IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 461 WDA 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

GREGORY MAUK,

Appellant

REPLY 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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ARGUMENT

A. The Court of Common Pleas Did Not Vacate Its Finding of Contempt.

In its brief, the Commonwealth repeatedly argues that this appeal is moot because the trial court "vacated" its judgment when it granted the writ of habeas corpus and released Mr. Mauk. But the trial court's order did no such thing. In his habeas petition, Mr. Mauk requested that the court either schedule the habeas for a hearing "and/or grant a writ of habeas corpus ordering his release from confinement forthwith." (R. 57a). The trial court granted that relief, and no more, when it ordered "that Defendant's motion for Habeas Corpus is **GRANTED** and Defendant shall be released forthwith." (R. 61a). Nothing in that order purported to "vacate" the judgment.

Habeas corpus serves as a way "to test the legality of the petitioner's commitment and detention." *Commonwealth ex rel. Bryant v. Hendrick*, 280 A.2d 110, 112 (Pa. 1971). It is used to "secure the immediate release of one who has been detained unlawfully, in violation of due process." *Commonwealth v. Wolfe*, 605 A.2d 1271, 1273 (Pa. Super. Ct. 1992). While a court *can* use habeas corpus as a vehicle to vacate an underlying judgment and sentence, a court does not have to use it in such a manner—and indeed, Pennsylvania courts permit habeas relief without touching an underlying judgment. *See*, *e.g.*, *Hendrick*, 280 A.2d at 112 (habeas corpus used to challenge conditions of confinement); *Commonwealth v.*

Isabell, 467 A.2d 1287, 1291-93 (Pa. 1983) (habeas corpus used to challenge calculation of a sentence, which would result in defendant's earlier release, without touching the underlying judgment). The trial court's order was at most vague on this point, and there is no indication that it was intended to vacate the finding of contempt. In fact, the trial court's 1925 Opinion did not contend that it had vacated the finding of contempt; it instead described its prior order as having only "ordered that Mauk be immediately released." Appellant's Br. Appx. A at 3. Without an actual statement of intent to vacate, the trial court did not do so.

B. Mr. Mauk Has Not Waived the Mootness Exception of "Capable of Repetition Yet Escaping Review."

Contrary to the Commonwealth's assertion, Mr. Mauk did not waive the mootness exception of "capable of repetition yet escaping review." In his opening brief, Mr. Mauk explained that he remains subject to an ongoing court order to pay fines and costs, which might again subject him to contempt proceedings. Appellant's Br. at 22-23. The brief then cites *Barrett v. Barrett*, 368 A.2d 616, 619 n.1 (Pa. 1977), *Commonwealth v. Cromwell Twp.,* 32 A.3d 639, 652 (Pa. 2011), and *Warmkessel v. Heffner*, 17 A.3d 408, 413 (Pa. Super. 2011) for that proposition. The cited provisions of *Cromwell* and *Warmkessel* explicitly name and describe the "capable of repetition yet escaping review" doctrine. Although Mr. Mauk's opening brief did not use that exact phrase, *Barrett* and *Warmkessel* themselves demonstrate that the concept can be expressed in other terms. *See*

Barrett, 368 A.2d at 619 n.1 ("Although Barrett's terms of imprisonment, as limited by the Superior Court, have expired, we do not regard these appeals as moot, since he remains subject to the orders of support and a failure to comply with them might again subject him to contempt proceedings."); *Warmkessel*, 17 A.3d at 413 ("Nevertheless, Appellant's release from prison does not render the issue moot because Appellant is subject to a continuing support order where Appellant might once again face civil contempt proceedings raising the issue of credit for time served, and other similarly situated defendants might raise the same claim. Therefore, this matter qualifies as an exception to the mootness doctrine."). Given that the Pennsylvania Supreme Court and this Court both describe this mootness exception in the same language that Mr. Mauk's brief did, there has been no waiver of this issue.

Moreover, the Commonwealth apparently agrees that this matter is not moot because of this exception, noting in its brief that "the issue may be repeated as Contemnor is subject to possible contempt hearings in the future." Appellee Br. at 4 n.1. Although the brief goes on to say that somehow that future scenario, unlike the one presently before the Court, will not escape review, the Commonwealth does not explain how future contempt proceedings will sufficiently differ to allow this Court to rule on the appeal prior to Mr. Mauk's discharge.

C. Without an Ongoing, Valid Purge Condition, the Trial Court Punished Mr. Mauk with Criminal Contempt.

One of the defining factors of civil contempt is the presence of a purge condition. Without a purge condition, compliance with which will eliminate any punishment—and in this case imprisonment—the contempt is criminal, not civil. *See Barrett*, 368 A.2d at 620-21 (absence of condition by which contemnor can immediately purge contempt converts civil contempt into unlawful criminal contempt).

The trial court may have wanted to punish Mr. Mauk for not making his payments on time and for not complying with the purge condition set on December 21. And indeed the court could have used its civil contempt authority to jail Mr. Mauk if he had not made his January and February payments, on the condition that he could be released at any time by paying that money.[1] But that was not what happened here. When the court jailed him on February 20, he had already paid, albeit late, and there was nothing else he could do to escape punishment once he was incarcerated. The court may have been frustrated by Mr. Mauk's late payments, but the record shows that the punishment (incarceration) it imposed for those late payments was an exercise of its criminal contempt powers, not civil. (R. 48a). *See Bruzzi v. Bruzzi*, 481 A.2d 648, 654 (Pa. Super. 1984) (finding criminal

[1] But only after a hearing at which the court determined that he was able to pay and was willfully refusing to make those payments.

contempt, not civil, where "appellant could not be coerced into returning the children; he had already done so"). Without a purge condition at the time of incarceration, the court's adjudication of Mr. Mauk's alleged contempt was criminal in nature.

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. For that reason, the Court should reverse the trial court's finding of criminal contempt.

Respectfully submitted,

Date: October 13, 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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