

**IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 461 WDA 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

GREGORY MAUK,

Appellant

BRIEF FOR APPELLANT GREGORY MAUK

Appeal from Order of the Court of Common Pleas
of Cambria County, Pennsylvania (Criminal Division) dated February 20, 2017

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STATEMENT OF JURISDICTION

Because this is an appeal from the Cambria County Court of Common Pleas' entry of a final order of contempt, this Court has jurisdiction under 42 Pa. Cons. Stat. § 742.

ORDER IN QUESTION

The trial court's order consisted of an oral ruling from the bench and a form completed by the court. The text of the oral ruling follows:

For those of you who are before me, and I explained I think very well to you when you were in front of me before the concept of contempt and confirming with you all individually that you could comply with those terms, and each of you under oath indicated to me that you could, and you have failed to do so.

Because you failed to purge your contempt, you are incarcerated to two weeks in prison. Ms. Clark of the Public Defender's Office will—you'll be held in a holding cell downstairs. If anybody has a disagreement that their payments were not made, in other words—well, a couple of months ago we had an individual where there was an error where he had made his payments on time and they had not been credited correctly.

So Ms. Clark will have an opportunity to speak with you only if you feel there was error as to payment. Other than that, you all failed to purge the conditions of your contempt and you're remanded to jail for two weeks, and so the sheriff's deputies are going to collectively escort you all to the holding cell. You'll have the opportunity to speak with your counsel downstairs. You cannot address the court at this time. Everybody who is in front of me addressed the court at the time of the contempt hearing. Sheriff's deputies?

(R. 48-49a).

To: Sarah Rose

IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DEFENDANT: Mark Gregory Thomas
CASE NUMBER(S): 2009-1032 thru 2009-1045
PROBATION OFFICER: Charles
STENOGRAPHER: Kelly Corcoran

1034, 1035, 1036, 1037, 1038, 1039, 1040
1041, 1042, 1043
1045 - 09
JUDGE: TAMARA R. BERNSTEIN
COURT CLERK: JUDY LAVERICK

COSTS AND FINES HEARING

AND NOW, this 20th day of February, 2017, IT IS ORDERED AND DIRECTED as follows:

- Vacate Bench Warrant.
- Defendant is released forthwith and the Bench Warrant is vacated.
- The Clerk of Courts shall issue a Bench Warrant forthwith for Defendant's failure to appear at the _____, 20____, costs and fines hearing.
- Defendant is found in contempt: _____
Defendant can purge this contempt by _____
- Defendant failed to purge the contempt and is sentenced to: 7 weeks CCP
- Defendant is ordered to make payments of \$ 150 per month beginning the first day of March, 2017.
- Defendant is ordered to pay \$ _____ per month toward restitution.
- Sign a wage attachment.
- Arrearages are set at zero.
- Defendant is Court ordered on the work crew.
- Defendant is to remain on the work crew.
- Defendant is removed from the work crew. Reason: _____

FILED FOR RECORD
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CLERK OF COURTS
CAMBRIA COUNTY, PA

OTHER:

Work release granted

- COPIES TO:
- Address: DEF. C & F
 DA SHERIFF
 ATTY. OTHER
- PHONE: PO
 PD
PS JAIL Fax
 JUDGE
 CA

BY THE COURT:

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court exercises a plenary scope of review, and it uses a *de novo* standard of review because the appeal only raises questions of law. *See First Citizens Nat'l Bank v. Sherwood*, 897 A.2d 178, 180 (Pa. 2006).

STATEMENT OF THE QUESTIONS PRESENTED

The principal question presented on appeal is:

Did the trial court err in sentencing Mr. Mauk to two weeks in jail as a sanction for indirect criminal contempt for failing to make timely payments in accordance with a court-ordered installment payment plan without affording Mr. Mauk the proper procedural safeguards, including: the right to bail, the assistance of counsel, and the right to a hearing?

The trial court implicitly answered this question in the **negative**.

STATEMENT OF THE CASE

A. Form of Action and Procedural History

This is a direct appeal from the court of common pleas challenging the order of contempt and sentence of imprisonment entered against Appellant Gregory Mauk on February 20, 2017.

On September 29, 2010, the Hon. Gerard Long of the Court of Common Pleas of Cambria County ordered Mr. Mauk to pay \$2600 in fines, \$12,202.63 in costs, and \$13,465 in restitution, following Mr. Mauk's guilty pleas to twelve counts of theft by deception, 18 Pa. Cons. Stat. § 3922(a)(1). (R. 01-26a).

On December 21, 2016, the Hon. Tamara Bernstein of the Cambria County Court of Common Pleas issued an order (the "December 21 Order") holding Mr. Mauk in contempt for failing to make payments on the costs and fines he owed. (R. 37a; R. 40a). The December 21 Order stated that Mr. Mauk is found in contempt and sentenced to two weeks in the Cambria County Jail, but the court explained that he could "purge" this sentence by making payments of \$150 per month on January 1 and February 1, 2017. (R. 37a; R 40a).

Mr. Mauk subsequently made payments of \$300 on or before February 9, 2017, and \$150 on or before February 20, 2017. (R. 13a). On February 20, 2017, the Court issued an order (the "February 20 Order") stating that Mr. Mauk "failed

to purge the contempt” and sentencing him to two weeks in the Cambria County Jail. (R. 48-49a; Feb. 20 Order).

Mr. Mauk filed a Petition for Habeas Corpus with the Court on March 1, 2017. (R. 52a). That petition was granted on March 3, 2017. (R. 61a). Mr. Mauk filed a timely notice of appeal from the February 20 Order to this Court. (R. 62a).

B. Factual Background

On December 21, 2016, the Cambria County Court of Common Pleas held a costs and fines hearing, at which Judge Bernstein presided and Mr. Mauk was present. (R. 10a). The purpose of the hearing was to determine whether individuals who had fallen behind on their obligations to pay court costs and fines should be held in contempt. (R. 28-29a.). The court explained to the individuals in the courtroom that those persons found in contempt would “have the opportunity to purge” by meeting certain conditions. (R. 29a). But it warned that “[i]f you fail to comply with the purge conditions, you come back in front of me and you go to jail. If you don’t show up after you haven’t purged, then you get a bench warrant, and then you sit in jail. And then you come back in front of me, and then I put you back in jail to serve your sentence.” (R. 29a). According to the court, “the concept is to try and give you an extra incentive to make sure that, on your list of bills, this is on the top of your priorities.” (R. 29a).

The court then outlined the procedure for defendants to follow when they were called and the information she would ask them to provide:

I want to know, number one, what are you able to pay toward your arrearages and when? Number two, going forward, what can you pay per month? Don't tell me \$20 because I guarantee you I will find a habit, whether you have a nice cell phone, whether you chew, whether you smoke. If you can cough up the money for that, if you have – you know, I have people with North Face jackets.

And I'm not saying you shouldn't have a jacket but, if you're able to get these types of things, you're able to come up with some type of a reasonable payment to come through.

(R. 30a).

Finally, the court asked a courtroom deputy to read the names of individuals who had previously been found in contempt but had failed to purge the conditions of their contempt. (R. 33-34a). The courtroom deputy read thirty-five names. (R. 33-34a). The court told the individuals whose names had been called to move to a certain area of the courtroom and stand there and stated:

All of these people who are in front of me, all of you who are in front of me now, failed to purge the conditions of your contempt. ... Now amongst you, some complied partially and some did not comply at all, and probably some ran downstairs this morning to pay. It's very imperative that you understand that a court order is a court order, and there are consequences. That being said, because of the amount of people I have here today, what I'm going to do is you're going to be remanded into custody, but we're going to discuss your sentences after the rest of the hearings today. All of you will be remanded to jail, but there are going to be varying times for when that occurs.

So what I'm going to do is we're going to keep you in custody and seated in the first three rows. After all the rest of this is done, then I'll

call you forward in groups depending on what your compliance was to discuss your sentence.

(R. 34-35a).

Mr. Mauk was not one of the thirty-five individuals who were alleged by the Court to have failed to purge their contempt at the December hearing. When his case was called, the court asked him whether he was able to do anything toward arrearages. (R. 36a). Mr. Mauk responded that he was unable to pay anything that day, explaining that he was employed as a painting contractor and that it sometimes took him up to ninety days to get paid. (R. 36a). The court stated that his current monthly payment obligation of \$250 per month “seems to be excessive” and reduced it to \$150 per month. (R. 37a). Mr. Mauk stated, “I can do that.” (R. 37a). The court then issued the following order from the bench: “I do find you in contempt. I’m setting your arrearages at zero. You’re sentenced to two weeks incarceration, and you can purge by paying January and February’s payments of \$150 per month.” (R. 37a).

Mr. Mauk paid \$300 toward his fines and costs on February 9 and \$150 toward his fines and costs on February 20. (R. 13a). Nevertheless, he was ordered to appear in the Cambria County Court of Common Pleas on February 20, 2017, for failure to pay fines and costs. (R. 10-11a).

At the February 20, 2017, costs and fines hearing, Judge Bernstein once again explained the procedure to the individuals in the courtroom. She stated:

So if I find you in contempt, I can sentence you to up to six months in jail and/or a thousand dollars fine. Now, I'm not sentencing anybody to a fine because everybody already has a sufficient financial obligation. What I have been doing, and I've been being very consistent, is, if I find that you're in contempt, I sentence you to two weeks in jail.

Because it's a civil contempt, before you panic, you have the ability to do what's called in the legal terms purge your sentence. What that really means is I give you certain conditions. If you meet those conditions, then you never have to go serve that two-week sentence. If you fail to meet those conditions, you come back before me and you have to serve the time. What I have been doing for our first contempt is a two-week jail term.

Let me explain a little bit about what you're going to see. When I talk to you up here and we talk about your purge conditions, I make sure there's something that you can do. For example, if you indicate you can make \$125 per month payment, we normally ask for \$150, but I have some flexibility.

But say you agree to pay \$125 per month. Then I'll indicate to you that you're in contempt of court and that you can purge that two-week sentence by making your payments on time for March and April. So if you pay March's payment in April, you're in contempt. That means you pay March's in March and April's in April, and you continue making payments thereafter. If you complete the purge conditions, that sentence goes away.

(R. 45-46a).

The court then asked the courtroom deputy to call the individuals from the December costs and fines hearing who had failed to purge the conditions of their contempt. (R. 47a). The courtroom deputy called the names of fifty-four people, including Mr. Mauk. (R. 47-48a). The court addressed those individuals:

Because you failed to purge your contempt, you are incarcerated to two weeks in prison. Ms. Clark of the Public Defender's Office will—you'll be held in a holding cell downstairs. If anybody has a disagreement that their payments were not made, in other words—well, a couple of months ago we had an individual where there was an error where he had made his payments on time and they had not been credited correctly.

So Ms. Clark will have an opportunity to speak with you only if you feel there was an error as to payment. Other than that, you all failed to purge the conditions of your contempt and you're remanded to jail for two weeks, and so the sheriff's deputies are going to collectively escort you all to the holding cell.

You'll have an opportunity to speak to your counsel downstairs. You cannot address the court at this time. Everybody who is in front of me addressed the court at the time of the contempt hearing. Sheriff's deputies?

(R. 48-49a).

The court subsequently issued the February 20 Order, sentencing Mr. Mauk to two weeks in the Cambria County Jail. (Feb. 20 Order). It did not advise Mr. Mauk or any of the other defendants sentenced to jail at the February 20, 2017, costs and fines hearing of their right to post bond or file an appeal from the contempt order. Mr. Mauk was imprisoned in the Cambria County Jail from February 20, 2017, until March 3, 2017, when the court issued an Order granting Mr. Mauk's Petition for a Writ of Habeas Corpus and ordering him to be released from jail. (R. 61a). The March 3 Order recited the following findings, which were based upon review of the

transcript of hearing held December 21, 2016, and the Order of Court dated December 21, 2016:

- (1) The Court's verbal order clearly stated the conditions to purge civil contempt.
- (2) The corresponding written order failed to state the purge conditions in a definite, clear, and specific manner.

(R. 61a).

C. The Court of Common Pleas Decision

In its May 22, 2017, Opinion, the Court of Common Pleas acknowledges that “the sentence imposed on Mauk, as a result of this Court’s finding of civil contempt, was not in accordance with the applicable law as the December 21 Order stating Mauk’s purge conditions was not definite, clear, and specific.” (App. A, p.

4) The court asserts that Mr. Mauk’s claim for relief in this appeal is moot, however, because it granted Mr. Mauk’s Petition for Writ of Habeas Corpus and that, as a result, there is no basis for the granting of additional relief. (App. A, p.5)

SUMMARY OF THE ARGUMENT

The Cambria County Court of Common Pleas violated the procedural due process rights of Appellant Gregory Mauk by using its criminal contempt powers to sentence him to two weeks in jail for failure to pay court fines and costs without providing him with the right to a hearing, the right to counsel, or the right to bail. The record demonstrates that Mr. Mauk’s experience is not unique: On the same

day that Mr. Mauk was sentenced, the court ordered fifty-three other people imprisoned for failure to pay, none of whom were afforded their procedural due process rights. In its Opinion, the trial court does not justify its imprisonment of Mr. Mauk. Instead, it asserts that his appeal is moot because he is no longer imprisoned. But like any criminal conviction, Mr. Mauk has a right to appeal his conviction for criminal contempt, and this Court has held that appeals of contempt orders are not moot where, as here, the trial court acts beyond its authority by failing to afford contemnors their procedural due process rights. Accordingly, this appeal is not moot, and the Court should reverse the trial court's order.

ARGUMENT

A. The Court of Common Pleas Improperly Imposed a Criminal Sanction for Mr. Mauk's Alleged Contempt without Affording Him the Proper Procedural Safeguards.

As this Court has explained, “[t]he proper classification of a contempt adjudication is important because it governs the procedures that must be followed.” *Gunther v. Bolus*, 853 A.2d 1014, 1016 (Pa. Super. 2004). In this case, the record demonstrates that Mr. Mauk was found guilty of indirect criminal contempt of the trial court's order that he pay \$150 on January 1, 2017, and \$150 on February 1, 2017, because he was sentenced to two weeks in jail on February 20 with no opportunity for release through compliance with the court's order. Without some means by which to escape the two-week jail sentence through a new or ongoing

purge condition, Mr. Mauk was being punished for his failure to comply with the court's prior order, and that definite jail sentence constituted a sentence of criminal (rather than civil) contempt. Accordingly, Mr. Mauk "was entitled 'to the essential procedural safeguards that attend criminal proceedings generally.'" *Ingebretsen v. Ingebretsen*, 661 A.2d 403, 405 (Pa. Super. Ct. 1995) (quoting *Crozer-Chester Medical Center v. Moran*, 560 A.2d 133, 137 (Pa. 1989)). These safeguards include the right to bail, the right to be notified of accusations against him and reasonable time to prepare a defense, the assistance of counsel, and the right to a hearing. *Id.* Because Mr. Mauk was denied virtually all of these protections, the trial court's contempt finding should be reversed.

1. The Trial Court's Sanction for Mr. Mauk's Contempt Was Criminal in Nature.

The distinction between civil and indirect criminal contempt depends on the court's "dominant purpose" in finding a party in contempt and the ability of the defendant to escape punishment by complying with the court's order. *Gunther*, 853 A.2d at 1016. If the purpose is to coerce the contemnor to comply with the court's order, and the court sets certain conditions by which the defendant can "purge" the contempt and escape punishment, it is civil contempt. *Id.*; *see also Bruzzi v. Bruzzi*, 481 A.2d 648, 652 (Pa. Super. 1984) (in civil contempt, one holds the "key to the jailhouse door," meaning the contemnor has the power to end his punishment by complying with the court's order). By contrast, where the "dominant purpose is to

punish the contemnor for a past violation, it is criminal.” *Gunther*, 853 A.2d at 1016. Criminal contempt calls for a “specific sanction [that] when imposed cannot be obviated because it is a completed offense.” *Crozer-Chester Medical Center*, 560 A.2d at 136. If the defendant is “powerless to escape by compliance,” the defendant has been sentenced to criminal contempt. *Id.* at 137 (quoting *In re Martorano*, 346 A.2d 22, 27-29 (Pa. 1975)); see *Ingebrethsen*, 661 A.2d at 405 (“Here, appellant was subject to criminal contempt as she did not have the opportunity to purge herself of the contempt finding.”).

In this case, the trial court’s “dominant purpose” was to punish Mr. Mauk for not complying with its December 21 Order. When it imposed incarceration on February 20, it did not give him an opportunity to purge the contempt and escape punishment. By the time of the February 20 hearing, he had already made the payments required by the December 21 Order, but he was late in doing so. (R. 13a). Thus, at the time he was jailed, he had no means of purging himself—the window of opportunity had already expired—and could not escape punishment for compliance. See *Bruzzi* 481 A.2d at 354 (parent who absconded with children and had already returned them by the time of contempt hearing was subject to criminal, not civil, contempt).

The trial court’s Opinion and March 3 Order granting Mr. Mauk’s Petition for a Writ of Habeas Corpus suggest that the court viewed the entire contempt

proceeding, including the February 20 Order, as civil in nature, with the only error being the court's failure to provide sufficiently specific written purge conditions in its December 21 Order. (R. 61a). The court explained at the hearings that "a court order is a court order, and there are consequences," that "[b]ecause you failed to purge your contempt, you are incarcerated to two weeks in prison," and "you all failed to purge the conditions of your contempt and you're remanded to jail for two weeks." (R. 34a; R. 48a). Thus, the trial court appears to believe that civil contempt works as follows: A defendant is ordered to do something, given an opportunity to abide by that order, and automatically punished if he or she fails to meet the order's requirements. But that process reflects criminal, not civil, contempt, for if at any time there is a condition by which the defendant cannot comply—or if there is no condition at all—then the court is not lawfully exercising its civil contempt authority. *See Barrett v. Barrett*, 368 A.2d 616, 620-21 (Pa. 1977) (absence of condition by which contemnor can immediately purge contempt converts civil contempt into unlawful criminal contempt). In other words, the punishment for noncompliance with a *civil* contempt purge condition (at least once that condition can no longer be met) is a *criminal* contempt sanction. *See Crozer-Chester Medical Center*, 560 A.2d at 132 (contempt was criminal where "there is no provision in the order which would make the length of time to be served at all contingent on payment of the fine at any time").

By incarcerating Mr. Mauk—and the other defendants—for allegedly failing to abide by the court’s costs and fines order without providing an opportunity to escape the jail sentence once they were ordered incarcerated, the trial court imposed a sentence for criminal contempt and was required to follow the requisite procedural protections. *See Diamond v. Diamond*, 715 A.2d 1190, 1194 (Pa. Super. 1998) (“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 the contempt, is entitled to the essential procedural safeguards that attend criminal proceedings generally.”) (quoting *In re Martorano*, 346 A.2d at 27–29).

2. The Trial Court Failed to Provide Mr. Mauk with the Requisite Procedural Safeguards.

Because he was subject to criminal contempt, Mr. Mauk was entitled to the essential procedural safeguards that attend criminal proceedings generally, including the right to bail, the right to present his case at a hearing, and the right to be represented by counsel. *Crozer-Chester Medical Ctr.*, 560 A.2d at 137; *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. Ct. 2003). The record demonstrates that the trial court failed to provide him with any of these protections.

First, the transcript of the February 20 hearing shows that none of the individuals being sentenced to jail for criminal contempt—which included Mr. Mauk as well as fifty-three other similarly situated defendants—was permitted to address the court, much less provided a hearing, before being sentenced to jail,

despite the central importance of a pre-deprivation hearing prior to the loss of one's liberty, *see, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (“recognizing that the right to be heard before being condemned to suffer grievous loss of any kind ... is a principle basic to our society”), and clearly established law that “in criminal contempt proceedings, guilt must be proved beyond a reasonable doubt.” *Vito v. Vito*, 551 A.2d 573, 577 (Pa. Super. 1988).¹ Indeed, the judge issued an explicit instruction to Mr. Mauk and the other fifty-three defendants, telling them “[y]ou cannot address the court at this time.” (R. 48a). The trial court further stated that “[e]verybody who is in front of me addressed the court at the time of the contempt hearing.” (R. 49a). The issue at the December 21 contempt hearing, however, was whether Mr. Mauk should be found in civil, rather than criminal, contempt. (R. 37a). Civil contempt requires fewer procedural safeguards, *see Gunther*, 853 A.2d at 1016,² and a prior finding of civil contempt cannot be automatically converted into criminal contempt. *See Barrett*,

¹ To find a defendant guilty of indirect criminal contempt, the court must find four elements beyond a reasonable doubt: “(1) the order must be definite, clear, specific and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct prohibited; (2) the contemnor must have had notice of the specific order or decree, (3) the act constituting the violation must have been volitional, and (4) the contemnor must have acted with wrongful intent.” *Commonwealth v. Baker*, 722 A.2d 718, 721 (Pa. Super. 1998) (citing *Diamond*, 715 A.2d at 1196).

² However, even civil contempt requires that an alleged contemnor have a hearing. *See Harcar v. Harcar*, 982 A.2d 1230, 1235 (Pa. Super. 2009) (civil contempt requires a “hearing on the contempt citation”).

368 A.2d at 620-21 (civil contempt is unlawfully converted to criminal contempt without the “safeguards of criminal procedure” if the defendant lacks the ability to comply with the purge condition). Accordingly, Mr. Mauk was entitled to a hearing prior to being imprisoned to determine whether his failure to pay the amounts ordered on January 1 and February 1 was willful. The trial court’s failure to provide Mr. Mauk with an opportunity to be heard regarding his reasons for failure to comply with the December 21 Order violated his procedural due process rights.³

Second, Mr. Mauk had a clearly established right to counsel prior to being imprisoned for criminal contempt under the Sixth Amendment to the United States Constitution. *See Turner v. Rogers*, 564 U.S. 431, 441 (2011) (recognizing that the Sixth Amendment provides a right to counsel in criminal contempt proceedings other than direct (summary) contempt proceedings); *Ingebrethsen*, 661 A.2d at

³ By failing to hold a hearing, the trial court also lacked any evidence that Mr. Mauk was actually in contempt. In order to find the defendant willful, the court must make an affirmative inquiry into ability to pay and determine that the defendant had that ability at the time the failure to pay occurred. *See Commonwealth v. Dorsey*, 476 A.2d 1308, 1311 (Pa. Super. Ct.1984) (trial court “did not inquire into the reasons for appellant’s failure to pay or did it make any findings pertaining to the willfulness of appellant’s omission,” in violation of *Bearden v. Georgia*, 461 U.S. 660, 672 (1983)). That is why Rule 706 of the Pennsylvania Rules of Criminal Procedure forbids jailing a defendant for failure to pay “unless it appears *after [a] hearing* that the defendant is financially able to pay the fine or costs.” Pa.R.Crim.P. 706(A) (emphasis added). If a defendant in fact lacked the ability to pay, the court cannot hold that defendant in contempt because there was no willful violation of the court’s order. This inquiry must look at the defendant’s present ability to pay at the time of the alleged contempt. *See Bearden*, 461 U.S. at 667-68.

405.⁴ But the trial court not only failed to inform Mr. Mauk of his right to counsel, it told him that he would not be permitted to speak with counsel unless “there was an error as to payment”—and even then, counsel was available only *after* the Court found Mr. Mauk in contempt and ordered him imprisoned. (R. 48a). Accordingly, the trial court deprived Mr. Mauk of his right to the assistance of counsel.

Third, the trial court failed to set bail in Mr. Mauk’s case. As with any other crime, a defendant who has been convicted of criminal contempt has a right to bail. *Ashton*, 824 A.2d at 1203. Under Rule 521 of the Rules of Criminal Procedure, a defendant who has been convicted and sentenced to a term of imprisonment for less than two years has the same right to bail as a defendant pre-verdict. Pa.R.Crim.P. 521(B)(1). Accordingly, the court was required to set bail for Mr. Mauk pursuant to Rule 520, as it did not issue any written findings justifying detaining him without bail. *See* Pa.R.Crim.P. 520(A) (requiring that bail “shall” be set unless the bail authority makes findings in writing or on the record why the court is refusing bail). The trial court’s failure to set bail or hold a bail hearing violated Mr. Mauk’s procedural due process rights.

⁴ In addition, Rule 122 of the Rules of Criminal Procedure requires that defendants be provided with counsel in hearings before the Court involving imprisonment for nonpayment of fines and costs. *See Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. 1983) (analogous provision in Rule 122 (then numbered Rule 316) addressing summary offenses requires appointment of counsel prior to imprisonment for nonpayment of fines and costs).

B. Mr. Mauk’s Appeal Is Not Moot Because the Court of Common Pleas Acted Beyond Its Authority and Mr. Mauk Remains Subject to the December 21 Fines and Costs Order.

1. The Lack of Procedural Safeguards Deprived the Trial Court of Authority to Sentence Mr. Mauk to Jail.

A “person’s right to appeal from a criminal contempt citation is immediate.” *Ashton*, 824 A.2d at 1201. That is because the crime of contempt, like any other crime, confers “on the contemnor all the negative characteristics of being a convicted criminal. The right of a citizen to be free of the stigma of an unfair or an unfounded criminal conviction is a hallmark of American jurisprudence; thus the right to be free from the taint of such a conviction is too important to be denied immediate review.” *Diamond*, 715 A.2d at 1195. As a result, this Court has held that there is a right to appeal a finding of criminal contempt. *Id.* (finding a “compelling interest for all in having a challenge to that conviction examined immediately”).

That right applies even when the contemnor has fully served the jail sentence imposed by the trial court if, as is the case here, the trial court’s finding of criminal contempt was made in the absence of the requisite procedural safeguards. *See Ingebretsen*, 661 A.2d at 404 (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”); *see also Altemose Construction Co. v. Building & Construction Trades Council*, 296 A.2d 504, 516 (Pa. 1972) (plurality opinion, but

all six participating justices agreed on contempt issue) (“irregularities” in the proceeding were “sufficiently serious” that they went to the “core validity of the contempt proceeding” and the appeal was not moot). In *Ingebretsen*, this Court held that an appeal of a criminal contempt order was not moot despite the fact that the appellant had already served her 90-day prison sentence because the trial court’s failure to provide the appellant with basic procedural due process protections deprived the court of its authority to impose a sanction for criminal contempt. *Ingebretsen*, 661 A.2d at 405; see *Altemose Const. Co.*, 296 A.2d at 516 (denying motion to quash appeal for mootness despite fact that contempt fines had been paid because court had no authority to impose fines in absence of requisite due process safeguards). The same is true here. The trial court had no authority to sentence Mr. Mauk to jail in the absence of procedural due process protections, and its criminal contempt order must be reversed.

2. Mr. Mauk Still Owes a Substantial Amount in Fines and Costs and Could Be Subject to Contempt Proceedings in the Future.

The Pennsylvania Supreme Court has made clear that, where there is an ongoing obligation to comply with a court order to make payments, an appeal from a finding of contempt will not be moot even if the contemnor has already served the entire sentence for contempt. *Barrett*, 368 A.2d at 619 n.1. Like the appellant in *Barrett* who owed child support, Mr. Mauk remains subject to an ongoing court order to pay fines and costs, and “and a failure to comply with them might again

subject him to contempt proceedings.” *Id.*; see *Commonwealth v. Cromwell Twp.*, 32 A.3d 639, 652 (Pa. 2011) (contempt appeal not moot where Township remained subject to court order); *Warmkessel v. Heffner*, 17 A.3d 408, 413 (Pa. Super. 2011) (contempt appeal not moot where contemnor had been released from jail but was still subject to court order).

The trial court’s order granting Mr. Mauk’s petition for writ of habeas corpus does not change the analysis. The court’s stated rationale for granting the petition reflects a misunderstanding of the procedural due process requirements that must be met prior to imposing a sentence for criminal contempt and thus provides no assurance that the court will provide due process to Mr. Mauk—or any other defendant—prior to sentencing him to jail for contempt in the future. First, the court describes Mr. Mauk’s sentence as a “civil contempt sentence” despite the lack of any purge conditions attached to it. (App. A, p. 5). And second, the court states that it granted Mr. Mauk’s habeas petition because the December 21 Order “failed to meet the requirements in *Gunther* that an Order for civil contempt be definite, clear, and specific.” (App. A, p. 5). Nowhere in its opinion does the trial court acknowledge that the February 20 Order sentenced Mr. Mauk to jail for criminal contempt. Nor does the court concede that he was entitled to such basic due process protections as the right to a hearing or the right to counsel prior to the imposition of that jail sentence.

The trial court's citations to *Commonwealth. ex. Rel. Ogden v. Cairns*, 48 Pa. Super. 265 (Pa. Super. Ct. 1911), and *Commonwealth ex rel. Waychoff v. Boyd*, 119 A.2d 567 (Pa. Super. Ct. 1956), are inapposite. Those cases involved appeals from denials of petitions for writs of habeas corpus by appellants who had already been released from jail. In this case, however, Mr. Mauk is not seeking release from jail; he is challenging the court's authority to sentence him to jail for criminal contempt in the absence of procedural safeguards. Given the possibility that Mr. Mauk may again find himself in violation of the December 21 Order and subject to the court's contempt power, his appeal presents a salient issue for this Court that has not been mooted by either the order granting his habeas petition or the expiration of his jail sentence.

REQUEST FOR PUBLICATION

Pursuant to Pa.R.A.P. 3519(a), Mr. Mauk respectfully requests that this Court publish its disposition in this matter because of the substantial public importance of the issues raised in this appeal. As is described above, Mr. Mauk was one of fifty-four individuals who were simultaneously jailed without due process because they did not pay fines, costs, and restitution. They are not alone in being jailed in modern debtors' prisons. As the Pennsylvania Interbranch Commission on Gender, Racial and Ethnic Fairness recently documented in its report "Ending Debtors' Prisons in Pennsylvania: Current Issues in Bail and Legal

Financial Obligations: A Practical Guide for Reform,” thousands of Pennsylvanians are jailed each year because they are indigent and unable to pay their fines, costs, and restitution. *See* Pa. Interbranch Comm’n on Gender, Racial and Ethnic Fairness, “Ending Debtors’ Prisons in Pennsylvania: Current Issues in Bail and Legal Financial Obligations: A Practical Guide for Reform” (July 10, 2017), http://www.pa-interbranchcommission.com/_pdfs/Ending-Debtors-Prisons-in-PA-Report.pdf. The Court’s disposition of this matter will provide much-needed guidance to Pennsylvania’s trial courts on how to appropriately exercise their contempt powers when a defendant defaults on payments.

CONCLUSION

For the foregoing reasons, the Court should hold that the trial court exceeded its authority in sentencing Appellant Gregory Mauk to jail for criminal contempt without affording him the due process protections to which he was entitled and for that reason reverse the trial court’s finding of criminal contempt.

Respectfully submitted,

Date: August 9, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties at the addresses and in the manner listed below:

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