

Circuit Court for Montgomery County
Case No.: 147656FL

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 838

September Term, 2022

SAMUEL COLLISON

v.

RUTH AGYEMANG

Wells, C.J.
Berger,
Beachley,

JJ.

Opinion by Wells, C.J.

Filed: February 14, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Samuel Collison (“Father”) appeals orders of the Circuit Court for Montgomery County adjudicating him in contempt and sentencing him to 90 days’ incarceration in the Montgomery County Detention Center.

We affirm in part and vacate in part. We affirm the order adjudging Father in contempt and vacate the order of incarceration.

BACKGROUND

Father and Ruth Agyemang (“Mother”) are the parents of a minor child (“Child”). On September 15, 2017, Father, who was self-represented, filed a complaint for custody of Child, alleging that Mother had denied him visitation with Child, and asking for joint legal and physical custody. Mother, through counsel, filed an answer and counter-complaint, denying the allegation in the complaint and seeking sole physical and legal custody of Child and child support from Father.

Following a *pendente lite* hearing before the family magistrate on April 6, 2018, the court entered a “Consent Order” directing Father, whom the parties stipulated was unemployed and “experiencing significant health issues,” to pay \$150 per month in child support. On May 11, 2018, the court, following a hearing, issued an order, by agreement of the parties, granting Mother sole legal and primary physical custody of Child and granting Father supervised visitation. The court further ordered that Father pay child support of \$150 per month, complete the Abused Persons Program, and notify Mother if he received Social Security Disability benefits.

Father filed a petition for contempt on November 7, 2018, alleging that Mother had denied him visitation without cause. Mother responded by filing a petition for contempt

against Father on February 11, 2020, alleging that he had failed to pay child support, complete the Abused Persons Program, and notify her of his receipt of Social Security Disability benefits. Mother asserted in her petition that she “[did] not want the Court to order jail time to enforce its Order.”

On April 9, 2021, the circuit court issued an order suspending Father’s in-person visitation with Child until he completed the Abused Persons Program and COVID-19 restrictions were suspended. The court permitted Father to have two videoconference calls per month with Child. The court further ordered that Father comply with the May 2018 order, and that child support be increased to \$206 per month, beginning on March 9, 2021.

The court held a remote status hearing on October 21, 2021. Mother appeared with counsel and Father appeared without counsel. Noting that the parties had not reached an agreement, the court scheduled a hearing on the contempt petitions for November 24, 2021. Mother’s counsel indicated that “[Mother] would be asking for jail in regard to the contempt as there’s been no progress regarding any of the items that we first discussed on January 5th of 2021.” The court stated that if Father was “found in contempt,” he “could be subject to incarceration.” The court advised Father that he was “entitled to have a lawyer represent [him] at [the contempt] hearing,” and that “if [he came] to the ... hearing without a lawyer, then it could be deemed that you’ll have waived your right to a lawyer.”

The contempt hearing proceeded on February 1, 2022. Mother appeared with counsel. Father did not appear. Mother’s counsel indicated that Father had notified him prior to the hearing that he had a blood clot and had requested his consent to appear remotely by videoconference. Mother’s counsel’s objected to Father’s request, and the

hearing proceeded in Father’s absence. Mother’s counsel argued that Father was in contempt of the 2018 order and that he had “the opportunity to purge these contempts[,]” but had failed to do so. Mother’s counsel asserted that “even if [Mother] could be said to be in contempt from [] November 2018 until the beginning of 2020, she has attempted to purge this and has opened up the door for communication consistently and has been the one who has been setting up the visits and ensuring that [Father] has access.”

The court denied Father’s contempt petition, finding that Mother had attempted to facilitate visitation. The court granted Mother’s contempt petition, finding that Father had failed to complete the Abused Persons Program, failed to provide his social security number to Mother, and failed to make any child support payments since 2018. The court also granted Mother’s motion for modification and ordered that Father’s visitation be at Mother’s sole discretion.

The court entered judgment in favor of Mother in the amount of \$7,422 for child support arrears and awarded Mother attorney’s fees in the amount of \$6,282. Mother also requested at the hearing that the court impose a jail sentence. Pursuant to her request, the court issued a body attachment for Father to return to court for “a sentencing date to determine whether or not incarceration is appropriate....”

After the February 1 hearing, Father sent letters to the court explaining that he had not appeared at the hearing for medical reasons, and that he had contacted the court and Mother’s counsel prior to the hearing to notify them of his condition. Father further stated that his monthly expenses exceeded his income and submitted documentation from the

Montgomery County Office of Child Support showing that his total outstanding arrearage as of March 1, 2022 was \$4,791.07.

On June 16, 2022, Father appeared without counsel for “a sentencing hearing on the contempt.” Mother’s counsel requested that the court impose “jail time” as it “might be the only thing that wakes up [Father] to understand that there is an order that he has to abide by.” Father responded that he had “proof of all the child support[.]” and documentation to support his medical condition, which he had previously submitted to the court. In response to the court’s question as to whether he had paid child support of \$206 per month, Father stated that he had made support payments and offered proof of his payments. He further stated that child support enforcement had informed him that he did not owe \$7,000.

The court asked Father if he wanted to say anything about whether the court should impose a jail sentence for his “repeated contempt of court,” and Father replied, “I don’t understand.” The court “sentenced” Father to “90 days in the local detention center.” Father protested that he did not “understand what is going on” and asked if the court wanted him “to make some payment today, like 1,000 or something?” The court sentenced Father to 90 days in the Montgomery County Detention Center.

Father noted an appeal and moved for a stay of judgment and release from incarceration pending appeal. On August 5, 2022, the circuit court granted Father’s motion to stay judgment and ordered his release from the detention center pending appeal.¹

¹ A person imprisoned upon a finding of contempt may appeal the contempt order, notwithstanding having been released from the imprisonment. *See Poole v. Bureau of Support Enf’t*, 238 Md. App. 281, 286, n.4 (2018) (citation omitted).

STANDARD OF REVIEW

On appeal from a decision holding a party in contempt, we will not disturb the order “absent an abuse of discretion or a clearly erroneous finding of fact upon which the contempt was imposed.” *Kowalczyk v. Bresler*, 231 Md. App. 203, 209 (2016) (citation omitted). Where, however, “the order involves an interpretation and application of statutory and case law, we must determine whether the circuit court’s conclusions are legally correct under a *de novo* standard of review.” *Id.* (citations omitted).

DISCUSSION

Maryland recognizes two forms of contempt: “direct and constructive – and two types of each form – criminal and civil. Direct contempt is committed in the presence of the trial judge ... while constructive contempt is any other form of contempt.” *Hammonds v. State*, 436 Md. 22, 33 (2013) (quoting *Smith v. State*, 382 Md. 329, 338 (2004)). Civil contempt “proceedings are generally remedial in nature and are intended to coerce future compliance,” whereas criminal contempt is designed to punish past misconduct. *State v. Roll & Scholl*, 267 Md. 714, 728 (1973); accord *Breona C. v. Rodney D.*, 253 Md. App. 67, 73-74 (2021) (citing *Dodson v. Dodson*, 380 Md. 438, 448 (2004)). Because the sanction for civil contempt is coercive, it must allow for “purging that permits the defendant to avoid the penalty by some specific conduct that is within the defendant’s ability to perform.” *Kowalczyk*, 231 Md. App. at 209 (citing *Bryant v. Howard Cnty. Dep’t Soc. Servs. ex. rel. Costley*, 387 Md. 30, 46 (2005)); accord *Stevens v. Tokuda*, 216 Md. App. 155, 171 (2014). Criminal contempt is “purely punitive” and does not require a purging provision. *Roll & Scholl*, 267 Md. at 728.

Constructive civil contempt proceedings may be initiated by a private party, the State or the court. *See* Md. Rule 15-206. Constructive criminal contempt, on the other hand, may be initiated only by the court or the State and must be docketed as a separate criminal action. *See* Rule 15-205. In the present case, the contempt order did not indicate the nature of the contempt the trial judge sought to impose on Father. Because Father had no authority to file a petition for criminal contempt, the order must be deemed as one for civil contempt.² *See e.g., Bryant* 387 Md. at 34 n.1 (regarding petition as one for civil contempt, even though the Department of Social Services initiated the petition and sought a penalty of incarceration for a definitive term without a purge provision, the Department had no authority to file a petition for criminal contempt). *Compare* Rules 15-205(b) and 15-206(b).

I.

Father argues that the circuit court erred by conducting the February 1, 2022 contempt hearing in his absence and finding him in contempt without making any inquiry on the record as to whether his absence was voluntary. In support of his position, Father relies on *Pinkney v. State*, 350 Md. 201, 217 (1998), a criminal case in which the defendant failed to appear on the day of trial and was tried *in absentia*. In *Pinkney*, the Supreme

² The proceedings also lacked the additional procedural safeguards mandated under Rule 15-205(e), pertaining to waiver of counsel provisions, and Rule 15-205(f), pertaining to waiver of jury trial provisions.

Court of Maryland³ held that “[b]efore trying a defendant *in absentia*, the trial court must both (i) find a knowing and voluntary waiver of the right to be present at trial and (ii) exercise sound discretion in determining whether to proceed with the trial of an absent criminal defendant.” 350 Md. at 213 (citations omitted). The Court’s decision in *Pinkney* was based on Rule 4-231, which governs a defendant’s right to be present in criminal causes.

In constructive civil contempt hearings, a trial court’s authority to proceed in the absence of an alleged contemnor is codified in Rule 15-207(c)(2), which provides that if the alleged contemnor fails to appear at the hearing, the court may: (1) proceed *ex parte*; or (2) order that the alleged contemnor be arrested and brought before the court for the hearing. Rule 15-207(c)(2). *See Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 119 (2009); *Wilson v. Holliday*, 364 Md. 589, 609 (2001) (noting that “Rule 15-207(c)(2) is clear and unambiguous, requiring no construction. It provides two, succinct alternatives for the court to select from should a contemnor fail to appear in a civil contempt proceeding”). Rule 15-207(c)(2) places no requirement on the court to determine the reason for the contemnor’s absence before proceeding *ex parte*. Because the circuit court did not err in conducting the February 1, 2022 contempt hearing without first inquiring as

³ At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See*, also, Md. Rule 1-101.1(a) (“From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland....”).”

to the voluntariness of Father’s absence, the court’s finding of contempt will not be disturbed.

II.

Father also contends that the circuit court erred in conducting the June 16, 2022 hearing by failing to determine whether his appearance without counsel at the hearing was knowing and voluntary. We agree.

In civil contempt proceedings where there is a possibility of incarceration, “the alleged contemnor has a right to counsel or the alleged contemnor must knowingly and voluntarily waive the right to counsel.” *Zetty v. Piatt*, 365 Md. 141, 155 (2001); *Rutherford v. Rutherford*, 296 Md. 347, 363 (1983) (holding that “an indigent defendant in a civil contempt proceeding cannot be sentenced to actual incarceration unless counsel has been appointed to represent him or he has waived the right to counsel”); *Jones v. State*, 351 Md. 264, 273-74 (1998) (recognizing that a defendant in a civil contempt proceeding in which incarceration is sought is entitled to be represented by counsel and, if indigent, entitled to appointed counsel); *Redmond v. Redmond*, 123 Md. App. 405, 415 (1998) (explaining that “it has been firmly established that a defendant in a civil contempt proceeding has a right to counsel where there is a possibility of imprisonment.”).

Rule 15-206(e) sets forth the procedural requirements that must be met in constructive civil contempt hearings to determine whether a contemnor’s appearance without counsel is knowing and voluntary, providing, in pertinent part:

(e) *Waiver of counsel if incarceration is sought.* (1) Applicability. This section applies if incarceration is sought and applies only to court hearings before a judge.

(2) Appearance in court without counsel.

(A) If the alleged contemnor appears in court without counsel, the court shall make certain that the alleged contemnor has received a copy of the order containing notice of the right to counsel or was advised of the contents of the notice in accordance with Rule 9-208(d);

(B) If the alleged contemnor indicates a desire to waive counsel, the court shall determine, after an examination of the alleged contemnor on the record, that the waiver is knowing and voluntary;

(C) If the alleged contemnor indicates a desire to have counsel and the court finds that the alleged contemnor received a copy of the order containing notice of the right to counsel or was advised of the contents of the notice pursuant to Rule 9-208(d), the court shall permit the alleged contemnor to explain the appearance without counsel. If the court finds that there is a meritorious reason for the alleged contemnor’s appearance without counsel, the court shall continue the action to a later time and advise the alleged contemnor that if counsel does not enter an appearance by that time, the action will proceed with the alleged contemnor unrepresented by counsel. If the court finds that there is no meritorious reason for the alleged contemnor’s appearance without counsel, the court may determine that the alleged contemnor has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing.

At the status hearing on October 21, 2021, Mother’s counsel indicated that she intended to request “jail” for Father’s contempt. The court advised Father that he was “entitled to have a lawyer represent [him] at [the contempt] hearing,” and that “if [he came] to the ... hearing without a lawyer, then it could be deemed that you’ll have waived your right to a lawyer.”

Father appeared at the June 16, 2022 “sentencing” hearing on the contempt without counsel. The court explained in its opening remarks that Mother “was asking that a jail sentence be imposed[.]” Facing the possibility of incarceration, Father’s right to counsel was implicated. Under Rule 15-206(e) the trial judge was required to determine whether

Father had been advised of his right to counsel and whether he intended to waive counsel. *See Redmond*, 123 Md. App. at 415 (“[A] civil contempt proceeding where there is a possibility of incarceration cannot be prosecuted unless the defendant has been afforded a lawyer[.]”).

At no point during the hearing did the court address Father’s right to counsel or ask if he desired to waive counsel. The court’s failure to follow the requirements of Rule 15-206(e) violated Father’s right to counsel, and the order of incarceration must be vacated.

III.

The circuit court also erred in ordering Father incarcerated without providing Mr. Collison with an opportunity to purge the contempt and avoid incarceration. Additionally, the hearing transcript shows that the court did not assess Mr. Collison’s financial ability to pay a monetary purge provision, even if one was provided.

An order of constructive civil contempt for failure to pay child support is not valid unless it specifies: “(A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for that contempt, and (C) how the contempt may be purged.” Rule 15-207(e)(4). Because the purpose of civil contempt is not to punish, but to obtain compliance with a court order, “it must provide for purging” by allowing “the defendant to avoid the penalty by some specific conduct that is within the defendant’s ability to perform.” *Bryant*, 387 Md. at 46. “A lawful purge provision ‘affords the defendant the opportunity to exonerate him or herself, that is, to rid him or herself of guilt and thus clear him or herself of the charge ... [i]n this way, a civil contemnor is said

to have the keys to the prison in his own pocket.” *Kowalczyk*, 231 Md. App. at 210 (quoting *Jones*, 351 Md. at 281).

A sanction must not only contain a purge provision, but the provision must be one that the contemnor has the ability to satisfy. *Fisher*, 186 Md. App. at 120 (noting that a valid purge provision requires that “completion of the purging provision must be feasible”); *Stevens*, 216 Md. App. at 169 (holding that court erred by not permitting the contemnor to purge his contempt before incarcerating him). “To that end, a court may not impose incarceration as a sanction for civil contempt when the defendant is unable to meet the purge condition in time to avoid that incarceration.” *Id.* Specifically, “a defendant’s prior failure to comply with a support order, even if done in bad faith, does not justify incarceration for civil contempt if there is a present financial inability to comply.” *Jones v. Johnson*, 73 Md. App. 663, 669 (1988) (citing *Elzey v. Elzey*, 291 Md. 361, 375-76 (1981)). Where “a defendant is unable [to] pay a purge provision, no amount of time in prison will induce compliance.” *Jones*, 351 Md. at 281. These principles require strict adherence. “[B]ecause a person’s liberty is at stake and because it is a judicial proceeding, both the form and substance of due process and proper judicial procedure must be observed. Shortcuts that trample on these prerequisites and conclusions ... are not allowed.” *Rawlings v. Rawlings*, 362 Md. 535, 571-72 (2001) (quoting *Thrower v. State ex. rel. Bureau of Support Enforcement*, 358 Md. 146, 161 (2000)).

Rule 15-207(e)(4) further provides that “[i]f the contemnor does not have the present ability to purge the contempt, the order may include directions that the contemnor make specified payments on the arrearage at future times and perform specified acts to

enable the contemnor to comply with the direction to make payments.” Thus, in determining an appropriate purge provision, “the court has some flexibility in deciding what directives to issue.” *Bryant*, 387 Md. at 50.

In this case, the court erred in ordering Father’s incarceration without first establishing a purge provision and making an affirmative finding that he had the present ability to comply with that provision. Accordingly, the unlawful order of incarceration shall be vacated. *See Arrington v. Dep’t of Human Resources*, 402 Md. 79, 107 (2007) (holding that “the finding of contempt can stand, but the sanction imposed, even though no longer in effect, must be vacated.”).

**JUNE 16, 2022 SENTENCING ORDER OF
THE CIRCUIT COURT FOR
MONTGOMERY COUNTY VACATED;
FEBRUARY 1, 2022 CONTEMPT ORDER
AFFIRMED. APPELLEE TO PAY COSTS.**