

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

IN THE MATTER OF:	:	
	:	
W.F., et al.	:	CASE NO. CA2010-10-029
	:	
	:	<u>OPINION</u>
	:	6/20/2011
	:	
	:	
	:	

APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 08AND0887

David B. Bender, Fayette County Prosecuting Attorney, James B. Roach, 1st Floor, Courthouse, 110 East Court Street, Washington Court House, Ohio 43160, for appellee,

Joshua W. Beasley, 8 East Main Street, West Jefferson, Ohio 43162, for appellant,
Wendy Gilpen

Mary E. King, 153 East Court Street, Washington Court House, Ohio 43160, guardian
ad litem

PIPER, J.

{¶1} Appellant, Wendy Gilpen, appeals the decision of the Fayette County Court of Common Pleas, Juvenile Division, finding her in contempt. We reverse the decision of the juvenile court.

{¶2} Gilpen, grandmother to W.F. and A.P., was given temporary custody of the children when they were removed from their mother's care. When Fayette County Children Services (FCCS) became concerned that the children were not receiving

adequate care in Gilpen's custody, the juvenile court made several orders after a January 13, 2010 hearing at which Gilpen was in attendance.

{¶3} The juvenile court's orders required that Gilpen provide FCCS with current contact phone numbers and any changes of residence. The court also ordered Gilpen to inquire with W.F.'s school every Monday to make sure he was doing well, and to report those findings to FCCS by the end of Tuesday each week. Gilpen was also ordered to pursue A.P.'s placement in Head Start. Gilpen failed to follow through on any of the juvenile court's orders.

{¶4} Because Gilpen failed to advise FCCS of her and the children's whereabouts, FCCS lost contact with Gilpen and the children until June 28, 2010 when Gilpen called a case worker at FCCS to report her residence. On July 8, 2010, the children were removed from Gilpen's care. The state filed contempt charges against Gilpen, and a hearing was held on August 31, 2010, for which Gilpen received proper notice.

{¶5} Before the hearing began, Gilpen's counsel asked for a continuance because he received word from Gilpen that she was in the hospital in severe pain and was scheduled for surgery in a few weeks. The juvenile court denied Gilpen's request for a continuance, and heard evidence from a FCCS case worker and the children's guardian ad litem (GAL). The juvenile court found Gilpen in contempt and sentenced her to serve 10 days in the county jail, suspended, and to pay \$100 in fines plus court costs. The court also ordered that Gilpen have no further contact with the children. However, the court did not give Gilpen an opportunity to purge the contempt.

{¶6} Gilpen now appeals the decision of the juvenile court, raising the following assignment of error:

{¶7} "THE TRIAL COURT ERRED IN FINDING APPELLANT IN CRIMINAL

CONTEMPT *IN ABSENTIA*, AND SENTENCING APPELLANT TO SANCTIONS WHEN COMPLIANCE WITH THE ORDER WAS NO LONGER POSSIBLE OR REASONABLE." (Emphasis sic.)

{¶8} In Gilpen's assignment of error, she argues that the juvenile court erred in finding her in contempt without continuing the hearing so that she could be present. Gilpen also argues that the juvenile court could not find her in contempt because once the children were removed from her custody, she could no longer comply with the order to report on their well-being. Finding the first argument meritorious, we sustain Gilpen's assignment of error as it relates to the juvenile court's decision to find her in contempt without first affording her the opportunity to attend the hearing.

{¶9} Contempt is the disobedience of a court order. *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, paragraph one of the syllabus. "The purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice." *Id.* at paragraph two of the syllabus. Contempt can be either direct or indirect. *In re J.M.*, Warren App. No. CA2008-01-004, 2008-Ohio-6763, ¶46. Direct contempt occurs within the actual or constructive presence of the court, whereas indirect contempt involves conduct that occurs outside of the actual or constructive presence of the court. *Id.*

{¶10} It is well established that an alleged contemnor must be afforded due process. *Courtney v. Courtney* (1984), 16 Ohio App.3d 329, 332. Both constitutional and statutory protections require that a person accused of indirect contempt be given notice and an opportunity to be heard. *Poptic v. Poptic*, Butler App. No. CA2005-06-145, 2006-Ohio-2713, ¶8; R.C. 2705.03. "More specifically, due process requires that the alleged contemnor have the right to notice of the charges against him or her, a reasonable opportunity to defend against or explain such charges, representation by

counsel, and the opportunity to testify and to call other witnesses, either by way of defense or explanation." *State ex rel. Miller v. Waller*, Franklin App. No. 04AP-574, 2004-Ohio-6612, ¶7.

{¶11} A person found to be in contempt of court is subject to punishment. R.C. 2705.05. Contempt is classified as civil or criminal depending upon the character and purpose of the punishment. *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 253. Where unconditional imprisonment is imposed as punishment for the contemnor's disobedience, the contempt is criminal. *Id.* at 254.

{¶12} Conversely, civil contempt renders punishment that is remedial or coercive and for the benefit of the complainant, and prison sentences are conditional. *Brown* at 253. Because a civil contempt sanction is coercive in nature, the contemnor must be afforded the opportunity to purge his contempt. *In re Cox* (Dec. 23, 1999), Geauga App. Nos. 98-G-2183, 98-G-2184, 1999 WL 1312688 at *4. Once the contemnor purges his contempt, any sanctions will be discontinued because compliance has been achieved. *Id.* Accordingly, the contemnor is said to "carry the keys of his prison in his own pocket." *Brown* at 253. "A trial court's finding of contempt will not be disturbed on appeal absent an abuse of discretion." *State v. Moody* (1996), 116 Ohio App.3d 176, 181.

{¶13} According to the record, Gilpen was held in indirect criminal contempt. Gilpen's actions, refusing to abide by the juvenile court's orders, occurred outside the actual or constructive presence of the court so that it was indirect. Although the state argues that Gilpen's contempt was civil in nature, the record indicates otherwise. After the hearing, the juvenile court found Gilpen in contempt and immediately ordered Gilpen to serve 10 days in county jail and pay a \$100 fine. Although the juvenile court suspended the jail sentence, it did not give Gilpen an opportunity to purge the jail sentence or fine by abiding by or obeying the terms of the court's original order.

{¶14} We also note that the imprisonment and fine were imposed as punishment for Gilpen's disobedience, and is therefore criminal in nature. The record is clear that the juvenile court imposed the sentence and fine as punishment because Gilpen failed to obey the orders it set forth after its January 13, 2010 hearing. By the time the contempt hearing was held, the children had been removed from Gilpen's custody and the juvenile court ordered Gilpen to have no further contact with the children. Therefore, Gilpen could not have fulfilled the terms of the original order such as verifying the older child's well-being at school, or making strides to enroll the younger child in Head Start. The purpose of civil contempt is to render punishment that is remedial or coercive and for the benefit of the complainant. However, based on the sentence of the court, Gilpen was not coerced into abiding by the terms of the juvenile court's orders, she was being punished for having failed to do so in the first place.

{¶15} R.C. 2705.05 permits punishment if a person is found in contempt of court. Therefore, Gilpen's argument that the juvenile court cannot hold her in contempt for failing to abide by the terms of the original orders lacks merit. Although Gilpen no longer had custody of the children, the state could have proved that she failed to abide by the terms of the court's orders by not giving FCCS her current contact information and address, not investigating the older child's school performance and reporting it, and in not making strides to have the younger child enrolled in Head Start.

{¶16} We are not reversing this case because the juvenile court lacked the ability to punish Gilpen. Instead, the abuse of discretion occurred when the juvenile court held the contempt hearing without affording Gilpen the opportunity to attend. Ohio courts have held that an alleged contemnor cannot be tried, convicted, and sentenced in absentia for indirect criminal contempt. *Adams v. Epperly* (1985), 27 Ohio App.3d 51; and *Cermak v. Cermak* (1998), 126 Ohio App.3d 589. "A criminal contemnor is afforded

the same constitutional rights and privileges as a defendant in a criminal action, including the right to due process. At a minimum, due process of law requires proper notice and an opportunity to be heard. This includes the right to be present at every stage of his or her trial, absent waiver or other extraordinary circumstances." *Edgell v. Burch*, Stark App. No. CA2005CA00186, 2006-Ohio-1068, ¶19. (Internal citations omitted.)

{¶17} The state points to *State v. Jones*, Lake App. No. 2008-L-028, 2008-Ohio-6559, for the proposition that a defendant waives his right to be present at every stage of his trial by choosing not to appear. However, Jones had attended portions of his trial and fled when the first day of the trial did not go well for him. The trial court dispatched multiple police officers to look for Jones at his known address and places he was known to go, and also called two local hospitals to make sure that Jones had not experienced a medical emergency. The trial court also inquired from Jones' attorney if Jones had offered an explanation for his nonappearance. However, Jones failed to appear without communicating with his attorney. Based on these circumstances, the court found that Jones voluntarily waived his right to attend his trial.

{¶18} We find the facts in *Jones* distinguishable. Unlike *Jones*, Gilpen did not attend the first part of her hearing and then leave after hearing unfavorable evidence against her. Neither did the juvenile court take any steps to locate Gilpen, or to verify the explanation offered by her attorney. Unlike Jones, the record indicates that Gilpen did not waive her right to attend the hearing, and expressly asked for a continuance so that she could attend.

{¶19} Although the juvenile court may have discredited Gilpen's explanation that she was in the hospital awaiting surgery, Gilpen contacted her attorney to offer a reason for her absence. Gilpen's counsel then requested a continuance, indicating that Gilpen

did not wish to waive her right to attend her contempt hearing. If the juvenile court had cause, it could have held Gilpen in contempt for her failure to appear at the hearing, or issued a bench warrant for her arrest. It could not, however, determine that she was in contempt and punish her in absentia.

{¶20} The state also relies on *State v. Carr* (1995), 104 Ohio App.3d 699, for the proposition that an accused's nonappearance is an issue of fact and that a trial court is permitted to find an accused's absence voluntary when there is unrebutted evidence that the accused was aware of his obligation to attend the proceedings. However, the facts of *Carr* are also different from the case at bar. Carr attended his trial on the first day during which time the state presented its case-in-chief and both parties rested. On the second day of the trial, during which time closing arguments were to occur, Carr did not attend and offered no reason for his absence. The court found that Carr waived his right to attend his trial through his own voluntary act and moreover, was not prejudiced by not attending closing arguments once all evidence had been presented. Gilpen, however, was not afforded the opportunity to attend the evidentiary portion of her hearing, and was not able to participate in that crucial phase of her contempt hearing.

{¶21} However, even if we were to consider the more general principles set forth in *Carr*, we find that under the facts of this case the juvenile court did not sufficiently inquire into the waiver issue. The court in *Carr* held that "if counsel has no explanation for the defendant's absence, the trial court may nevertheless find the absence to be voluntary because the presumption that the defendant knows of his obligation to attend has gone unrebutted. If an explanation is offered, the court must weigh that evidence to determine whether the absence is voluntary. If the court finds that it is, the trial may proceed without the defendant. If the court finds the absence involuntary, the trial must be recessed until the defendant is available to appear or, in the court's discretion, a

mistrial may be declared." Id. at 703.

{¶22} Because the juvenile court heard Gilpen's reason for her absence, it should have, at a minimum, considered whether her absence was voluntary or not. The following exchange occurred once Gilpen's counsel informed the court of her absence:

{¶23} "[DEFENSE COUNSEL] Your Honor, just for the record, I have spoken with my client. She called me about 9:45 to say she was in the hospital at Adena in Greenfield. She said she went there this morning because she was in a lot of pain. She is scheduled for surgery on September the 13th, and she says it's because they think the cancer is back – is all I have at this time. So I would respectfully ask for a continuance based on that, your Honor.

{¶24} "[COURT] Did you talk to the hospital?

{¶25} "[DEFENSE COUNSEL] No, your Honor. She called me at 9:45. I didn't talk to the hospital.

{¶26} "[COURT] The Court has not received anything directly from the hospital. Have you, [prosecutor]?

{¶27} "[PROSECUTOR] No.

{¶28} "[COURT] Children Services?

{¶29} " CHILDREN SERVICES] No contact with her through the guardian ad litem's office.

{¶30} "[COURT] So I will deny as far as the request for the continuance."

{¶31} However, this exchange is insufficient to demonstrate that the juvenile court weighed the evidence to determine whether Gilpen's absence was voluntary. The juvenile court dismissed Gilpen's explanation for her absence simply because the court, state, or children services agency had not directly heard from the hospital. However, the juvenile court reached this decision without ever attempting to contact the hospital to

verify whether Gilpen had in fact been admitted or if she was medically unable to attend the contempt hearing.

{¶32} We reach this decision based on the facts of this case alone, and are not creating a standard that a trial court must locate every defendant who fails to appear at a proceeding. However, under the facts of this case, the juvenile court received a potentially-credible explanation from Gilpen's attorney that she was at a specific hospital, for a specific reason. If doubtful of the explanation's credibility, the court could have ordered that verification from the hospital be supplied at the next hearing, subject to a new contempt if not supplied. However, even if it did not attempt to contact the hospital or verify Gilpen's explanation, the trial court should have still weighed the evidence to determine whether Gilpen's absence was voluntary, and considered the fact that Gilpen offered a readily-verifiable explanation and request for a continuance.

{¶33} Having found that the juvenile court erred in finding Gilpen in criminal contempt in absentia, we sustain Gilpen's assignment of error specific to her in absentia argument, reverse the decision of the trial court, and remand for a new hearing.

{¶34} Judgment reversed and remanded.

POWELL, P.J., and RINGLAND, J., concur.