

[Cite as *Mickler v. Carter*, 2009-Ohio-6588.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

YOLANDA COOLEY-CARTER MICKLER :	:	Appellate Case No. 23373
Plaintiff-Appellant	:	
	:	Trial Court Case No. 1996-DR-484
v.	:	
	:	(Civil Appeal from Common
MARCUS CARTER :	:	Pleas Court, Domestic Relations)
Defendant-Appellee	:	
	:	
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O P I N I O N

Rendered on the 11th day of December, 2009.

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BROGAN, J.

{¶ 1} Yolanda Cooley-Carter Mickler appeals from the trial court's March 23, 2009 judgment entry sentencing her to five days in jail for contempt of court.

{¶ 2} In her sole assignment of error, Mickler contends the trial court violated her due process rights in a criminal contempt sentencing hearing by not allowing her to present evidence and by applying an incorrect burden of proof.

{¶ 3} The record reflects that Mickler and the appellee, Marcus Carter, divorced in 1996. They had one child together during their marriage. Following an evidentiary hearing, the trial court upheld a magistrate's ruling and found Mickler in civil contempt on December 18, 2007 for not facilitating court-ordered parenting time between Carter and the child. (Doc. #193). The trial court's contempt order imposed a five-day jail sentence. The order provided, however, that Mickler could purge the contempt by requiring the child to contact Carter by telephone and by facilitating his parenting time with the child. It appears that Mickler did not serve any jail time immediately after the December 18, 2007 civil contempt finding.

{¶ 4} On August 25, 2008, Carter filed a motion for imposition of sentence. (Doc. #195). Therein, he asserted that Mickler had continued to prevent telephone contact and had continued to refuse him parenting time with the child. As a result, he asked the trial court to require Mickler to serve the five-day jail sentence it had imposed on December 18, 2007. The trial court initially set Carter's motion for a hearing on November 13, 2008 but later rescheduled the hearing for March 23, 2009. (Doc. #206, 213). On that date, the trial court heard argument from counsel and unsworn statements from Mickler and Carter. At the conclusion of the hearing, the trial court advised Mickler that she would be required to serve the five days previously imposed.

{¶ 5} That same day, March 23, 2009, the trial court filed a sentencing entry in which it ordered Mickler to begin serving five days in jail for civil contempt. (Doc. #214). The entry noted that the five days were "from the imposition of a previously suspended sentence." The entry further provided that Mickler could purge the

contempt by “encouraging and providing parenting time for Mr. Carter with [the minor child].” The following day, March 24, 2009, the trial court filed an order releasing Mickler from custody and withdrawing the sentencing entry it had filed the previous day. (Doc. #215). At the same time, the trial court filed a new March 24, 2009 sentencing entry. Like the prior one, the new entry imposed a five-day jail sentence for civil contempt. (Doc. #216). It provided that the sentence commenced on March 23, 2009, and it gave Mickler credit for one day served in jail. Under the heading, “Opportunity to Purge,” the new entry stated: “[Mickler] shall provide parenting time for Marcus Carter according to court order.”

{¶ 6} On April 9, 2009, Mickler filed a notice of appeal from the trial court’s March 23, 2009 sentencing entry. She maintains on appeal that the trial court transformed her contempt into criminal contempt during the March 23, 2009 sentencing hearing. Specifically, she insists that the matter was criminal because the trial court sentenced her to five days in jail for violating a November 13, 2008 court order granting Carter parenting time. Mickler further contends the trial court denied her due process at the March 23, 2009 hearing by not allowing her to present evidence and by applying the civil contempt burden of proof. Therefore, she insists that there is no valid finding of contempt and that her five-day sentence is illegal.

{¶ 7} Upon review, we find Mickler’s argument to be unpersuasive. As an initial matter, we note that she has appealed from the March 23, 2009 sentencing entry, which the trial court withdrew the following day and replaced with a new sentencing entry. Contrary to Mickler’s argument on appeal, we note too that there is no November 13, 2008 court order granting Carter parenting time. In fact, there is

no record of anything happening on November 13, 2008. The trial court initially scheduled Mickler's civil contempt sentencing hearing for that date but then postponed it. (Doc. #206).

{¶ 8} In any event, we find no merit in Mickler's assertion that the trial court held her in criminal contempt. The trial court's original December 18, 2007, contempt finding designated the contempt as civil in nature and gave Mickler an opportunity to purge it by facilitating visitation and telephone contact between Carter and their minor child. Based on his belief that Mickler still was not facilitating visitation, Carter moved on August 25, 2008 for an order requiring Mickler to serve the five-day civil contempt sentence the trial court had imposed on December 18, 2007. (Doc. #195).

{¶ 9} As set forth above, the trial court held a hearing on Carter's motion on March 23, 2009. Following the hearing, it filed two sentencing entries, the first on March 23, 2009 and the second on March 24, 2009. Both entries indicated that Mickler was being ordered to serve the five-day jail sentence that previously had been imposed for civil contempt. (Doc. #214, 216). Both entries again provided Mickler with an opportunity to purge the contempt by facilitating Carter's court-ordered parenting time. On appeal, Mickler concedes that she served only one day in jail, March 23, 2009, before being released and given yet another opportunity to purge the contempt. The trial court's allowance for purging the contempt by facilitating parenting time indicates that civil contempt was found.¹ It is well settled

¹This court and others have recognized that a trial court may use civil contempt to compel compliance with court-ordered visitation. See, e.g., *Summe v. Summe* (June 6, 1990), Montgomery App. Nos. 11452, 11474 (recognizing that a court "can compel future compliance with the court-ordered visitation schedule and, thus, allow the contemnor to purge himself of any contempt"); *C.G. v. C.L.*, Cuyahoga App. No. 90341,

that civil contempt involves the imposition of punishment with a coercive or remedial purpose for the benefit of the complainant. *Wittbrot v. Wittbrot*, Clark App. No. 2002 CA 19, 2002-Ohio-6075, ¶35. A key feature of civil contempt is the contemner's opportunity to purge the contempt. *Id.*

{¶ 10} Although we disagree with Mickler's claim that her contempt was criminal, that determination is not dispositive. Her primary argument on appeal is that the trial court violated her due process rights when it declined to allow her to present testimony during the hearing on Carter's motion for imposition of sentence. (See March 23, 2009 hearing transcript at 8). But the due process right to testify and call witnesses applies to both civil and criminal contempt. *U.S. Bank Natl. Assn. v. Golf Course Mgt., Inc.*, Clermont App. No. CA2008-08-078, 2009-Ohio-2807, at ¶14, 17. Therefore, for purposes of Mickler's due process argument, it makes no difference whether her contempt was civil or criminal.

{¶ 11} Although the appellant did not testify under oath at the contempt hearing, the trial court gave her ample opportunity to explain to the court why she had not taken adequate steps to encourage her daughter to visit with her father. Also, counsel did not suggest there were any other witnesses that appellant wished to present on her behalf. More importantly, we conclude that Mickler's due process argument is moot. Long before March 23, 2009, the trial court had found Mickler in

2008-Ohio-3135, ¶28 ("[S]everal courts have recognized that '[w]hile the trial court cannot fashion a remedy to return past visitations to the defendant by allowing the plaintiff to purge herself of contempt, the trial court can compel future compliance with the visitation schedule established by the court order, thus, allowing plaintiff to purge herself of any alleged contempt.'") (citations omitted).

contempt and had given her an opportunity to purge the contempt by facilitating Carter's visitation with their child. The purpose of the March 23, 2009 hearing was to resolve Carter's August 25, 2008 motion for imposition of sentence, which asserted that Mickler had not purged the contempt and sought to have her jailed. The trial court agreed with Carter and required Mickler to serve one day in jail before releasing her and giving her yet another opportunity to purge the contempt previously found. Therefore, Mickler currently stands in the same position she did on December 18, 2007, when the trial court first found her in contempt, imposed a jail sentence (which it did not require her to begin serving), and provided a way for her to purge the contempt by facilitating visitation. Mickler also currently stands in the same position she did on August 24, 2008, the day before Carter filed his motion for imposition of sentence, and on March 22, 2009, the day before the sentencing hearing about which she complains. At those times, she stood as a contemnor (by virtue of a December 18, 2007 civil contempt finding) who had received a five-day jail sentence, but who had not been required to serve the full sentence, and who had been given an opportunity to purge the contempt by facilitating visitation. Mickler stands in exactly the same position today. The only practical consequence of the March 23, 2009 sentencing hearing is that she served one day in jail. We cannot give Mickler back her one day in jail even if the trial court did violate her due process rights during that hearing. As a result, her assignment of error is moot.

{¶ 12} Based on the reasoning set forth above, Mickler's appeal is hereby dismissed as moot.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Denise Cross