UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 2661, 2662, 2663

September Term, 2014

CONSOLIDATED CASES

BRIAN OSBOURNE JOHNSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: February 23, 2016

Appellant Brian Osbourne Johnson spent two months in jail because he did not pay $1,200.00 to purge his contempt. He was released on an appeal bond, but the contempt finding stands even though no court has ever expressly found that he had a current ability to pay the purge amount. The Offices of the Public Defender and the Attorney General both agree that Mr. Johnson should not have been incarcerated. We agree and reverse.

FACTUAL AND PROCEDURAL HISTORY

At an October 27, 2014, hearing in the Circuit Court for Howard County, Mr. Johnson admitted to being in contempt of court for failing to pay child support in three separate cases. The court set purge amounts of $300.00 in the first case, $400.00 in the second, and $500.00 in the third, for a total of $1,200.00. Instead of incarcerating Mr. Johnson, the court scheduled a review hearing for November 24, 2014.

Mr. Johnson had not made the required payments by the time of the review hearing, and the court gave him more time. Mr. Johnson failed to appear at a subsequent hearing; the court issued a body attachment; and he was arrested on January 31, 2015. As far as we can discern, Mr. Johnson had not and still has not paid the amount necessary to purge his contempt.

At a February 4, 2015, hearing, the Howard County Department of Social Services requested that Mr. Johnson be incarcerated because he "had failed to make any payments towards the purge." Arguing against incarceration, Mr. Johnson's counsel informed the court that two days before he was arrested, his client had just started a new job that paid

$12.00 per hour. When it became apparent that the court was nonetheless inclined to incarcerate Mr. Johnson for contempt, Mr. Johnson's counsel requested that he be incarcerated only on weekends. The court denied the request and ordered that Mr. Johnson be incarcerated. The court made no inquiry or explicit finding about Mr. Johnson's present ability to pay. Three weeks later the court issued work-release orders for Mr. Johnson.

Meanwhile, Mr. Johnson filed timely appeals. After two months of incarceration, he was released on his own recognizance pending the appeals.[1]

On July 19, 2015, the Public Defender's Office, representing Mr. Johnson, and the Office of the Attorney General, representing the State, filed a joint motion in this Court to vacate Mr. Johnson's sanction of incarceration. The motion argued that the circuit court had failed to make the required inquiry and findings about Mr. Johnson's ability to actually pay the amount necessary to purge his contempt and that, as a consequence, his incarceration amounted to a sentence in a debtor's prison.

In an order dated August 12, 2015, this Court granted the joint motion in part. The order remanded the case to the circuit court, "without affirmance or reversal, for that court to reconsider the sanction of incarceration," given the parties' joint representation that the court had made no inquiry into Mr. Johnson's present ability to purge himself of

[1] Although Mr. Johnson is not currently incarcerated, the case is not moot, because "he would be subject to immediate reincarceration" if this Court affirmed the sanction of contempt. *Arrington v. Dep't of Human Res*., 402 Md. 79, 89 n.7 (2007).

his contempt at the time of the imposition of the sanction of incarceration. If the circuit court "conclude[d] that the parties' representation [was] correct," the order required that the court "immediately vacate its order of incarceration."

The circuit court heard the remanded cases on October 6, 2015. The court agreed with the parties "that at the February 4, 2015 hearing, no inquiry was specifically made by the [c]ourt" into Mr. Johnson's present ability to pay the purge. Nonetheless, instead of complying with this Court's order to immediately vacate the order of incarceration, the court went on to state that it "did find without explicitly stating, that on February 4, 2015, the Defendant had the present ability to pay the purge amounts." The court concluded that "incarceration was appropriate for failure to pay."

In reaching that decision, the circuit court noted three pieces of evidence purportedly establishing that Mr. Johnson had the present ability to pay $1,200.00 on February 4, 2015. First, Mr. Johnson had failed to apply his earnings from a seasonal holiday job to the purge amount. Second, Mr. Johnson had just started a new job making $12.00 per hour. Third, Mr. Johnson had asked to be allowed to serve on weekends even though he would have to pay for the privilege, which, the court concluded, evidenced "the ability to pay the weekend fees," and, by extension, the amount necessary to purge the contempt.

The court decided that it could not make any determination at the October 6, 2015, hearing that Mr. Johnson was still able to pay the $1,200.00 to purge himself of his contempt. The court indicated that it would await the outcome of this appeal, and, if it

were affirmed, would then schedule a purge review hearing. The court did not note that, if we affirmed its decision, Mr. Johnson would be subject to immediate re-imprisonment (as his appeal bond would be revoked). *See supra* n.1.

On October 26, 2015, both parties filed a second joint motion in this Court. The parties argued that the court had erred in its after-the-fact conclusion that Mr. Johnson had had a present ability to pay $1,200.00 to purge himself of his contempt on February 4, 2015. We denied the motion with leave to re-assert the issues in the briefs.

QUESTIONS PRESENTED

The two parties have each presented one substantially similar question, which, for clarity, we rephrase as two questions:

1. Did the circuit court err in incarcerating Mr. Johnson for contempt, despite making no inquiry about Mr. Johnson's present ability to pay the purge amount?

2. Did the circuit court err in concluding that the evidence adduced at the February 4, 2015, hearing allowed an implied finding that Mr. Johnson had the present ability to pay the purge amount?

For the reasons that follow, we answer both questions in the affirmative. We reverse.

DISCUSSION

Contempt is divided into two categories: civil and criminal. Criminal contempt is a punitive sanction designed to punish someone for "a deliberate effort or a wilful act . . . committed with the knowledge that it would frustrate the order of the court." *Hammonds v. State*, 436 Md. 22, 35 (2013) (quoting *Dorsey v. State*, 356 Md. 324, 352 (1999)) (quotation marks omitted). Civil contempt, on the other hand, is remedial or compulsory,

designed to compel a party to obey the court's order. *Bahena v. Foster*, 164 Md. App. 275, 286 (2005) (quoting *State v. Roll & Scholl*, 267 Md. 714, 728 (1973)). This case involves civil contempt.

Failure to pay court-ordered child support is one instance in which a court may use civil contempt to compel compliance with its orders. An essential aspect of civil contempt is that the contemnor must be able to "purge" the contempt by doing what the court orders. *Jones v. State*, 351 Md. 264, 276-77 (1998). The contemnor is said to "hold the keys to the jailhouse door" and is able to walk free at any time by satisfying the purge provision. *Id.* at 277 (citing *Shillitani v. United States*, 384 U.S. 364, 371 (1966)).

Both implicit and explicit in civil contempt is that a court may not put the keys where the contemnor cannot reach. "[A] person may not be incarcerated for civil contempt based on a failure to comply with a support order unless the court established a purging provision with which the person had the current ability to comply and, by so complying, avoid the incarceration[.]" *Arrington v. Dep't of Human Res.*, 402 Md. 79, 94 (2007). In fact, jailing someone despite an inability to pay a fine or purge provision violates the equal protection and due process guarantees of the Fourteenth Amendment to the United States Constitution. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 667-68 (1983) ("if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it"); *Reddick v. State*, 327 Md. 270, 273-74 (1992) ("having determined

that a fine or restitution is an appropriate sentence, a court cannot then imprison a defendant solely because of his inability to pay it") (citing *Bearden*, 461 U.S. at 665).

To ensure that no one is jailed merely because of an inability to satisfy a debt, "any party judged to be a civil contemnor must be afforded the opportunity to show a present inability to purge the contempt" before being incarcerated. *Jones*, 351 Md. at 276. While "the burden is on the contemnor to establish his or her inability to meet the purge," *Arrington*, 402 Md. at 102, the court may not "circumvent the limitation on incarceration" by ignoring "credible and uncontroverted evidence of a defendant's impecunious circumstances[.]" *Id.* Furthermore, to subject the contemnor to imprisonment, the court must actually have found a "'present ability to purge the contempt.'" *Long v. State*, 371 Md. 72, 89-90 (2002) (citing *Thrower v. State ex rel. Bureau of Support Enf't*, 358 Md. 146, 160-61 (2000)).

These are not archaic or technical rules. "[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." *Thrower*, 358 Md. at 161. "Shortcuts that trample on these requisites and conclusions that are based on hunch rather than on evidence are not allowed." *Id.*

In addition to protecting fundamental constitutional rights, these safeguards serve a practical purpose: a parent in jail is typically unable to earn money to pay child support. If a contemnor "is unable [to] pay a purge provision, no amount of time in prison will induce compliance." *Jones*, 351 Md. at 281. "The ultimate objective of all these efforts

and techniques, including those that are truly punitive in nature, is not to punish the parent *but to provide support for the children*." *Thrower*, 358 Md. at 160 (emphasis added). Only when the court is firmly convinced and explicitly finds that a party is able, but unwilling, to pay the ordered amounts, may the contemnor be jailed to induce compliance.

In this case, at the hearing on February 4, 2015, the circuit court made no inquiry or finding about Mr. Johnson's present ability to pay the $1,200.00. In that respect, this case is materially indistinguishable from two prior cases in which Maryland appellate courts have reversed findings of contempt. In *Arrington*, 402 Md. at 88, "[n]o inquiry was made, and no finding was made, as to whether [the contemnor] could pay [the purge] amount." Similarly, in *Fields v. Fields*, 74 Md. App. 628, 635 (1988), "[t]he trial judge made no finding that the [contemnor] had the ability to pay the amount required to purge the contempt." In both of these cases, the sanction of imprisonment was illegal. In this case, Mr. Johnson's imprisonment was likewise illegal.

The court's failure to inquire into Mr. Johnson's present ability to pay at the February 4, 2015, hearing would alone have sufficed to reverse the decision to jail Mr. Johnson. However, when given a chance to remove the purge provision because of the failure to inquire into Mr. Johnson's present ability to pay, the court declined to do so, reasoning that it had impliedly found that Mr. Johnson had the present ability to pay his purge amount. We did not, however, order the court to determine whether or not it had made a finding; we ordered the court to determine whether it had made an inquiry. As

the circuit court concluded, it did not inquire. The order imposing imprisonment must be vacated.

In the interest of guiding the circuit court on remand, we comment further. At the October 6, 2015, hearing, the circuit court pointed to three pieces of evidence suggesting that Mr. Johnson had the ability to pay the purge amount in February. We disagree that the evidence demonstrated that Johnson had the present ability to pay $1,200.00 on February 5, 2015.

First, the court observed that Mr. Johnson failed to apply the earnings from a seasonal job towards the purge amount. While accurate, the court's observation misses the target. For purposes of imposing the sanction of incarceration, "the issue is not the ability to pay at the time the payments were originally ordered," or some other point in the past, "but rather the *present* ability to pay." *Arrington*, 402 Md. at 94 (quoting *Elzey v. Elzey*, 291 Md. 369, 374 (1981)) (quotation marks omitted). The relevant question was whether Mr. Johnson could pay $1,200.00 on February 5, 2015, not whether he could have paid out that sum out of a past paycheck that he may have spent (or even squandered) on something else.

Second, the court observed that Mr. Johnson had started a new job at $12.00 per hour during the week before the hearing. Yet Mr. Johnson had worked at that job for only two days before being arrested; the record contains nothing to suggest that he had seen a paycheck; and even if he had, it is doubtful that he would have earned more than

about $192.00 before taxes and other living expenses.[2] Two days of work at $12.00 an hour cannot establish a present ability to pay $1,200.00. *See Arrington*, 402 Md. at 87-88, 107 (holding that $2,000.00 purge provision was "unlawful," where contemnor had been working for 30 hours per week at $8.00 per hour for about two weeks); *Thrower*, 358 Md. at 161 ("[i]t defies any semblance of logic or human experience to suppose that, on $69/week unemployment benefits and with no other significant assets, [one contemnor] would be able to pay $840 within a month or that on $75/week, [the other contemnor] would be able to pay $900 in three weeks"); *see also Bryant v. Howard Cnty. Dep't of Soc. Servs*., 387 Md. 30, 50-51 n.4 (2005) (noting impossibility of avoiding incarceration by paying $1,000.00 within nine weeks, when contemnor earned only $8.00 per hour before deductions and expenses).

Third, the court observed that, in order to be able to work at his new job, Mr. Johnson had asked to serve his incarceration only on weekends and understood that he would have to pay for the weekend incarceration. The court retroactively interpreted this request to mean that Mr. Johnson could pay the purge amount. As the State points out, however, "Mr. Johnson's willingness to pay these fees in the future—in an unspecified amount—does not evidence an ability to pay $1,200 that day." Presumably, if Mr. Johnson paid any fees to be incarcerated only on weekends, he would receive that money

[2] If Mr. Johnson worked two eight-hour days, he would have worked for 16 hours at $12.00 per hour. Twelve times 16 equals 192.

from the job he had just started and would continue to receive it only because of the weekends-only incarceration.

Nothing in the court's post hoc analysis suggests that Mr. Johnson had a present ability to pay the purge amount on February 5, 2015. The order of incarceration must be vacated.

CONCLUSION

There is no question that Mr. Johnson was in contempt of the circuit court's orders. Nor is there any serious question that when the court exhibited restraint in allowing him additional time to pay, Mr. Johnson took advantage of the court's patience by skipping a court date. Despite Mr. Johnson's conduct, however, the court could not properly impose the sanction of incarceration without inquiring into whether he had a present ability to pay his court-ordered obligations and expressly finding that he did. Because the court did not conduct that inquiry and did not make that finding, we vacate the order mandating Mr. Johnson's incarceration and remand for further proceedings consistent with this opinion.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED. CASES REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS WAIVED.