

NO. SC97608

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. APOLLO BROWN
RELATOR

v.

THE HONORABLE JASON KANOY
RESPONDENT

PROCEEDING IN PROHIBITION
FROM THE ASSOCIATE CIRCUIT COURT OF CALDWELL COUNTY
CAUSE NO. 13CL-CR00153

RESPONDENT'S BRIEF

Wyatt Z. Roberts
Missouri Bar No. 58729
Kenneth C. Hensley
Missouri Bar No. 28172
HENSLEY LAW OFFICE
401 West Foxwood Drive
P.O. Box 620
Raymore, Missouri 64083
Telephone: (816) 322-4466
Facsimile: (816) 348-0896
hensleylawoffice@gmail.com
ATTORNEYS FOR RESPONDENT

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to issue and determine original remedial writs pursuant to Missouri Constitution Article V, Section 4.1.

Relator filed a petition seeking prohibition in this matter in the Missouri Court of Appeals, Western District, and said relief was denied thereby.

STATEMENT OF FACTS

Relator was charged with the Class A Misdemeanor of Violation of an Order of Protection and the Class C Misdemeanor of Assault in the Third Degree on April 18, 2013 in Caldwell County, Missouri in Case Number 13CL-CR00153. Relator appeared in front of Judge Jason Kanoy on June 7, 2013, and pled guilty to the Class A Misdemeanor of Violation of an Order of Protection, the assault charge was dismissed. Relator was sentenced to 180 days in the Caldwell County Jail, the execution of which was suspended, and Relator was placed on probation for a period of two years. Relator was also ordered to serve 28 days of shock incarceration, but was given credit for time served. Relator was allowed to pay his court costs via a payment plan at the rate of \$50 per month, and was given a payment review date of July 18, 2013.

Subsequently, two motions were filed on July 22 and October 10, 2013, to revoke Relator's probation alleging that he had violated his probation by failing to report, failing to appear in court, failing to pay costs as ordered, and consuming alcohol. The matters were continued to October 3, 2013, and a warrant was ordered on that date due to Relator's failure to appear. On August 7, 2014, Relator appeared pursuant to a writ of habeas corpus ad prosequendum, admitted violating his probation, and his previously imposed sentence of 180 days was executed.

On September 11, 2014, Relator received a judicial parole with a show cause "payment review" date of November 13, 2014 with the condition that he pay \$100 per month toward his court costs. Relator failed to appear on November 13,

2014, and the court issued a warrant for his arrest. On March 5, 2015, Relator was found to be in contempt of court and sentenced to two days of incarceration with credit for time served. Respondent thereafter reset Relator's matter for payment review the following month and has continued to reset it for payment review approximately every month thereafter, sometimes adjusting at Relator's request the amount of monthly payments he is to make.

Respondent's normal course of conduct in such cases can be seen from other docket entries provided as exhibits to Relator's Petition: payment review dates are scheduled approximately monthly. So long as defendants owing fines and/or court costs either make a payment or ask for more time to continue making payments, the court reschedules the matter for another payment review date. If someone fails to make a payment, contact the court, and show up for court, then a warrant is issued for their arrest to explain such failures. If after a hearing the person is found to have failed to pay, contact the court, and show up as ordered without a reasonable excuse though able, they are typically cited for contempt and sentenced to credit for time served.

POINT

THIS COURT SHOULD DENY RELATOR'S REQUEST FOR WRIT OF PROHIBITION BECAUSE RESPONDENT'S ACTIONS HAVE NOT VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Cases:

State ex rel. Family Support Div.-Child Support Enforcement v. Lane, 313 S.W.3d 186 (Mo. App W.D. 2010)

State ex rel. Missouri Public Defender Comm'n v. Waters, 370 S.W.3d 592 (Mo. banc 2012)

State v. Flenoy, 968 S.W.2d 141, 143 (Mo. banc 1998)

State v. French, 79 S.W.3d 896 (Mo. banc 2002)

U.S. v. Dixon, 509 U.S. 688, 700 (1993)

ARGUMENT

THIS COURT SHOULD DENY RELATOR’S REQUEST FOR WRIT OF PROHIBITION BECAUSE RESPONDENT’S ACTIONS HAVE NOT VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY.

A. Standard

A writ of prohibition is available only

(1) to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.

State ex rel. Missouri Public Defender Comm’n v. Waters, 370 S.W.3d 592, 603 (Mo. banc 2012). Where the issuance of the writ is dependent upon the interpretation of law, the review is *de novo*. *State ex rel. White Family Partnership v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008).

B. Argument

Double Jeopardy is the constitutional prohibition against multiple punishments for the same conduct. Specifically, there are two protections available to criminal defendants: (1) protection from being successively prosecuted for the same conduct after a finding of guilty or not-guilty, and (2) “protection from multiple punishments for the same offense.” *State v. Flenoy*, 968

S.W.2d 141, 143 (Mo. banc 1998). Respondent assumes that Relator is asserting the former protection from being successively prosecuted for the same conduct after a finding of guilty or not-guilty. The latter protection is intended to protect against multiple charges being filed in the same case for the same conduct and is applied using the *Blockberger* test. *Id.* (citing *Blockberger v. U.S.*, 284 U.S. 299 (1932)).

Respondent posits that a claim of a Double Jeopardy violation is misplaced for several reasons. First, Relator was punished in the instant issue by being held in contempt of court for disobeying a court order, not for committing a crime. Specifically, Relator was found to have failed to make a payment toward his outstanding court costs as ordered by the court pursuant to a payment plan. He was not found to have committed a new crime. A review of the caselaw by Respondent fails to produce an example of the Double Jeopardy protections being extended to successive punishments for contempt of court.

The U.S. Supreme Court has ruled that a person may not be criminally prosecuted for the exact same conduct that previously resulted in a finding of contempt. *U.S. v. Dixon*, 509 U.S. 688, 700 (1993). The *Dixon* Court employed the *Blockberger* test in their analysis. *Id.* at 697. In that case, Dixon had been released on bond with a condition that he not violate any law, and his release order specified that violation of the conditions of release could subject him to criminal contempt proceedings. *Id.* at 691. While released, Dixon was arrested and charged with possession of cocaine, he was found to be in contempt of his release

order, and he was incarcerated pursuant to that contempt order. *Id.* at 691-692. The criminal charges filed against him charging him with the same conduct for which he was found to be in contempt were dismissed on Double Jeopardy grounds and the Supreme Court upheld that dismissal. *Id.* at 700.

The instant case is distinguishable from the *Dixon* case, albeit perhaps only superficially. This matter involves successive findings of contempt rather than criminal prosecutions. Respondent concedes that this may very well be a distinction that is inconsequential, but there does not appear to be any caselaw wherein double jeopardy has barred successive findings of contempt against a person. Respondent would note that a criminal conviction and a finding of contempt do vary in the ancillary or tangential effects of those outcomes.

Being convicted of a crime carries with it social stigma and potential negative administrative consequences that a finding of contempt does not trigger. For example, job applications routinely ask if applicants if they have ever been convicted of a crime, and criminal convictions may imperil one's right to drive, hunt, fish, etc. The same cannot be said for findings of contempt. However, the most significant commonality shared by a criminal conviction and a finding of contempt for the accused is the threat of punishment—whether it be by incarceration or fine. Thus, distinctions between criminal convictions and findings of contempt notwithstanding, it seems only logical that successive findings of contempt should be protected by the Double Jeopardy clause the same way that successive criminal prosecutions are.

Assuming that the Double Jeopardy clause may apply to successive findings of contempt, Respondent believes that Relator's argument is misplaced in the case at bar because here Relator is under a continuing duty to the trial court—to continue making monthly payments toward his outstanding court costs or at a minimum to contact the court and explain his inability to do so that month. Thus, every instance of failing to make a payment toward his court costs, contact the court, and/or show up in court as ordered is a separate and distinct contumacious act committed by Respondent and subjecting him to a finding of contempt.

Respondent believes that such failures to make payments are analogous to child support payments. Persons failing to make child support payments are subject to multiple prosecutions if they continuously fail to pay child support as ordered. They are similarly subject to multiple findings of contempt. Failing to pay court costs pursuant to a payment plan as ordered by the court is no different, and should not be banned as a violation of Double Jeopardy protections.

Relator summarily dismisses Respondent's analogy to child support payments on the basis that double jeopardy protections would not apply to civil contempt proceedings. Respondent posits that it is incorrect to assume that double jeopardy would not bar a court from repeatedly holding someone in contempt of court for failure to comply with its order on the basis that the contempt proceeding was civil rather than criminal. There are other examples of constitutional protections normally reserved for criminal cases extending to civil contempt proceedings.

For example, the Western District has stated that an alleged contemnor's right to counsel under the Sixth Amendment exists where he faces the possibility of imprisonment regardless of whether the proceeding against him is criminal or civil. *State ex rel. Family Support Div.-Child Support Enforcement v. Lane*, 313 S.W.3d 182, 186 (Mo. App W.D. 2010). If double jeopardy bars successive findings of contempt for the same conduct, then it should not matter whether the contempt proceeding is civil or criminal in nature. *See, id.*

Relator further dismisses Respondent's child support analogy by pointing out that it is not a double jeopardy violation to twice prosecute someone for failing to pay child support during two separate and distinct periods of time. *See, State v. French*, 79 S.W.3d 896 (Mo. banc 2002). Relator's argument is misplaced. Failure to make payments pursuant to a court-ordered payment plan at two separate and distinct points in time is analogous to the conduct at issue in *French*. *Id.* at 598-599. As such, it should not be deemed a violation of the Double Jeopardy clause to hold someone in contempt of court for twice failing to make payments as ordered pursuant to a court's payment plan order at separate and distinct times.

Finally, Respondent believes that the course requested by Relator would have the effect of abolishing payment plans for fines and court costs. If courts were powerless to require people to continue to make monthly payments on their court costs as ordered, then few judges would allow payment plans. If judges did not allow payment plans, more defendants would surely be sentenced to

incarceration further exacerbating the over-incarceration problem that exists in this country. Respondent believes that it is in the public interest for payment plans to exist, and that the only way for them to exist is for the courts to be able to enforce their payment plans.

Respondent believes that Relator's reliance on Goldfarb is misplaced. The only thing "between [Relator] and a one-hundred-year sentence" is not Respondent's stamina, it is Relator's timely compliance with the Court's order that he continue to make payments pursuant to his payment plan. Were Relator's outstanding balance to be paid in full, Respondent would have no further authority to compel Relator to appear in court and show why he should not be held in contempt.

CONCLUSION

For the above-stated reasons, Respondent contends that it is not a violation of the prohibition against double jeopardy to twice—or more—hold someone in contempt of court for failing to pay court costs pursuant to a payment plan that that person has entered into with the court. Specifically, it is Respondent's position that every payment in a payment plan missed is a potentially different contumacious act subject to a finding of contempt and punishment therefor.

Respectfully submitted,



Wyatt Z. Roberts #58729

Kenneth C. Hensley #28172

HENSLEY LAW OFFICE

401 West Foxwood Drive

P.O. Box 620

Raymore, MO 64083

Telephone: (816) 322-4466

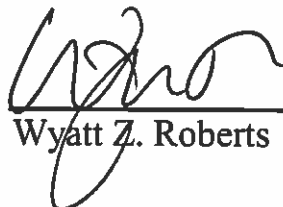
Facsimile: (816) 348-8096

hensleylawoffice@gmail.com

ATTORNEYS FOR RESPONDENT

CERTIFICATION OF COMPLIANCE

I hereby certify that, pursuant to Rule 84.06(c), this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 2,409 words, as calculated by the word count function of Microsoft Word.

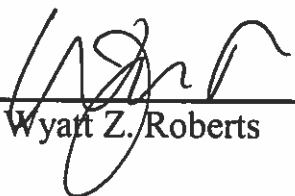


Wyatt Z. Roberts

#58729

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2019, this document was filed using the Missouri electronic filing system, the above and foregoing was served through the electronic filing system, on Matthew Mueller, 920 Main Street, Suite 500, Kansas City, MO 64105, ATTORNEY FOR RELATOR.



Wyatt Z. Roberts #58729