classification of contempts as civil and criminal is one which has been adopted by many courts, and I will discuss this classification briefly The courts that see such a distinction recognize that the line of demarcation is hazy and very indistinct. The classification is not followed by all jurisdictions; for instance, some courts take the position that all contempts are criminal. As a matter of fact there is a considerable diversity among courts as to several aspects of contempt, and all I will do as to these aspects is to mention what I feel are some of the prevailing views in the absence of statute.

A common practice in labelling a contempt as civil or criminal is to look to the purpose of the proceeding adjudicating the contempt. When the primary purpose of the proceeding is to preserve the court's authority and to punish for disobedience of its orders the contempt is criminal. When the primary purpose is to provide a remedy for an injured litigant and to coerce compliance with an order, the contempt is civil. A criminal contempt is directed against the power and dignity of the court, and proceedings relative to such a contempt are for the protection of the court. A civil contempt is the failure to give to a litigant the benefits he is entitled to under a court order, and proceedings relative to such a contempt are mainly for the protection of the injured litigant.

There can, of course, be acts which constitute both civil and criminal contempt. If a witness refuses, without proper cause, to testify, after being ordered to do so by the court, this constitutes a criminal contempt, since the witness defies the authority of the court, and a civil contempt, since the witness deprives a litigant of testimony he is entitled to under court order

Of course, such a witness can be imprisoned for civil contempt, to try and compel him to testify later on in the trial, in order to try and secure his testimony for a litigant, and he can also be punished for criminal contempt, in order to maintain the authority of

* Justice, Supreme Court of New Hampshire.

the court. If he were only imprisoned to force him to testify, and he continued in his refusal during the remainder of the trial, this might be considered of little help in maintaining the authority of the court, so that punishment for criminal contempt would also be considered advisable. Even if, after being imprisoned, he decided to testify, and did so, although this would purge him of the civil contempt, it would not purge him of the criminal contempt, the two contempts being separate and distinct, and he would still be subject to punishment for criminal contempt.

Generally the court institutes a criminal contempt proceeding, and, except in summary proceedings, designates a public prosecutor or party to prosecute the proceeding. Also, generally a party institutes civil contempt proceedings, although there is authority to the effect that the court may do so. It would appear that ordinarily the court should leave it to the proper party to institute civil contempt proceedings, since the court order is for the party's benefit; ordinarily, if the court institutes a civil contempt proceeding, the alleged contemnor might feel that the court was unduly aiding the other side. However, it may be that special circumstances will exist in a particular case which make it proper and advisable for the court to do so. For instance, it would appear that in the case of the witness who refuses to testify, and is ordered by the court to do so, the court may, in its discretion, take it on himself to try and compel the witness to testify by imprisonment; the court may feel in such a situation that, having ordered the witness to testify he should, in the interest of a fair trial, undertake to enforce his order.

In civil contempt proceedings, if imprisonment is imposed, it must ordinarily be coercive rather than punitive. Imprisonment for civil contempt usually is not for a definite term, but the contemnor stands committed unless and until he performs the act required by the court order. It is said that the contemnor carries the key to his cell in his pocket. On the other hand, in criminal contempt proceedings imprisonment, if imposed, is for a fixed term.

The amount of punishment, in a criminal contempt proceeding, is within the discretion of the court, but must be reasonable, and cannot be cruel or unusual.

In a civil contempt proceeding it is, of course, proper for the court to jail a contemnor until such time as he performs a certain act, even though this may result in an extended confinement, since, for one reason, the contemnor has the key to the jail in his pocket. However, the question arises whether such a commitment may, in a particular case, become so oppressive as to warrant relief. Sup-

pose that a contemnor is imprisoned for failure to obey an order to turn over to his divorced wife a ring worth $500.00, and that, although he admits he could comply with the order, he doesn't do so since the ring is a family heirloom and he is unusually stubborn. Does his confinement become so oppressive after one year, or five years or ten years as to entitle him to relief?

In civil contempt proceedings it is generally held that since the purpose of the proceeding is remedial, the defendant's intent in committing the contempt is not material. In some criminal contempt cases it has been held that intent is a necessary element of the offense. Thus in *United States v Kroger Grocery and Baking Co.*[1] when the defendant, the owner and operator of a number of grocery stores, and its officers and employees were enjoined from selling goods at prices in excess of OPA prices, the defendant company was held not guilty of contempt when enjoined sales were made by employees whom the defendant instructed not to sell for prices in excess of the OPA prices.

In accordance with this distinction, it has been held in civil contempt proceedings that it is no defense that the alleged contemnor acted in reliance on advice of counsel, and in some criminal contempt proceedings that this is a good defense.

It seems that the intent referred to in discussing contempt is subjective rather than objective. It is a question as to whether the acts, words and circumstances show the necessary intent. In the case of *State v Goff*[2] a party in a case made threatening remarks to a witness who had testified; the remarks were made on the courthouse steps after the arguments in the case but before the witness had been excused. The court held that these actions were sufficient to prove the requisite intent for holding the party in contempt, even though the party did not intend to defy the court, since it is a subjective rather than an objective intent that is required.

Criminal contempt proceedings are generally governed by the rules applicable to criminal cases, whereas civil contempt proceedings are generally held to be remedial and civil in their nature.

Thus it has been said that a criminal contempt proceeding is veritably a criminal trial in which the rules relative to the presumption of innocence and relative to establishing guilt beyond a reasonable doubt apply, and the rules of evidence governing criminal trials apply In civil contempt proceedings it is frequently held that it is only necessary to prove the contempt by a preponderance of the evidence.

---

1. 163 F.2d 168 (1947).
2. 228 S.C. 17, 88 S.E.2d 788 (1955).

It has been held in both state and federal courts that an alleged civil contemnor is not entitled to a jury trial. This has also been the rule in state courts in criminal contempt proceedings, in the absence of a statute. The rule in federal courts in criminal contempt cases now appears to be somewhat different. In the case of *Cheff v Schnackenberg*,[3] although the Court affirmed a criminal contempt conviction without a jury, where the sentence was for six months, the Court stated that in the exercise of its supervisory power over federal courts, it ruled that sentence exceeding six months for criminal contempt cannot be imposed by federal courts unless a jury trial has been received or waived. This raises the question as to whether or not state courts will be subject to such a limitation under the due process clause of the 14th amendment.

The due process clause of the 14th amendment to the United States Constitution has been held to apply to state criminal contempt cases, and to require that one charged with contempt be given a public hearing and an opportunity to be represented by counsel, except in cases of direct contempt.

In the case of *In re Oliver*,[4] Oliver testified as a witness before a state judge sitting as a one man grand jury in secret session. Immediately after he testified the judge summarily found him guilty of contempt on the basis that he had given false and evasive answers, the judge relying in part on testimony another witness had previously given when Oliver was not present. The conviction was not in open court, Oliver was not represented by counsel, and he had no opportunity to present a defense.

The Court, in reversing the conviction for lack of due process, stated that:

> Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of charges against him, have a reasonable opportunity to meet them by way of defense of explanation, have the right to be represented by counsel, and have the right to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to the due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturb the court business, when all of the essential elements of the misconduct are under the eyes of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority

3. 384 U.S. 373 (1966).
4. 333 U.S. 257 (1948).

> before the public." If some of the essential elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for his knowledge about these essential elements, due process requires, according to the *Cooke* case, that the accused be accorded notice and a fair hearing.

The *Oliver* case involved a criminal contempt. However, it is generally held in civil as well as in criminal contempt cases that the person charged with contempt has a right, except in cases of direct contempt, to a hearing and to representation by counsel.

The question arises as to this last mentioned right as to whether one charged with a serious indirect criminal contempt is entitled to have the state furnish a lawyer for him, at the state expense, if he is financially unable to do so.

The Court also held in the *Oliver* case that the conviction must be set aside because it was done in secret session.

This same issue was considered in *Levine v United States*.[5] In that case, the petitioner, having refused to answer questions before a grand jury in a federal district court, was brought, together with the grand jury, before the judge. The court cleared the courtroom of all but the petitioner, his counsel, the grand jury, the government counsel and the reporter The court again asked the questions of the petitioner, and, on his refusal to answer, found him in contempt. In this case, the conviction was sustained. The Court stated that the petitioner did not have a right to a public hearing up through the time when the questions were asked him, because of the secret nature of grand jury proceedings, but did have a right to a public hearing after that time, when he refused to answer and when he was convicted of contempt. However, the Court distinguished this case from the *Oliver* case on the basis that the petitioner's counsel did not ask to have the hearing opened to the public. The use of summary procedure in a situation such as existed in this case was later disapproved in *Harris v United States*,[6] which overruled *Brown v United States*.[7]

Although the *Oliver* case relates to a criminal contempt proceeding, it would seem that the general rule giving the right to public hearings would apply to civil contempt proceedings.

These cases raise the question as to whether it is ordinarily advisable for a court to hold a contempt hearing in chambers.

---

5. 362 U.S. 610 (1960).
6. 359 U.S. 19 (1959).
7. 359 U.S. 41 (1959).

There are two fairly recent United States Supreme Court cases which deal with the right to a hearing in criminal contempt cases.

In *Harris v United States*,[8] which I have already mentioned, as disapproving summary procedure in a situation such as existed in the *Levine* case, the petitioner refused to answer questions before a New York grand jury The petitioner and the grand jury were brought before the District Court where he again refused to answer, whereupon he was found guilty of contempt and sentenced to one year imprisonment. The Supreme Court set aside the conviction since the petitioner was not given a hearing, the Court holding that this was not a case of direct contempt.

In *Holt v Commonwealth of Virginia*[9] the Court held that the conviction of an attorney for contempt was not consistent with due process. In this case the judge had cited Attorney A for contempt. Attorney B, in representing Attorney A, filed a motion to change the venue, alleging that the judge, in the contempt proceedings against A, had acted as police officer, prosecution witness, adverse witness and grand jury The court thereupon held Attorney B guilty of contempt on the basis of the allegation in the motion to change the venue. The court acted summarily, without a hearing, and the Supreme Court held that this was not due process. The Court stated that the judge, in order to hold Attorney B guilty of contempt, must have assumed that the allegations in the motion were untrue, which he had no right to do.

8. *Supra* note 6.
9. 381 U.S. 131 (1965).