

IN THE SUPERIOR COURT OF PENNSYLVANIA
Western District

NO. 461 WDA 2017

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs.

GREGORY MAUK,
Appellant.

BRIEF FOR APPELLEE

APPEAL FROM THE ORDER, ENTERED ON FEBRUARY 20, 2017 BY THE HONORABLE TAMATA BERNSTEIN, JUDGE PRESIDING, IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA, DOCKETED AT CP-11-CR-1033-2009, CP-11-CR-0001035-2009, CP-11-CR-0001037-2009, CP-11-CR-0001039-2009, CP-11-CR-0001041-2009, CP-11-CR-0001043-2009, CP-11-CR-0001045-2009, CP-11-CR-0001034-2009, CP-11-CR-0001036-2009, CP-11-CR-0001038-2009, CP-11-CR-0001040-2009, CP-11-CR-0001042-2009, CP-11-CR-0001044-2009.

KELLY CALLIHAN, DISTRICT ATTORNEY FOR
CAMBRIA COUNTY
Scott M. Lilly, Esquire, Chief Deputy,
Appellate Division
PA I.D. No. 307579
Cambria County Courthouse
200 South Center Street
Ebensburg, PA 15931
(814)472-1680
slilly@co.cambria.pa.us
ATTORNEY FOR APPELLEE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court erred when it afforded a civil contemnor due process of law and eventually, upon motion, vacated the order of contempt rendering any dispute moot.

Suggested Answer: No.

SUMMARY OF ARGUMENT

Contemnor's argument is moot as his sentence of contempt has already been vacated. Moreover, Contemnor's argument is based upon his sentence for criminal contempt. However, the trial court's dominant purpose was to effectuate compliance with an order. It offered purge conditions, which the contemnor failed to meet. Thus, this was a civil contempt proceeding and not a criminal contempt. As such, Contemnor's argument fails.

ARGUMENT

- 1. Whether the trial court erred when it afforded a civil contemnor due process of law and eventually, upon motion, vacated the order of contempt rendering any dispute moot.**

Contemnor's arguments are moot as he seeks to vacate a previously vacated order. Moreover, they are substantively without merit as Contemnor's sentence was the result of civil contempt and not criminal contempt.

Mootness

The Superior Court does not render advisory opinions. *Commonwealth v. T.J.W.*, 2015 PA Super 97, 114 A.3d 1098, 1102 (Pa. Super. Ct. 2015). “[A]n actual case or controversy must exist at all stages of the judicial process, or a case will be dismissed as moot.” *In re M.B.*, 2014 PA Super 212, 101 A.3d 124, 127 (Pa. Super. Ct. 2014). “An issue before [the Superior] Court is moot if in ruling on it the Court cannot enter an order that has any legal force or effect.” *In re J.A.*, 107 A.3d 799, 811 (Pa. Super. Ct. 2015).

On December 21, 2016, the Contemnor was found in contempt of court and ordered to serve a sentence of two weeks in the Cambria County prison. RR 37a. The Contemnor was allowed to purge this sentence by making timely payments of \$150 in January and February. RR 37a. It was determined that Contemnor failed to timely make his payments. Indeed, Contemnor had failed to make any of his monthly payments between October of 2016 and January of 2017. RR 13a. As his payments

were untimely, he failed to purge his contempt and was ordered to serve a sentence of two weeks of incarceration. RR 48a. On February 28, 2017, Contemnor filed a petition for writ of habeas corpus. RR 52a. et seq. On March 3, 2017, the court vacated its sentence of contempt as it had believed that the “written order failed to state the purge condition in a definite, clear, and specific manner.” RR 61a.

The Contemnor cannot vacate his order of contempt. It has already been vacated. The Superior Court’s authority in this matter is limited to affirming or reversing the trial court’s order. As the order has been vacated, the Superior Court has no authority to act.¹

The Contemnor repeatedly cites the case of *Ingebrethsen* in support of his argument that his facially moot argument is not substantively moot. *Ingebrethsen* is not applicable to the facts of this case and cannot be relied upon.² In *Ingebrethsen*, a mother was incarcerated for 90 days for contempt when she intentionally disobeyed a child custody order after the mother found that the father had physically abused the child. *Ingebrethsen v. Ingebrethsen*, 443 Pa. Super. 256, 260, 661 A.2d

¹ The Contemnor never invokes the mootness exception that a case can be heard if it is capable of repetition and will likely evade future review. *See, Venango County Public Defender v. Venango County Court of Common Pleas*, 586 Pa. 317, 326, 893 A.2d 1275, 1280 (Pa. 2006); *Horsehead Resource Development Company, Inc. v. Department of Environmental Protection*, 780 A.2d 856 (Pa.Cmwlth.2001). While this issue may be repeated as Contemnor is subject to possible contempt hearings in the future, it will not evade appellate review. Moreover, as the Contemnor has not invoked this exception, it is waived.

² *Ingebrethsen* is also inapplicable as it involved criminal contempt and the case sub judice is a civil contempt proceeding.

403, 404 (Pa. Super. Ct. 1995). Mother timely appealed the sentence. *Id.* As a threshold matter, the Superior Court considered whether the case was moot as the jail sentence had already been served. *Id.* at 405. As cited in the Contemnor’s brief, the Superior Court held that when a “trial court acts beyond its authority by failing to afford contemnors their procedural due process rights, the appeal will not be considered moot.” *Id.* at 404; APPELLANT’S BRIEF, pg. 21. In *Ingebretsen*, the sentence could only be considered moot simply because it was already served. Conversely, in this case, the appeal is moot because the actual underlying order of contempt has been *vacated by the trial court.*³ Again, the Contemnor is asking this court to vacate an order that does not exist. It is beyond dispute that an appeal cannot lie from a vacated order.

Contemnor also attempts to assert relevancy by noting that he is still subject to a December 21, 2016 costs and fines order. *See*, APPELLANT’S BRIEF, pg. 21. However, Contemnor never asserted any defects in the order of December 21, 2016. If Contemnor had an issue with the December 21, 2016 order, he failed to timely object or appeal.

³ Contemnor also cites *DEP v. Cromwell Township*, 613 Pa. 1, 32 A.3d 639 (Pa. 2011); *Barrett v. Barrett*, 470 Pa. 253, 368 A.2d 616 (Pa. 1977); and *Warmkessel v. Heffner*, 2011 PA Super 46, 17 A.3d 408 (Pa. Super. Ct. 2011) for the proposition that any appeal will lie from a contempt order after the prison sentence has been served. Again, as noted above, the appeal is moot because the contempt order has been vacated.

Civil Contempt

Contrary to Contemnor's arguments, he is subject to civil contempt and not criminal contempt.

There is nothing inherent in a contemptuous act or refusal to act which classifies that act as "criminal" or "civil". The distinction between civil and criminal contempt is rather a distinction between two permissible judicial responses to contumacious behavior. For example, it is clear that a contemptuous refusal to testify before a grand jury may be dealt with either a (sic) criminal contempt, civil contempt, or both.

These judicial responses are classified according to the dominant purpose of the court. If the dominant purpose is to prospectively coerce the contemnor to comply with an order of the court, the adjudication of contempt is civil. If, however, the dominant purpose is to punish the contemnor for disobedience of the court's order or some other contemptuous act, the adjudication of contempt is criminal.

Dominant purpose of coercion or punishment is expressed in the sanction imposed. A civil adjudication of contempt coerces with a conditional or indeterminate sentence of which the contemnor may relieve himself by obeying the court's order, while a criminal adjudication of contempt punishes with a certain term of imprisonment or a fine which the contemnor is powerless to escape by compliance.

The civil-criminal classification of contempt exists solely for determination of a contemnor's procedural rights and a court's sentencing options. Quite simply, a contemnor who will be sentenced to a determinate term of imprisonment or a fixed fine, which he is powerless to escape by purging himself of his contempt, is entitled to the essential procedural safeguards that attend criminal proceedings generally. Second, a court is not permitted to impose a coercive sentence conditioned on the contemnor's performance of some act that is incapable of performance.

Crozer-Chester Med. Ctr. v. Moran, 522 Pa. 124, 131–32, 560 A.2d 133, 137 (Pa. 1989) (emphasis in original). In this case, as of December 20, 2016, Contemnor was engaging in contemptuous behavior — namely, failing to timely pay his courts costs

and fines. RR. 13a; 27a, *et seq.* In 2016, Contemnor made 3 of 12 payments. RR 13a. In December, the trial court *sua sponte* lowered Contemnor's monthly payment from \$250 a month to \$150 a month. RR 37a. However, the court wanted consistent payments every month. RR. 37a. It was clear during the hearing of December 20, 2016, that the trial court required consistent, timely, monthly payments. RR. 37a. Failure to do so would result in jail time. RR. 37a. Thus, Contemnor's failure to timely make a payment in January of 2017 – the first month of order – violated his purge conditions. The trial court's dominant purpose was not punishment. The trial court was demanding compliance of its order. Contemnor did not meet his purge conditions, thus the trial court acted properly in sentencing the Contemnor.

The Contemnor confuses the nature of the hearing of February 20, 2017. See APPELLANT'S BRIEF, pg. 15 (“When it imposed incarceration on February 20, it did not give him an opportunity to purge the contempt and escape punishment.”) The trial court had already offered the Contemnor an opportunity to purge his contempt on December 21. It does not need to offer new purge conditions after contemnor has already failed to comply with his old purge conditions. Such a circular argument would devolve into an endless cycle where the trial court is robbed of any authority to demand compliance.

The Contemnor failed to purge his contempt, thus the sentence was appropriate.

Conclusion

For the reasons stated above, the Commonwealth requests this Honorable Court dismiss this case as moot.

THE HONORABLE KELLY CALLIHAN
DISTRICT ATTORNEY OF CAMBRIA COUNTY

/s/ SCOTT M. LILLY
SCOTT M. LILLY, ESQUIRE
CHIEF DEPUTY, APPELLATE UNIT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for Appellee in the above captioned action was served upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121:

Service by first class mail as follows:

Sara J. Rose, Esquire
American Civil Liberties Union
PO Box 23058
Pittsburgh, PA 15222

Andrew Christy
American Civil Liberties Union
PO Box 322053
Philadelphia, PA 19102

David J. Millstein
105 Rocky Drive
Greensburg, PA 15601

THE HONORABLE KELLY CALLIHAN
DISTRICT ATTORNEY OF CAMBRIA COUNTY

/s/ SCOTT M. LILLY
SCOTT M. LILLY, ESQUIRE
CHIEF DEPUTY, APPELLATE UNIT

Dated: September 29, 2017