

STATE OF MICHIGAN
COURT OF APPEALS

AMANDA E. MAYES,

Plaintiff-Appellee,

v

NATHANIEL LIVINGSTON, JR.,

Defendant-Appellant.

UNPUBLISHED

November 18, 2010

No. 290533

Washtenaw Circuit Court

LC No. 08-000115-PP

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order finding him guilty of criminal contempt for violating a personal protective order (PPO) for which he was sentenced to 91 days in jail. We vacate the order finding defendant guilty of criminal contempt and vacate his sentence.

On January 14, 2008, the circuit court entered an ex parte domestic relationship PPO against defendant at the request of petitioner who had children with defendant. On January 28, 2008, defendant filed a motion to terminate the ex parte PPO pursuant to MCR 3.707(A)(1)(b). Defendant argued that petitioner's request for the PPO was an attempt to gain an advantage in their ongoing and acrimonious custody battle because, on January 10, 2008, defendant obtained an ex parte custody determination in Ohio that awarded him parenting time with his two children. Defendant argued that the PPO issued against him required supervised visitations with his children which contradicted the Ohio court's order granting him a particular parenting time schedule.

A hearing on defendant's motion was conducted on February 7, 2008, consistent with MCR 3.707(A)(2). The circuit court first noted that, in 2003, there was "an issue of domestic violence that occurred between these two people," but the court concluded "I am not persuaded that [defendant] will cause any future physical damage or injury to the petitioner" However, because of allegations made by petitioner that defendant had lost custody of an older daughter, whose mother was not petitioner, the court apparently remained concerned about the welfare of the two children at issue. Accordingly, on February 21, 2008, the circuit court entered

an order modifying the PPO to allow defendant unsupervised parenting time with one child. The court also set a hearing for March 10, 2008, with regard to his parenting time with the other, younger child on the ground that defendant admitted that she was not his biological daughter. The modified PPO was entered on February 22, 2008, and included provisions pertaining to petitioner.

On March 10, 2008, the hearing was continued and focused on the issue of how defendant lost custody of the child who was not petitioner's child. The court concluded that petitioner's allegations were unsubstantiated, but the PPO would not be changed with regard to defendant's parenting time.

By motion signed and dated July 24, 2008, but docketed on July 28, 2008, petitioner alleged that defendant violated the PPO by coming to her house. She requested that defendant be ordered to appear and answer the contempt charge. See MCR 3.708(B)(1).

On July 25, 2008, the circuit court ordered defendant to appear on August 21, 2008, to show cause why he should not be held in contempt for violating the PPO. See MCR 3.708(B)(1)(a). The order indicated that failure to appear may result in a bench warrant being issued for defendant's arrest.

By motion dated August 12, 2008, but docketed on August 19, 2008, defendant requested an ex parte order appointing counsel to represent him with regard to the accusation that he violated the PPO. In the event his request was denied, defendant requested permission to participate in the hearing by telephone because he lived in Ohio and was indigent.

On August 20, 2008, the circuit court entered an order appointing defendant counsel through the Washtenaw County Public Defender's Office and on that same day attorney Lloyd Powell entered his appearance on defendant's behalf.

Before defendant received notice of the court's order appointing counsel he again moved for an order allowing him to appear at the contempt proceeding by telephone. Defendant averred that he did not have the financial means to travel to Ann Arbor to participate in the hearing scheduled for the following day and he did not have counsel. In the alternative, defendant requested a stay of the proceedings. Although defendant references the hearing to be conducted "the next day," this motion was docketed on August 26, 2008.

On August 21, 2008, the hearing was conducted regarding defendant's alleged violation of the PPO. Attorney Timothy Niemann from the Washtenaw Public Defender's Office appeared on behalf of defendant, but defendant did not appear. The court indicated that it had received defendant's request to testify by telephone that morning on her facsimile. The court held that defendant could not participate in the hearing by telephone and excused attorney Niemann from the proceeding. Later that same day, the court heard testimony from petitioner, admitted her evidence, and took the matter under advisement.

On September 3, 2008, the circuit court entered an order concluding that defendant violated the PPO by going to petitioner's residence. Sentencing for the violation was scheduled for September 18, 2008. On September 17, 2008, attorney Lloyd Powell from the Washtenaw Public Defender's Office filed another appearance on defendant's behalf. On September 18, 2008, defendant was scheduled to be sentenced for violation of the PPO, but he did not appear.¹ The next day, the circuit court issued a bench warrant for defendant's arrest for failing to appear for sentencing.

On October 31, 2008, defendant was arrested in Cincinnati pursuant to the bench warrant, and remained in jail pending sentencing on the PPO violation until January 22, 2009. On that date, attorney Timothy Niemann from the Washtenaw Public Defender's Office appeared on defendant's behalf and indicated to the court that defendant had been in custody for almost three months and that he was "unclear" as to why, but in the interim defendant lost his job, may have lost his house, and lost his schooling for the fall. Defendant personally addressed the court and indicated that attorney Niemann "is not my attorney. . . . [he] has not communicated with me." Defendant further stated:

Not only has he not communicated with me, it's my understanding that during this – this so called trial that occurred up in this court in August, that Mr. Niemann didn't stay, didn't represent me, didn't ask one question, didn't make one objection, he hasn't filed a single motion in my case since being appointed. In fact, when I called Mr. Niemann in August and asked him about this case, he told me that he didn't represent me, that -- and that I wasn't to call his office anymore.

The circuit court then indicated that it would appoint new counsel to defendant with regard to a new sentencing date of January 29, 2009, but it denied defendant's request for a new trial, holding: "You had the opportunity to appear, you had notice of the date of the hearing and you failed to appear."

On January 23, 2009, the circuit court entered an order appointing counsel for defendant, but the order was docketed on January 26, 2009. On January 28, 2009, attorney Erane Washington-Kendrick entered her appearance on behalf of defendant.

On January 29, 2009, the sentencing hearing was continued. At that time, attorney Washington-Kendrick indicated a desire to preserve defendant's issues for appeal, including that defendant still contested the validity of the original PPO issued and the fact that the violation hearing was conducted in his absence, without benefit of counsel, and which resulted in his incarceration for 91 days. Attorney Washington-Kendrick indicated that the reason that defendant went to petitioner's house—allegedly in violation of the PPO—was to determine the address where his children lived for purposes of the custody case that was ongoing in Ohio; defendant did not see, talk to, threaten, harass, or harm petitioner. Further, counsel argued that the reason a request to be present at the contempt hearing by telephone was filed the day before the hearing was that the clerk's office would not accept documentation from defendant because he had filed so many documents. "He actually sent in the actual pleadings for the – for the

¹ A transcript of the hearing has not been provided to this Court.

request within the seven days, but it was returned to him because of that particular prohibition from him filing documents.” Thereafter, the court sentenced defendant to 91 days with credit for time served. The order was entered on January 29, 2009.

On or about February 12, 2009, defendant filed a motion in the circuit court requesting that the court appoint him appellate counsel to appeal his sentence. On February 20, 2009, defendant filed a claim of appeal with this Court. By motion dated April 14, 2009, defendant again requested that the circuit court appoint him appellate counsel. According to the circuit court’s register of actions, defendant’s motion was “hld” and granted on May 4, 2009. No transcript of this proceeding was filed with this Court. On May 11, 2009, the circuit court entered an order appointing Erane Washington-Kendrick as defendant’s appellate counsel. On December 7, 2009, this Court remanded this matter to the circuit court for appointment of substitute appellate counsel because defendant’s appointed counsel failed to properly pursue his appeal. On January 5, 2010, the circuit court entered an order appointing present counsel to represent defendant in his appeal.

On appeal, defendant argues that the finding of criminal contempt must be vacated because his due process rights were violated by the circuit court’s (1) failure to provide him proper notice of the charge, (2) failure to provide him the effective assistance of counsel, and (3) failure to provide him the opportunity to be present and confront the witnesses against him. We agree. This Court reviews for an abuse of discretion a circuit court’s decision to hold a party in contempt; however, constitutional issues in that regard are reviewed de novo. *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003).

No person may be deprived of life, liberty, or property without due process of law. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. Underlying the right of due process are the principles of fair play and fundamental fairness. *In re Contempt of Henry*, 282 Mich App 656, 669; 765 NW2d 44 (2009). The analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks and costs involved, as well as the private and governmental interests that might be affected. *Id.* Contempt proceedings are considered quasi-criminal in nature for the reason that both civil and criminal contempt proceedings may result in imprisonment. See *In re Contempt of Dougherty*, 429 Mich 81, 90-91; 413 NW2d 392 (1987). In civil contempt proceedings, the objective of punishment is generally remedial and to enforce compliance with an order while the objective of sanctions in criminal contempt proceedings is punitive, punishing past disobedient conduct. *Id.* at 92-93; *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007).

In this case, it appears that the PPO against defendant was entered pursuant to MCL 600.2950, because petitioner and defendant had a prior dating relationship as well as children in common. A PPO is an injunctive order issued by the circuit court. MCL 600.2950(30)(c). Pursuant to MCL 600.2950(23), the failure to comply with such order subjects the person in violation to the criminal contempt powers of the court and, upon a finding of guilt, permits imprisonment for up to 93 days. Accordingly, a contempt proceeding for violation of a PPO under MCL 600.2950 is criminal, not civil, in nature. A criminal contempt proceeding requires

some of the due process safeguards of an ordinary criminal trial. *DeGeorge*, 276 Mich App at 592. “A defendant charged with contempt is entitled to be informed of the nature of the charge against him or her and to be given adequate opportunity to prepare a defense and to secure the assistance of counsel.” *Id.* A party charged with criminal contempt is presumed innocent and his guilt must be proven beyond a reasonable doubt. *Id.*; see, also, MCR 3.708(H)(3).

Proceedings to enforce a PPO issued against an adult are governed by MCR 3.708. After the petitioner filed her motion alleging that defendant violated the PPO and requested that he be found in contempt, the circuit court was required to determine whether there was a basis for a finding of contempt and, if so, either order defendant’s appearance or issue a bench warrant for his arrest. MCR 3.708(B). In this case, the court ordered defendant to appear on August 21, 2008. Consistent with due process rights, MCR 3.708(D) provides in pertinent part that, at a defendant’s first appearance regarding enforcement of the PPO, the court must (1) advise the defendant of the alleged violation, (2) advise the defendant of his right to contest the charge at a contempt hearing, (3) advise the defendant that he is entitled to an attorney’s assistance at the hearing, and (4) upon request and if appropriate, appoint the defendant an attorney.

Here, prior to the scheduled hearing, defendant requested that counsel be appointed to represent him at the hearing and that he be allowed to appear by telephone because he was indigent and lived in Ohio. Defendant first made these requests in a motion dated August 12, 2008, but the circuit court failed to rule on the request to appear by telephone.² Defendant filed another motion on August 20, 2008, the day before the scheduled hearing, with the same requests, apparently unaware that counsel had been or would be appointed on his behalf. The day before the scheduled hearing the circuit court entered an order appointing counsel and attorney Lloyd Powell of the Washtenaw County Public Defender’s Office filed his appearance on defendant’s behalf.

On August 21, 2008, the attorney who appeared on defendant’s behalf at the scheduled hearing was Timothy Niemann from the Washtenaw Public Defender’s Office. Defendant was not present. The circuit court first denied defendant’s request to appear by telephone and then dismissed defendant’s appointed counsel from the proceedings. The court then held the criminal contempt hearing without defendant being present and without defendant being represented by counsel. Thus, defendant was denied all of the rights afforded by a first appearance hearing as set forth in MCR 3.708(D).

Further, pursuant to MCR 3.708(F), the circuit court was not permitted to go forward with the contempt hearing that same day. MCR 3.708(F) provides, in relevant part:

² Throughout the lower court proceedings, there were delays in the court clerk’s docketing of dated submissions, including documents, motions, briefs, and orders. At the sentencing hearing, defendant’s attorney indicated on the record that at some point the circuit court clerk refused to accept defendant’s filings because he had purportedly been filing too many documents.

Following the respondent's appearance or arraignment, the court shall do the following:

- (a) Set a date for the hearing at the earliest practicable time except as required under MCL 764.15b.

Accordingly, rather than hold a contempt hearing in defendant's absence, the circuit court should have issued a bench warrant to secure defendant's attendance, just as the order commanding defendant's appearance threatened. And even if defendant is deemed to have waived his right to a first appearance hearing by failing to appear as ordered, setting another date for the violation hearing would have at least given defendant time to consult with his appointed counsel and would have provided him an adequate opportunity to prepare a defense to the charge. See *DeGeorge*, 276 Mich App at 592.

However, there is no indication on the record of this first and only hearing on the alleged PPO violation that defendant's "appointed counsel" had even spoken with defendant before the hearing. Moreover, defendant's purported counsel did not make a single argument on defendant's behalf prior to or in response to the court dismissing him from the violation hearing. Under the Due Process Clause, as well as MCR 3.708(D)(3) and (4), an indigent defendant is entitled to have counsel appointed for a contempt proceeding that may result in incarceration. See *Mead v Batchlor*, 435 Mich 480, 495-498; 460 NW2d 493 (1990). Here, although counsel was technically appointed to represent defendant at the hearing, that appointment was effectively revoked by the circuit court.

The criminal contempt hearing proceeded on that same date even though defendant was completely denied his right to counsel, as well as the rights afforded to him under MCR 3.708(H)(2), including the rights to be present, to present evidence, and to examine as well as cross-examine the witnesses. The circuit court permitted petitioner to testify regarding the alleged violation and thereafter found defendant guilty of criminal contempt. Defendant was ordered to appear for sentencing on September 18, 2008. On September 17, 2008, attorney Lloyd Powell from the Washtenaw Public Defender's Office again filed an appearance on defendant's behalf. Defendant did not appear for sentencing and the next day a bench warrant was issued for his arrest.

The record evidence indicates that defendant was arrested in Ohio on October 31, 2008, pursuant to the bench warrant. For reasons not apparent on the record, defendant was held in custody for almost three months, until his sentencing date of January 22, 2009. On that date, attorney Niemann from the Washtenaw Public Defender's Office appeared on defendant's behalf and indicated that he was "unclear" as to why defendant was incarcerated for 84 days prior to this hearing date, but requested that defendant be sentenced to time served. Defendant personally addressed the circuit court, stating that Niemann was not his attorney and had neither communicated with him nor represented his interests at the violation hearing—claims which are readily apparent from the record. The sentencing was adjourned, defendant was taken back into custody, and the circuit court appointed a different attorney to represent defendant. On January 29, 2009, the sentencing hearing was again commenced, concluding with defendant being sentenced for time served.

On this record it is evident that defendant's due process rights were violated and that the several errors were not harmless—they were clearly prejudicial. See *People v McGee*, 258 Mich App 683, 699-700; 672 NW2d 191 (2003). Further, the complete denial of counsel is a structural defect that defies harmless error analysis. See *Neder v US*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Accordingly, the circuit court's order finding defendant guilty of criminal contempt is vacated and defendant's sentence is vacated.

The order finding defendant guilty of criminal contempt is vacated and defendant's sentence is vacated.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Elizabeth L. Gleicher