IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01338 COA

IN THE INTEREST OF H.H. , A MINOR: V.E.H. APPELLANT

v.

STATE OF MISSISSIPPI APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MICHAEL H. WARD

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY COURT YOUTH COURT DIVISION

ATTORNEY FOR APPELLANT: SUSANNE MERCHANT

ATTORNEY FOR APPELLEE: OFFICE OF ATTORNEY GENERAL

BY: PAT S. FLYNN

NATURE OF THE CASE: CRIMINAL - CONTEMPT

TRIAL COURT DISPOSITION: FOUND IN CONTEMPT TWICE AND SENTENCED TO 90 DAYS EACH TIME.

MANDATE ISSUED: 8/5/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

McMILLIN, P.J., FOR THE COURT:

The case now before the Court is an appeal from a judgment finding VEH to be in contempt of the Youth Court of Lauderdale County and sentencing her to a fine and incarceration. VEH has appealed, raising issues that amount to a claim that she has been deprived of her property and her liberty without due process of law. We agree and reverse and remand this case with instructions.

I.

Facts

VEH is the natural mother of a male child, HH. VEH and HH's father are divorced. In previous proceedings in the Lauderdale County Youth Court, HH had been adjudicated to be an abused child within the meaning of the Youth Court Act. VEH was implicated in the incidents that led to the adjudication of abuse. The Youth Court's dispositional order, entered on May 10, 1995, placed HH in the custody of his father under the oversight of the Lauderdale County Department of Human Services and limited VEH's visitation to every other weekend under the constant supervision of VEH's mother.

In mid-June 1995, the Lauderdale County Department of Human Services filed a motion to have VEH cited for contempt for alleged violations of the terms of the Youth Court's dispositional order. An amendment to the motion was filed in October 1995. It is not clear whether the October amendment was intended to replace or supplement the earlier motion since some of the allegations in the motion appear to be duplications of earlier charges; however, the trial judge treated the second motion as supplementary, and this Court will consider it in the same light.

Both motions recited, in separate numbered paragraphs, the factual allegations relied upon by the Department to substantiate its charge that VEH was wilfully disobeying the court's order. The proceeding was brought under authority of section 43-21-153 of the Youth Court Act, which permits the youth court to punish those who violate or refuse to obey the court's orders with a fine not to exceed $500 and imprisonment not to exceed ninety days. Miss. Code Ann. § 43-21-153 (1972). The first motion contained eight separate allegations, and the second motion added four additional ones, for a total of twelve. At the contempt hearing, the trial court treated the various allegations much like separate counts in a criminal indictment. Thus, VEH was, at the commencement of the proceeding, exposed to the possibility of fines totaling $6,000 and imprisonment for a period approaching three

years.

II.

Due Process Considerations

VEH bases her denial of due process argument on the provisions of section 43-21-557 of the Mississippi Code of 1972. This section sets out the method of proceeding in an adjudicatory hearing in the youth court. Miss. Code Ann. § 43-21-557 (1972). The requirements the court must meet before proceeding include an explanation to the parties of their right to counsel and their right against self-incrimination. Miss. Code Ann. § 43-21-557(e)(i) - (ii).

This Court disagrees that section 43-21-557 applies to a contempt proceeding brought under section 43-21-153. Section 43-21-557, as we have observed, applies only to "adjudicatory hearings." This phrase, in the Youth Court Act, is a term of art describing a proceeding to inquire into the merits of a petition alleging a child to be delinquent, in need of supervision, neglected, or abused. Miss. Code Ann. § 43-21-451, -455 (1972). A contempt proceeding is, therefore, not an "adjudicatory hearing" in the sense that the term is used in the Youth Court Act, and section 43-21-557 has no application in this case.

That conclusion, however, does not resolve the underlying issues raised by VEH. There can be no doubt that a person subjected to a proceeding for criminal contempt has certain rights guaranteed under the constitution. Our determination of the inapplicability of section 43-21-557 merely means that the search to determine those rights must be conducted elsewhere. We find the answers under general principles of law regarding the procedure for punishing an alleged contemnor. These principles apply in any court having jurisdiction to punish for contempt.

Preliminarily, we observe the distinction between direct contempt and constructive contempt, since the procedure for dealing with these separately-defined offenses differs. Direct contempt is an act that affronts the authority or dignity of the court during a court proceeding. *Varvaris v. State,* 512 So. 2d 886, 887 (Miss. 1987). It is summarily punishable without the necessity of further inquiry since the trial judge's knowledge of the event is the sole evidence necessary to support an adjudication. *Purvis v. Purvis,* 657 So. 2d 794, 797 (Miss. 1994). Constructive contempt, on the other hand, occurs when a party violates a court order outside the presence of the judge. *Jenkins v. State,* 242 Miss. 627, 633, 136 So. 2d 205, 207 (1962). We, thus, conclude that we are dealing with allegations of constructive contempt in this case.

Before a person may be punished for constructive contempt of court, the person is entitled, under principles of due process, to be informed, with some degree of precision, the nature of the alleged act of contempt, to notice of a hearing, and to a hearing on the allegations. *Wood v. State,* 227 So. 2d 288, 289 (Miss. 1969). The specifications of the allegations must be in writing. *Jordan v. State,* 216 Miss. 542, 548, 62 So. 2d 886, 888 (1953).

In addition, because the proceeding has the potential to deprive the person of both property and liberty, the person has certain other constitutional safeguards. "[I]t is certain that in proceedings for

criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911). There is, unquestionably, a right to be represented by counsel. "The right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or 'civil'." *Ridgway v. Baker*, 720 F. 2d 1409, 1413 (5th Cir. 1983). If that right is to be waived, it must be done with knowledge of the consequences. In a case such as this, when the accused contemnor appears without counsel, there is no safeguard to insure that the individual has made an informed decision to forego representation if the trial court does not make proper inquiry. The only thing in the record concerning VEH's right to an attorney occurring before the contempt proceeding commenced was this statement by the court: "And, Mrs. H., you're representing yourself. Is that correct, ma'am?" VEH's reply was simply, "It is."

The State, in its brief, would have this Court read volumes into this brief exchange. It argues that the trial court's choice of words implies that the matter has been resolved satisfactorily at some prior time. Otherwise, according to the State, we could have expected to find a statement such as "I see you don't have an attorney." While we may admire the State's analytical skills in this regard, we are unconvinced that this idea can serve as a foundation strong enough to support a decision in this case. Persons appearing in criminal proceedings are routinely informed of their right to counsel, even in matters involving misdemeanors. Only upon full inquiry to insure a complete understanding of that right is a defendant permitted to waive the right to counsel. It even remains within the power of the court to require a criminal defendant to accept the services of an attorney in an advisory role when the defendant insists on his right of self-representation. *See* U.R.C.C.C. 8.05(5). There is no rational basis to distinguish a contempt proceeding from a proceeding in a criminal case insofar as the trial court's obligation to inquire concerning counsel is involved.

In this case, there is no indication that VEH had any conception of the serious nature of the proceeding. A person facing criminal charges is confronted with the real possibility of incarceration, and it is fair to assume that this fact is commonly known and understood. Knowledge of the broad powers of a court to punish for contempt may not be so widespread. This Court harbors little doubt that had VEH been informed that when she appeared in the Lauderdale Youth Court to answer the petitions filed by the Department of Human Services, she faced the real possibility of incarceration for a period of three years and fines totaling $6,000, she would have been amazed beyond measure. It is clear, at least from the record, that no one connected with this proceeding sought to advise her of that fact and to suggest that, before she submitted herself to such a risk, she might consider the advisability of seeking the advice of counsel.

The State also advances what is, in effect, a "harmless error" argument, saying that "[VEH's] obvious contempt for the trial court's orders would have resulted in a guilty verdict had she been represented by a throng of attorneys." We find that argument to be particularly without merit. Our review of the transcript of the contempt hearing indicates that essentially all of the proof supporting the trial court's adjudication came from VEH's own testimony when she was called by the petitioner as an "adverse witness." That evidence was corroborated with testimony of HH's father; however, his testimony consisted primarily of statements allegedly made to the father by HH.

This Court is reasonably certain that it would not take a throng of attorneys to have recommended to VEH that she assert her right against self-incrimination, which would have thwarted the petitioner's

effort to call her as a witness. We are equally certain that something less than a throng of attorneys would have seized the opportunity to interpose a hearsay objection to testimony concerning anything allegedly reported by HH to his father. Without that evidence, proof of contempt in the present record is non-existent.

We leave unanswered the issue of whether VEH, upon a legitimate claim of indigence, has the right to appointment of an attorney at the expense of the State. That issue is not before us, and there is some indication, by the fact that VEH is represented by counsel on this appeal, that she can afford representation. It would be improper, therefore, for us to speculate on that question at this point. Our opinion deals only with the issue of whether VEH was sufficiently aware of her right to representation at the hearing. There simply must be some indication that she was informed of and understood the potentially dire consequences of an unfavorable outcome; otherwise, it would seem impossible for her to make anything resembling an informed decision on the matter. Though it is a criminal case, we conclude that the language of the United States Supreme Court in the case of *Westbrook v. Arizona* has some application to a criminal contempt proceeding:

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

Westbrook v. Arizona, 384 U.S. 150, 150 (1966).

The record is devoid of any information that would support a conclusion that VEH's decision to represent herself at the contempt hearing was an informed decision. The adverse consequences to her resulting from that decision were demonstrated within seconds of the commencement of the hearing when the court inquired as to the State's first witness and the State announced, "We're going to call [VEH] to the stand adversely, your Honor." VEH then took the stand and confessed, under oath, to acts that undoubtedly constituted clear violations of the court's previous order.

We concluded earlier that section 43-21-557 did not apply to a youth court contempt proceeding. We have determined, nevertheless, that under general principles of law applicable to all contempt proceedings, essentially the same protections as contained in the statute were available to VEH. Included in these rights is the fundamental idea that a person may not be required to put her liberty at risk without the benefit of counsel unless that right is waived after being fully informed of the possible consequences of such a waiver. No such waiver was sought or given in this case, and the adjudication of contempt must be reversed.

III.

Double Jeopardy Considerations

As her second issue, VEH claims that certain of her contempt adjudications were actually for the same offense, so that she was being punished twice for the same act. She alleges that this violates

principles of double jeopardy. The first charge in the June 15 petition was "[t]hat she has had personal unsupervised visits with the minor, H.H." The first charge in the October 3 amendment is identical in form. The trial court found her separately guilty of contempt on both charges. He found, and the State now argues on appeal, that the earlier count was for incidents occurring before June 15 and the second was for additional incidents occurring after June 15. This Court finds this proposition troubling. In the first place, it is impossible to tell from a reading of the two motions that this was, in fact, what the State intended when it filed the amendment. Secondly, there is nothing in the record that indicates a date that any of the alleged unsupervised visits took place, so that any finding that certain of the events occurred before June 15 and others occurred after that date would be based upon nothing more than speculation and could not support an adjudication of separate acts of contempt. Thus, whether considered on the issue of double jeopardy or principles of sufficiency of the evidence, it is clear that these multiple adjudications of contempt could not be permitted to stand even were we not reversing on other grounds.

There is an added problem we observe in our review of the motions. We conclude that certain other of the charges appear hopelessly duplicative, such that it would be impossible to determine at any point in the proceeding whether offered proof was in support of one charge or another. By way of example, the first paragraph of the June 15 motion charges "unsupervised visits." The second paragraph alleges that VEH went to HH's father's home at times when the father was not there "to visit the minor"- of necessity, an unsupervised visit. The third paragraph charges that VEH took the child from HH's grandmother's home and transported him to her own apartment unaccompanied by the grandmother. The fourth paragraph charges that she has taken HH to her apartment and spent the night alone with him. VEH was adjudicated guilty separately on all four of those accusatory paragraphs. Because of the imprecise nature of the allegations, proof of a particular incident when VEH went to the father's home when he was not there to visit HH would appear to apply with equal facility to the first or second count. Proof that VEH, on a particular occasion, took the child from the grandmother's home to her own apartment for an overnight visit would prove an offense under the first, third and fourth paragraph, thus exposing VEH, not to double punishment, but to triple punishment for the same contemptuous act.

The point we make is that a pleading seeking to have a party punished criminally for wilful disobedience of a court order is not unlike a criminal indictment. It must charge the alleged offense with sufficient clarity that the alleged contemnor can understand the nature of the charge and prepare to meet it. This should include, as a bare minimum, allegations of incidents of disobedience specific as to date and circumstance so that the contemnor can make some meaningful response to the charges. Pleadings such as those filed in this case, where evidence is interchangeable and may be shifted among the various charges as needed to sustain the proof, is not acceptable under fundamental notions of procedural due process.

We remand this case for further proceedings not inconsistent with this opinion and specifically direct that, prior to proceeding, the allegations of contemptuous behavior by VEH be reduced to a writing specifically identifying the dates of such alleged conduct, the nature of the behavior, and the specific portion of the youth court's order that the behavior is said to violate. We further direct that VEH either be entitled to representation by counsel at the hearing held to adjudicate the fact of her contempt, or, should she desire to proceed pro se, that the youth court permit this only after a suitable on-the-record inquiry as to VEH's understanding of her rights and a finding that her decision

to forego her right to counsel was an informed one.

THE JUDGMENT OF THE LAUDERDALE COUNTY YOUTH COURT IS REVERSED. THIS CAUSE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. THE COSTS OF THIS APPEAL ARE TAXED TO LAUDERDALE COUNTY.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.