

**COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT**

CATHERINE L. BASORE	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 01-COA-01410
RONALD E. BASORE	:	
	:	
Defendant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Ashland County
Common Pleas Court, Domestic Relations
Division, Case No.00-DIV-11049

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: 12/20/2001

APPEARANCES:

For Appellant

JOSEPH P. KEARNS, JR.
P.O. Box 345
153 West Main Street
Ashland, Ohio 44805

[Cite as *Basore v. Basore*, 2001-Ohio-7054.]
Boggins, J.

STATEMENT OF THE FACTS AND CASE

Appellant was the attorney for the Plaintiff, Catherine L. Basore, in a divorce case in Ashland County Common Pleas Court.

On March 21, 2001, Appellant was late for a 8:45 a.m. hearing in the divorce proceeding, arriving at approximately 8:51 a.m.

Upon his late arrival, the Magistrate inquired as to the reason for his tardiness, to which Appellant replied that he "was getting the papers together for today's proceedings". (T. at 2).

Not finding such explanation sufficient, in addition to Appellant's failure to apologize to the court for his tardiness, the Magistrate found Appellant to be in direct contempt of court with the recommendation of a fine of \$200.00. The Magistrate also stated on the record that Appellant had failed to appear entirely for a hearing in a separate matter, without ever providing an excuse or an apology to the court. (T. at 2).

Appellant appealed the Magistrate's Order within the relevant seven day time period for review.

On April 2, 2001, the trial court affirmed the Magistrate's Order.

It is from this decision that Appellant appeals, assigning the following error:

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT AFFIRMED THE MAGISTRATE'S ORDER FINDING APPELLANT TO BE IN DIRECT CONTEMPT OF COURT FOR BEING FIVE (5) MINUTES LATE TO A HEARING.

In his sole assignment of error, Appellant argues that the trial court erred in finding him in "direct" contempt, rather than indirect contempt. We agree.

Contempt has been defined as the disregard for judicial authority. *State v. Flinn* (1982), 7 Ohio App.3d 294. Contempt may be either direct or indirect. *In re: Purola* (1991), 73 Ohio App.3d 306, 310. Direct contempt occurs in the presence of the court, while indirect contempt occurs outside its immediate presence. *Id.* Revised Code §2705.02, on indirect contempt, provides in relevant part, that "a person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to a lawful writ, process, order, rule, judgment, or command of a court or an officer." Thus, the knowing failure to obey the lawful order of a court may be grounds for a finding of contempt. *Arthur Young & Co. v. Kelly* (1990), 68 Ohio App.3d 287. "Contempt is further classified as civil or criminal depending on the character and purpose of the contempt sanctions." *Purola, supra*, at 311. Criminal and civil contempt serve different ends within the judicial system, and are governed by different rules. Civil contempt is designed to benefit the complainant and is remedial in nature. *Id.* Thus, an individual charged with civil contempt must be permitted to appear before the court and purge himself of the contempt by demonstrating compliance with the court's order he is charged with violating. *Id.* at 312.

Criminal contempt, on the other hand, is usually characterized by unconditional fines or prison sentences. *Id.* at 311. In the case of criminal contempt,

there is no requirement that the person charged be permitted to purge him or herself of the contempt. *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250. The absence of an opportunity to purge

oneself when charged with criminal contempt is appropriate because the purpose of criminal contempt is punitive. *Id.*

Indirect contempt of court "is one committed outside the presence of the court but which also tends to obstruct the due and orderly administration of justice." *In re Lands* (1946) 146 Ohio St. 589, 595. Because the court generally has no personal knowledge of the alleged contemptuous behavior, it must afford the accused procedural safeguards such as a written charge, an adversary hearing, and the opportunity for legal representation. See R.C. 2705.03; *State ex rel. Seventh Urban, Inc. v. McFaul* (1983), 5 Ohio St.3d 120, 122; *State v. Moody* (1996), 116 Ohio App.3d 176, 180.

Courts have consistently held that the arriving late to a hearing or not appearing at all constitutes an indirect contempt of the court. See, e.g., *Cleveland v. Ramsey* (1988), 56 Ohio App.3d 108; *E. Cleveland v. Reed* (1977), 54 Ohio App.2d 147; *Orlando v. Haggins, supra.*

In *State v. Moody*, the Twelfth District Court of Appeals considered a very similar factual situation. Moody, the accused in a criminal trial, absented himself during jury deliberations to take his brother to a medical appointment. During Moody's absence, the jury submitted two questions to the court. The trial court

waited about one hour before proceeding to answer the questions in Moody's absence. The trial court then found Moody in direct contempt and summarily ordered him incarcerated. The court of appeals reversed the contempt finding, holding "[t]hat the failure to appear at or arriving late to a hearing before the court occurs in the constructive presence of the court rather than the immediate presence of the court and is treated as indirect contempt." *State v. Moody*, 116 Ohio

App.3d at 181, 687 N.E.2d at 323.

Likewise, in *Weiland v. Indus. Comm.* (1956), 166 Ohio St. 62, the Ohio Supreme Court considered a contempt citation against an attorney who arrived forty minutes late for trial because of automobile problems. While acknowledging that a portion of the offense could be considered direct contempt and in the presence of the court (entering court late), the court found that "part of the alleged misconduct was committed on the trip * * * and hence was not in or near the court itself. This was in the nature of an indirect contempt, and the appellant was entitled to an opportunity to proffer evidence to show any extenuating or even exculpatory circumstances." *Id.* at 66.

The contemnor's inaccessibility necessarily occurred outside the courtroom. We therefore find that the court erred by classifying contemnor's conduct as a direct contempt. Because contemnor's conduct did not constitute direct contempt, he was entitled to the procedural protections set forth in R.C. §2705.03. Those protections were not provided.

A review of the record in this instant case reveals that Appellant failed to arrive for a hearing on time. We therefore find appellant was not in direct criminal contempt.

We therefore sustain Appellant's sole assignment of error and remand this matter for a hearing. We do not express any opinion on the merits of an indirect contempt citation under the facts of this case.

The judgment of the trial court is reversed and remanded for proceedings in accordance with R.C. §2705.03. By Boggins, J.

Hoffman, P.J. and

Farmer, J. concur

JUDGES

