

[Cite as *State v. Owens*, 2004-Ohio-4970.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No.	21860
Appellee		
v.		
RICKY L. OWENS	APPEAL FROM JUDGMENT	
Appellant	ENTERED IN THE	
	COURT OF COMMON PLEAS	
	COUNTY OF SUMMIT, OHIO	
	CASE No.	CR 03 07 2177

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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WHITMORE, Judge.

{¶1} Appellant, Ricky L. Owens, has appealed from the judgment of the Summit County Court of Common Pleas sentencing him to two years of community control following his plea of no contest to the charge of nonsupport of dependents in violation of R.C. 2919.21. This Court affirms.

I.

{¶2} On July 31, 2003, Appellant was charged by way of indictment with two counts of nonsupport of dependents. Appellant moved to dismiss the charges on the grounds that the charges were barred by double jeopardy. Appellant contended that his previous contempt in the Domestic Relations Division of the

Summit County Court of Common Pleas for failure to pay child support barred the State from bringing the current charges against him. The trial court denied his motion to dismiss, and Appellant subsequently entered a plea of no contest. Upon his plea, the State recommended that count two of the indictment be dismissed, and the trial court dismissed that count. Appellant was then sentenced to two years community control. Under his sentence, Appellant is required to pay monthly child support. Appellant may be incarcerated for six to twelve months if he violates the terms of his community control. Appellant timely appealed the judgment of the trial court, raising one assignment or error.

## II.

### ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION TO DISMISS, ISSUING A FINDING OF GUILTY AND IN SENTENCING APPELLANT AS PRIOR TO THIS CASE, APPELLANT WAS FOUND GUILTY AND SENTENCED FOR THE IDENTICAL OFFENSE, THEREBY VIOLATING THE DOUBLE JEOPARDY PROVISION CONTAINED IN THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.”

{¶3} This Court quotes only the legal argument portion of Appellant’s sole assignment of error. The factual representations contained in Appellant’s assignment of error will be addressed herein. In his sole assignment of error, Appellant has contended that the trial court erred in denying his motion to dismiss the indictment on the grounds that it violated the Double Jeopardy Clause of the U.S. Constitution. We disagree.

{¶4} The Double Jeopardy Clause ensures that an individual will not receive multiple criminal punishments from the same sovereign for the same offense. *Hudson v. United States* (1997), 522 U.S. 93, 99. These protections will apply to a contempt proceeding in which the sanction imposed is criminal rather than civil in nature. *Id.* at 101. As such, this Court must determine whether the Domestic Relations Division’s sanction was criminal or civil in nature.

{¶5} The pertinent test in distinguishing criminal and civil contempt is as follows: “what does the court primarily seek to accomplish by imposing sentence?” *Shillitani v. U.S.* (1966), 384 U.S. 364, 370. This Court has previously addressed the issue raised by the Appellant. See *State v. Birch*, 9th Dist. No. 20910, 2002-Ohio-3734.

{¶6} In *Birch*, the Appellant moved to dismiss the charges of nonsupport filed against him on the grounds of double jeopardy. Upon the denial of his motion, he pled no contest to the charges. As such, the procedural and factual elements of *Birch* correspond with those in the instant appeal. In *Birch*, we explained that civil contempt sanctions are “designed for remedial and coercive purposes[.]” *Birch*, 2002-Ohio-3734, at ¶11, citing *State ex rel. Corn v. Russo* (2001), 90 Ohio St.3d 551, 555. They are ordinarily conditional, allowing the contemnor an opportunity to purge himself of contempt. *Birch*, 2002-Ohio-3734, at ¶11.

{¶7} On the other hand, sanctions imposed for criminal contempt are punitive in nature, vindicating the authority of the court. *Corn*, 90 Ohio St.3d at 555. Therefore, in order to constitute criminal contempt, a sanction must have an “overriding punitive purpose[.]” *State v. Kilbane* (1980), 61 Ohio St.2d 201, 206.

{¶8} Here, like *Birch*, Appellant was given the opportunity to purge his civil contempt by paying his monthly child support obligations. His subsequent jail sentence was imposed not so much as a result of the court’s action, but as a result of Appellant’s decision not to pay child support. Appellant’s decision not to purge his contempt does not cause the civil contempt to become criminal. *Birch*, 2002-Ohio-3734, at ¶13.

{¶9} While Appellant has urged this Court to reconsider *Birch*, he has cited no authority in conflict with *Birch*, nor given any argument other than the conclusory statement that Appellant’s contempt sanction was punitive. As such, we have no reason to reconsider *Birch*. See also, *State v. Martin* (Mar. 27, 2001), 5th Dist. No. 00CA003; *State v. Palmer*, 2nd Dist. No. 19921, 2004-Ohio-779 (both holding that the sanctions imposed for failure to pay child support are civil in nature).

{¶10} As such, we conclude that the primary purpose of the sanctions imposed by the Domestic Relations Division of the Summit County Court of Common Pleas were remedial in nature, intended to coerce Appellant to comply with the child support order. As such, the sanctions’ overriding purpose was not

punitive. Therefore, the trial court did not err in denying Appellant's motion to dismiss. Accordingly, Appellant's sole assignment of error is overruled.

III.

{¶11} Appellant's sole assignment of error is overruled, and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

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BETH WHITMORE  
FOR THE COURT

SLABY, J.  
BOYLE, J.  
CONCUR

APPEARANCES:

RICHARD P. KUTUCHIEF, Attorney at Law, 807 Key Building, Akron, Ohio 44308, for Appellant.

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