

ORIGINAL

IN THE OHIO SUPREME COURT

11-1985

Michael Liming, :
 :
Plaintiff-Appellant, :
 :
vs. : On appeal from the Athens
 : County Court of Appeals
Denday Damos, : Fourth Appellate District
 : Case No. 10 CA 39
Defendant-Appellee. :

NOTICE OF CERTIFIED CONFLICT

OFFICE OF THE OHIO PUBLIC DEFENDER

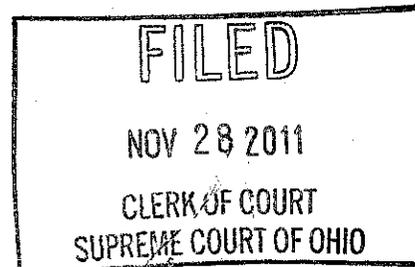
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Michael Liming*



IN THE OHIO SUPREME COURT

Michael Liming, :
 : Case No. 2011-1170
Plaintiff-Appellant, :
 :
vs. : On appeal from the Athens
 : County Court of Appeals
Denday Damos, : Fourth Appellate District
 : Case No. 10 CA 39
Defendant-Appellee. :

NOTICE OF CERTIFIED CONFLICT

In accordance with S.Ct. Prac.R. 4.1, Plaintiff-Appellant Michael Liming files notice that the Fourth Appellate District has certified a conflict in its decision in *Liming v. Damos*, 4th Dist. No. 10CA39, 2011-Ohio-2726, with *Samantha N. v. Lee A.R.*, 6th Dist. Nos. E-00-036, E-00-037, 2001 Ohio App. LEXIS 540. The Entry on Motion to Certify Conflict and the conflicting court of appeals' opinions are attached.

Mr. Liming filed a timely motion to certify a conflict in the Fourth Appellate District on June 6, 2011, in case number 10CA39. That motion was not ruled upon within the sixty days identified in App.R. 25(C). Consequently, on October 13, 2011, Mr. Liming filed a notice asking this Court to accept jurisdiction of Mr. Liming's discretionary appeal. On November 22, 2011, the Fourth Appellate District certified the following question to this Court:

Is a purge hearing to impose a suspended sentence for failing to pay child support a civil or criminal proceeding?

While the Fourth Appellate District's entry certifying a conflict is untimely, the certified conflict question should be considered by this Court in deciding whether to accept jurisdiction in Mr. Liming's discretionary appeal.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

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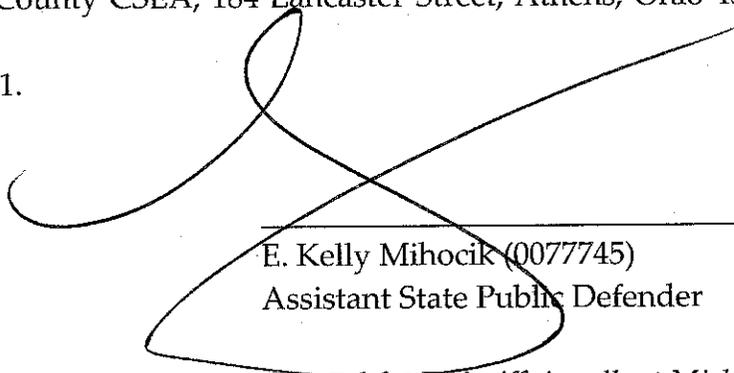
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Counsel for Plaintiff-Appellant Michael Liming

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served, by regular U.S. Mail, upon Keith Wiens, Athens County CSEA, 184 Lancaster Street, Athens, Ohio 45701 this 28th day of November, 2011.



E. Kelly Mihocik (0077745)
Assistant State Public Defender

Counsel for Plaintiff-Appellant Michael Liming

NOV 22 2011

Quinton, CLERK
COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

MICHAEL LIMING,	:	Case No. 10CA39
	:	
Plaintiffs-Appellant,	:	
	:	<u>ENTRY ON MOTION TO</u>
v.	:	<u>CERTIFY CONFLICT</u>
	:	
DENDAY DAMOS (fka LIMING),	:	
	:	
Defendant-Appellee.	:	

APPEARANCES:

Timothy Young, Ohio State Public Defender, and E. Kelly Mihocik, Assistant Ohio State Public Defender, Columbus, Ohio, for appellant.

Keith M. Wiens, Athens County Child Support Enforcement Agency, Athens, Ohio, for Athens County Child Support Enforcement Agency.

Harsha, P.J.

{¶1} This matter is before the Court on a motion to certify a conflict filed by Appellant Michael Liming. Appellee has not filed a motion in opposition. Liming contends that our May 27, 2011 decision in this case is in conflict with the Sixth District's decision in *Samantha N. v. Lee A.R.* (Feb. 16, 2001), Erie App. Nos. E-00-036 & E-00-037, 2001 WL 127343.

{¶2} Section 3(B)(4), Article IV of the Ohio Constitution provides: "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." "[A]t least three conditions must be met before and during the certification of a case to [the Supreme Court of Ohio] pursuant to Section

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3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be 'upon the same question.' Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 1993-Ohio-223, 613 N.E.2d 1032.

{¶13} Liming asks this Court to certify a conflict on the following questions:

Must a trial court appoint counsel to represent a contemnor at a purge hearing, if, at the conclusion of that hearing, the trial court imposes a period of imprisonment based upon a previously suspended sentence arising from the contemnor's alleged failure to pay his or her child support obligations?

Is a purge hearing to impose a suspended sentence for failing to pay child support a criminal contempt proceeding that entitles the contemnor to the full panoply of criminal due process rights?

{¶14} *Liming v. Damos*, Athens App. No. 10CA39, 2011-Ohio-2726, involved the imposition of a civil contempt order for failure to pay child support followed by a purge hearing. We held that the purge hearing constituted a civil proceeding, not a criminal proceeding. And we found that an indigent contemnor had no right to appointed counsel at such a purge hearing under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. See *id.* at ¶¶17-14. We also declined to create a categorical rule based on procedural due process, requiring the State to provide indigent civil contemnors, who were represented by counsel at their contempt hearing, with appointed counsel at purge hearings. *Id.* at ¶13.

{¶15} *Samantha N.* also involved a civil contempt order for failure to pay child

support followed by a purge hearing. The *Samantha N.* Court addressed whether a due process based right to counsel existed at such a purge hearing. However, the *Samantha N.* Court did not address the specific issue of whether an *indigent contemnor* had a right to *appointed* counsel at such a proceeding. The appellant in that case complained that “he did *hire* an attorney to represent him in the hearing and that when the court could not reach his counsel by telephone to learn why his counsel was not present for the hearing, the trial court forced him to proceed without representation.” *Samantha N.* at *2 (Emphasis added). Therefore, we disagree with Appellant’s contention that our judgment in *Liming* is in conflict with the decision in *Samantha N.* to the extent Appellant argues that the *Samantha N.* Court “held that before a jail sentence could be imposed at a purge hearing, an indigent contemnor must be appointed counsel.” (Motion to Certify Conflict at 2). Accordingly, we deny Appellant’s motion to certify a conflict on the first proposed question.

{16} However, the *Samantha N.* Court did address the issue of whether a purge hearing following a civil contempt proceeding was civil or criminal in nature. The *Samantha N.* Court found that such a hearing was criminal in nature and concluded that the appellant was entitled to “those rights and constitutional privileges afforded a defendant in a criminal action.” *Samantha N.* at *3, quoting *Winkler v. Winkler* (1991), 81 Ohio App.3d 199, 202, 610 N.E.2d 1022. We agree that our judgment in *Liming* conflicts with *Samantha N.* on the question of whether a purge hearing following a civil contempt proceeding for failure to pay child support is civil or criminal in nature. However, *Liming* did not address an indigent contemnor’s entitlement to the full panoply of criminal rights – it only addressed a right to appointed counsel. Therefore, we certify

the following modified version of Liming's second proposed question to the Supreme Court of Ohio for resolution:

Is a purge hearing to impose a suspended sentence for failing to pay child support a civil or criminal proceeding?

{17} We grant Liming's motion in part, deny it in part, and certify the foregoing question to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. **MOTION GRANTED IN PART AND DENIED IN PART.**

Abele, J. & McFarland, J.: Concur.

FOR THE COURT



William H. Harsha, Presiding Judge



**MICHAEL LIMING, Plaintiff-Appellant, v. DENDAY DAMOS (fka
LIMING), Defendant-Appellee.**

Case No. 10CA39

**COURT OF APPEALS OF OHIO, FOURTH APPELLATE DIS-
TRICT, ATHENS COUNTY**

2011 Ohio 2726; 2011 Ohio App. LEXIS 2322

May 27, 2011, Released

SUBSEQUENT HISTORY: Later proceeding at *Liming v. Damos*, 129 Ohio St. 3d 1498, 2011 Ohio 5244, 954 N.E.2d 1210, 2011 Ohio LEXIS 2526 (Ohio, Oct. 13, 2011)

PRIOR HISTORY: *Liming v. Damos*, 2009 Ohio 6490, 2009 Ohio App. LEXIS 5448 (Ohio Ct. App., Athens County, Dec. 8, 2009)

DISPOSITION: [**1] JUDGMENT AFFIRMED.

COUNSEL: Timothy Young, Ohio State Public Defender, and E. Kelly Mihocik, Assistant Ohio State Public Defender, Columbus, Ohio, for appellant.

Keith M. Wiens, Athens County Child Support Enforcement Agency, Athens, Ohio, for Athens County Child Support Enforcement Agency.

JUDGES: William H. Harsha, Presiding Judge. Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

OPINION BY: William H. Harsha

OPINION

DECISION AND JUDGMENT ENTRY

Harsha, P.J.

[*P1] As a condition of his divorce, a court ordered Michael Liming to pay child support for his two minor children. After Liming missed payments, the Athens County Child Support Enforcement Agency (CSEA) asked the court to find him in contempt. At a hearing where Liming had counsel, the trial court found him in contempt and sentenced him to 30 days in jail. However, the court suspended the sentence and gave Liming an opportunity to purge the contempt if he met cer-

tain conditions. Later, CSEA alleged that Liming failed to comply with those conditions and asked the court to impose the previously suspended sentence. At the "purge hearing," the court denied Liming's request for court-appointed counsel, found that Liming failed to purge the contempt order, and ordered [**2] Liming to serve ten days of his 30 day suspended sentence. Liming now appeals the trial court's denial of his request for counsel.

[*P2] Liming contends that he had a right to counsel at the purge hearing under the *Sixth Amendment to the United States Constitution* and Section 10, Article I of the Ohio Constitution. However, the purge hearing constituted a civil proceeding, not a criminal proceeding, rendering these constitutional provisions inapplicable. Therefore, we reject this argument.

[*P3] Liming also contends that indigent civil contemnors who were represented by counsel at the time they were found in contempt have a procedural due process right to counsel at purge hearings under the *Fourteenth Amendment to the United States Constitution* and Section 16, Article I of the Ohio Constitution. However, a civil contemnor has a diminished liberty interest at a purge hearing because the trial court previously found him in contempt and imposed an appropriate sanction, which it simply deferred by conditioning his freedom on compliance with the court's order. Moreover, requiring the government to provide counsel at all purge hearings would impose fiscal and administrative burdens on the state while [**3] there is little risk of erroneous decisions when the only remaining issue is the limited question of whether the contemnor purged the contempt. Balancing these interests, we decline to create a categorical rule requiring the state to provide indigent civil contemnors, who were represented by counsel at their contempt hearing, with appointed counsel at purge hearings.

I. Facts

[*P4] Liming and Denday Damos married in 1993 and had two children. When the couple divorced in 2005, the court named Damos the legal custodian and residential parent of the children and ordered Liming to pay child support. In 2008, CSEA filed motions asking the court to find Liming in contempt for among other things, falling behind in his child support payments. Liming appeared at the contempt hearing represented by counsel. The magistrate recommended that the trial court hold him in contempt, sentence him to 30 days in jail, suspend the sentence, and give Liming an opportunity to purge the contempt by complying with certain conditions for one year, such as paying his monthly child support obligation on time and making payments towards the arrearage each month. Liming did not file objections to the magistrate's decision, [**4] and the trial court adopted the decision.

[*P5] In 2009, CSEA claimed that Liming failed to purge the contempt and asked the court to impose the previously suspended jail sentence. At the "purge hearing" on the motion, the court denied Liming's request for appointed counsel. The court found that Liming did not pay his current child support obligation or arrearage obligation in March, May, August, October, and December 2009. The court also found that he failed to pay his arrearage obligation from January to May 2010. The court ordered Liming to serve ten days of the suspended sentence and continued to suspend the remaining 20 days of the sentence so long as Liming complied with certain conditions. This appeal followed.

II. Assignments of Error

[*P6] Liming assigns two errors for our review:

The trial court violated Mr. Liming's right to counsel when it refused to appoint Mr. Liming an attorney to represent him at a hearing in which a jail sentence was imposed. *Sixth and Fourteenth Amendments to the United States Constitution*; Sections 10 and 16, Article I of the Ohio Constitution (July 28, 2010 Judgment Entry on Motion to Impose; Tr. 4.)

Because the June 2010 hearing to impose sentence was criminal [**5] in nature, Mr. Liming was entitled to counsel. The trial court erred when it refused to appoint Mr. Liming counsel for that hearing. *Sixth and Fourteenth Amendments to the United States Constitution*; Sections 10 and 16, Article I of the Ohio Constitution (July 28, 2010 Judgment Entry on Motion to Impose; Tr. 4.)

III. Constitutional Right to Appointed Counsel

[*P7] In his first and second assignments of error, Liming contends that he had a right under the federal and state constitutions to appointed counsel at the purge hearing. Liming cites the *Sixth Amendment to the United States Constitution* (made applicable to the states through the *Fourteenth Amendment*) and Section 10, Article I of the Ohio Constitution as a basis for this right. The *Sixth Amendment* guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." Section 10, Article I of the Ohio Constitution, which outlines the rights of criminal defendants, provides: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel[.]" Therefore, we must ini-

tially determine whether the purge hearing constituted a [**6] civil or criminal proceeding. We begin our analysis with an examination of the underlying finding of contempt.

[*P8] "Contempt is a disregard of, or disobedience to, the orders or commands of judicial authority." *McClead v. McClead*, *Washington App. No. 06CA67*, 2007 Ohio 4624, at ¶32 (per curiam), citing *Cassidy v. Cassidy*, *Pike App. No. 03CA721*, 2005 Ohio 3199, at ¶20. "Contempt proceedings are often classified as *sui generis*, neither civil nor criminal. However, most courts distinguish between civil and criminal contempt proceedings." *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001 Ohio 15, 740 N.E.2d 265 (internal citation omitted). The distinction largely depends upon the purpose of the sanction imposed. *Id.*

[*P9] Criminal contempt sanctions "are punitive in nature and are designed to vindicate the authority of the court." *Eastern Local School Dist. Bd. of Educ. v. Eastern Local Classroom Teachers' Assn.*, *Pike App. No. 03CA717*, 2004 Ohio 1499, at ¶8, citing *State ex rel. Johnson v. County Court of Perry Cty.* (1986), 25 Ohio St.3d 53, 25 Ohio B. 77, 495 N.E.2d 16. They "are usually characterized by an unconditional prison term or fine." *Id.*, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 254, 416 N.E.2d 610. [**7] "Civil contempt sanctions are remedial or coercive in nature and are for the benefit of the complainant." *Id.*, citing *Brown at 253*. "Prison sentences are conditional. The contemnor is said to carry the keys of his prison in his own pocket * * * since he will be freed if he agrees to do as ordered." *Brown at 253*.

[*P10] After making the contempt finding, the trial court sentenced Liming to 30 days in jail but suspended the sentence on the condition that he, among other things, timely pay his current child support obligation and make installment payments toward his arrearage. The court's sanction was coercive and benefited Liming, so we characterize the order as a civil contempt order.

[*P11] Nonetheless, Liming claims the purge hearing related to that order constituted a criminal proceeding. He cites *In re Earley v. Campbell* (Mar. 30, 2000), *Stark App. No. 99-CA-256*, 2000 Ohio App. LEXIS 1276, 2000 WL 329969 and *Samantha N. v. Lee A.R.* (Feb. 16, 2001), *Erie App. Nos. E-00-036 & E-00-037*, 2001 Ohio App. LEXIS 540, 2001 WL 127343, to support his argument. We find *Earley* inapplicable as it did not involve a purge hearing but instead involved a contempt finding followed by a deferred sentencing hearing. See *Earley* 2000 Ohio App. LEXIS 1276, [WL] at *2.

[*P12] In *Samantha N.*, the trial court [**8] found the appellant in contempt for failing to keep his child support obligations current, but the court suspended his jail sentences on the condition that he follow a particular payment schedule. *Samantha N.*, 2001 Ohio App. LEXIS 540, [WL] at *1. The child support enforcement agency alleged that the appellant failed to follow the court's order. *Id.* The appellant did not have counsel at the contempt hearing or purge hearing. *Id.* The appellant complained that he hired an attorney to represent him at the purge hearing, but when the court "could not reach his counsel by telephone to learn why his counsel was not present for the hearing, the trial court forced him to proceed without representation." 2001 Ohio App. LEXIS 540, [WL] at *2.

[*P13] The Sixth District concluded the trial court "was exercising its criminal contempt powers [at the purge hearing] because it was clearly no longer attempting to coerce appellant to pay his child support arrearages. Instead the trial court was punishing appellant for not complying with its previous orders." 2001 Ohio App. LEXIS 540, [WL] at *3 (footnote omitted). The *Samantha N.* Court noted that "[o]nce the contempt power is classified as criminal, the contemnor is entitled to those rights and constitutional privileges afforded a defendant [**9] in a criminal action. * * * The most important of these are the contemnor's right to due process and to have the complainant prove

the contempt beyond a reasonable doubt." *Id.*, quoting *Winkler v. Winkler (1991)*, 81 Ohio App.3d 199, 202, 610 N.E.2d 1022. And the court concluded that the trial court denied the appellant his due process rights. *Id.*

[*P14] The *Samantha N.* Court did not address the issue of whether indigent parties have a constitutional right to appointed counsel at purge hearings. Moreover, we disagree with the Sixth District's characterization of a purge hearing as an exercise of criminal contempt powers. The fact that Liming failed to meet the purge conditions to avoid enforcement of his sentence did not convert the purge hearing into a criminal contempt proceeding at which he faced a new risk of imprisonment. See *Segovia v. Likens*, 179 Ohio App.3d 256, 2008 Ohio 5896, 901 N.E.2d 310, at ¶39. The only issue before the court at the purge hearing was whether Liming met the purge conditions imposed following the civil contempt hearing, i.e., whether he paid his current child support obligations and his arrearage. See *id.* Finding that Liming had not purged the contempt, the trial court did not impose a new sentence. See *id.* "Rather, the court enforced the sentence it had already imposed." *Id.* Thus, we conclude that the purge hearing retained the civil character of the original contempt proceeding. And because the purge hearing did not constitute a criminal prosecution, the *Sixth Amendment to the United States Constitution* and Section 10, Article I of the Ohio Constitution did not apply to it.

[*P15] The characterization of the purge hearing as civil in nature does not foreclose the possibility that Liming had a procedural due process right to counsel predicated on the *Fourteenth Amendment to the United States Constitution* or Section 16, Article I of the Ohio Constitution. "When read in conjunction with Sections 1, 2, and 19 [of the *Ohio Constitution*], Section 16 is the equivalent to the *Fourteenth Amendment's due process clause*. As a consequence, decisions of the United States Supreme Court can be utilized to give meaning to the guarantees of Article I of the

Ohio Constitution." *State ex rel. Heller v. Miller (1980)*, 61 Ohio St.2d 6, 8, 399 N.E.2d 66 (internal citation omitted).

[*P16] The United States Supreme Court has explained:

For all its consequence, "due process" has [**11] never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy [(1961)]*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the *Due Process Clause* is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services (1981), 452 U.S. 18, 24-25, 101 S. Ct. 2153, 68 L. Ed. 2d 640.

[*P17] Liming claims that he had a due process right to counsel at the purge hearing because he faced the loss of his physical liberty at the hearing. He cites *Lassiter* for the proposition that "[r]egardless of whether the matter is civil or criminal, due process demands that whenever a party faces the deprivation of his or her liberty interest, the party is entitled to counsel." (Appellant's [**12] Br. 5). Contrary to Liming's assertion, *Lassiter* did not create a per se right to appointed counsel whenever loss of liberty is possible. *Lassiter* did not even establish a presumption in favor

of appointed counsel when incarceration is possible. In rejecting a mother's claimed right to counsel before her parental rights could be terminated, the Court simply found a "presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty[.]" *Lassiter at 31*. *Lassiter* did not involve a potential loss of physical liberty, so the Court had no occasion to hold -- and did not hold -- that when loss of liberty is at stake, there is a per se right to or presumption in favor of appointing counsel.

[*P18] Liming also cites *Argersinger v. Hamlin (1972), 407 U.S. 25, 38, 92 S.Ct. 2006, 32 L.Ed.2d 530* for the proposition that "'where imprisonment actually occurs[,] the indigent-defendant must have been appointed counsel.'" (Appellant's Reply Br. 2). However, the *Argersinger* Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented [**13] by counsel at his trial." *Argersinger at 37*. *Argersinger* involved the Sixth Amendment right to counsel in criminal proceedings, not a due process based right to counsel in a civil proceeding, thus we find it inapplicable here.

[*P19] Thus, we decline to create a per se right to counsel at purge hearings based solely on the possibility of imprisonment after such a hearing. We recognize that this conclusion appears at odds with our decision in *Matter of Estate of Straub (Feb. 13, 1992), Ross App. No. 1728, 1992 Ohio App. LEXIS 863, 1992 WL 37781, at *8*, where we broadly stated that "counsel must be appointed for those unable to afford counsel in any proceedings where incarceration is a possibility, including both civil and criminal contempt proceedings." However, *Straub* did not involve a purge hearing, so we did not have occasion to address the right to counsel in that context.

[*P20] Liming cites a number of Ohio cases for the proposition that a civil contemnor is entitled to counsel at a purge hearing. However, none of these cases address the specific issue of

whether a civil contemnor has a constitutional right to appointed counsel at a purge hearing: *Schock v. Sheppard* (1982), 7 Ohio App.3d 45, 7 Ohio B. 48, 453 N.E.2d 1292; *Green v. Green*, Portage App. No. 2007-P-0092, 2008 Ohio 3064 [**14]; *Everly v. Shuster* (Apr. 27, 1999), Noble App. No. 237, 1999 WL 260895, 1999 Ohio App. LEXIS 1973; *Duffield v. Duffield* (Sept. 12, 2001), Wayne App. No. 01CA0002, 2001 Ohio App. LEXIS 4012, 2001 WL 1044077.

[*P21] Therefore, to determine whether an indigent civil contemnor who had counsel at his contempt hearing has a per se right to appointed counsel at a purge hearing, we turn to the United States Supreme Court's decision in *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18. The *Mathews* Court identified three factors for courts to evaluate in determining what procedural due process requires: 1.) the private interests at stake; 2.) the government's interest; and 3.) the risk that the procedures used will lead to erroneous decisions. *Mathews* at 335. See *Lassiter*, *supra*, at 27 (in part balancing these factors to decide whether mother had due process right to counsel before parental rights could be terminated).

[*P22] As to the private interests at stake, civil contemnors such as Liming certainly face the loss of physical liberty at a purge hearing. However, as the Tenth District has recognized, this liberty interest is a "diminished one." *Segovia*, *supra*, at ¶43. In *Segovia* the trial [**15] court found Ricardo, the plaintiff in an action to establish parental rights and responsibilities concerning two minor children, in contempt for failing to comply with a court order regarding phone access to the children. *Id.* at ¶¶2 3, 7-8. The court sentenced Ricardo to 15 days in jail but suspended the sentence on the condition that Ricardo purge the contempt by giving the children's mother additional phone time with them during his next parenting weekend. *Id.* at ¶7. Subsequently, the mother filed a motion to enforce, claiming Ricardo did not comply with the purge condition. *Id.* at ¶11. At the purge hearing, Ricardo sought a continuance to obtain counsel, but the court denied his request. *Id.*

at ¶12. The court enforced five days of the suspended sentence and continued to suspend the remaining ten days. *Id.* at ¶17. Ricardo appealed, arguing in part that the court should have determined whether he was indigent and eligible for court appointed counsel. *Id.* at ¶18.

[*P23] In evaluating the private interests at stake, the *Segovia* Court considered the fact that "a litigant's right to counsel diminishes as his personal liberty interest diminishes." *Id.* at ¶42, citing *Lassiter* at 26. The Court [**16] cited parole revocation as an example, noting that "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.*, quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484. While the Tenth District recognized that "Ricardo faced the risk of losing his freedom following the purge hearing," the Court also recognized that the "trial court had already conditioned Ricardo's freedom on his continued compliance with the court's order." *Id.* at ¶43. "Thus, like a parolee subject to having his parole revoked, Ricardo's liberty interest was a diminished one." *Id.* Likewise, we conclude that since the trial court already conditioned Liming's freedom on compliance with the purge conditions, he had a diminished liberty interest at the purge hearing.

[*P24] Regarding the risk that the procedures used will lead to erroneous decisions, the Tenth District considered the fact that Ricardo had a "full opportunity, with counsel, to defend against the contempt charge in the first instance" and "did not object to or otherwise appeal from that [**17] court's finding of contempt." *Id.* at ¶44. Therefore, the *Segovia* Court found that it could afford the finding of contempt "sufficient reliability to support a sentence." *Id.*, citing *Alabama v. Shelton* (2002), 535 U.S. 654, 665, 667, 122 S.Ct. 1764, 152 L.Ed.2d 888. And the Court concluded that "the only question at issue in the purge hearing-whether Ricardo purged the contempt-was a limited one and presented a low risk of an erroneous decision by the trial court." *Id.*

[*P25] Like the contemnor in *Segovia*, Liming had counsel to defend the contempt charge in the first instance and did not appeal from the contempt finding. And we agree with the *Segovia* Court that the only question at issue during a purge hearing, i.e. whether the contemnor purged the contempt, is a limited one and presents a low risk of an erroneous decision by the trial court. Moreover, in examining the government's interest, we recognize that requiring the state to provide indigent civil contemnors with appointed counsel at purge hearings would place additional fiscal and administrative burdens on the government. See *Mathews, supra, at 335*.

[*P26] Balancing the civil contemnor's diminished liberty interest at a purge hearing against [**18] the low risk of an erroneous decision at the hearing and the government's interest, we decline to create a categorical rule that civil contemnors represented by counsel at contempt hearings have a due process based right to appointed counsel at purge hearings. We overrule Liming's first and second assignments of error and affirm the trial court's judgment. This decision does not foreclose the possibility that fundamental fairness -- "the touchstone of due process" -- might require the appointment of counsel at a purge hearing under certain circumstances. See *Gagnon v. Scarpelli (1973), 411 U.S. 778, 787-790, 93 S.Ct. 1756, 36 L.Ed.2d 656* (declining to adopt categorical rule that government must provide counsel for indigents in all probation or parole revocation cases and instead adopting a case-by-case approach). However, Liming does not advocate a case-by-case approach to this issue, let alone argue that he was entitled to counsel at the purge hearing based on circumstances unique to his case. So we need not address those issues here.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable [**19] grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. Exceptions.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

William H. Harsha, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.



Samantha N. and Sylvia P., Appellees v. Lee A. R., Appellant

Court of Appeals Nos. E-00-036, E-00-037

**COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT,
ERIE COUNTY**

2001 Ohio App. LEXIS 540

February 16, 2001, Decided

PRIOR HISTORY: [*1] Trial Court No. 95-PA-87 97-SU-0176.

DISPOSITION: JUDGMENTS REVERSED.

COUNSEL: Dennis P. Levin, for appellant.

JUDGES: George M. Glasser, J., Richard W. Knepper, J., Mark L. Pietrykowski, P.J., CONCUR.
Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

OPINION BY: George M. Glasser

OPINION

DECISION AND JUDGMENT ENTRY

GLASSER, J. This is a consolidated appeal from two different judgments of the Erie County Court of Common Pleas, Juvenile Division, filed on May 10, 2000, in which the court ruled that appellant, Lee A. R., failed to purge two previous findings of contempt, and ordered him to consecutively serve two thirty day sentences in jail. Appellant has presented three assignments of error for consideration on appeal that are:

"FIRST ASSIGNMENT OF ERROR

The appellant was denied his right to procedural due process when the trial court failed to obtain a valid waiver of appellant's waiver of counsel at hearing.

"SECOND ASSIGNMENT OF ERROR

The trial judge abused his discretion in failing to continue the hearing until appellant's retained counsel could be located and be present for hearing.

"THIRD ASSIGNMENT OF ERROR

The failure of [*2] the court to even consider appellant's statements with regard to his inability to comply with the purge conditions which inability rises to the level of a complete defense, constitutes an abuse of discretion."

Appellant has fathered two children by two different mothers, and for each child, the Erie County Court of Common Pleas, Juvenile Division, entered separate orders in separate cases for appellant to pay child support. On March 19, 1999, the trial court filed form judgment entries in each case containing its rulings that appellant was in contempt of court for failing to keep his child support obligations current. The court ordered appellant to serve thirty days in jail for each contempt conviction, but stayed the imposition of the sentences on condition that appellant purge his contempt by making payments of \$ 275.08 a month in one case, and of \$ 64.04 per week in the other case. Appellant was also ordered to open a bank account for the purpose of making his child support payments, and was directed to provide the account number and routing number to the Erie County Child Support Enforcement Agency ("CSEA").

CSEA subsequently filed motions for the imposition of the contempt sentence [*3] in both cases, alleging that appellant failed to comply with the court orders to purge his contempt. On May 10, 2000, the trial court held a joint hearing on the motions for both cases. The transcript of the hearing begins with an opening statement from the court which includes the following statement: "The record will reflect that [appellant] is present without benefit of counsel, his having previously waived his [*sic*] rights to counsel under the contempt proceedings in both matters." Likewise, the form judgment entries filed by the trial court after the hearing in which the court ordered appellant to serve two thirty day sentences in jail consecutively, have check marks entered prior to the statement: "and waived his right to counsel."

The transcript shows that the trial court then held the hearing, in which an attorney for CSEA informed the trial court that its records showed that appellant had failed to make any payments at all on some occasions, and that he was still in arrears on his child support obligations for both cases. The attorney for CSEA said that because appellant is unemployed, the agency believed he was choosing when to make payments and when not to make [*4] payments, and that he was not being entirely forthright about his monetary circumstances.

Appellant attempted to contest the statements made by the CSEA attorney, and explained to the court that he had made at least partial payments to his bank account each month, but because he is self-employed as a car mechanic and is still working on building his business, he was unable to pay the full amount each and every month. He referred to documents he had to verify his statements, but they were never offered or admitted as exhibits.

Appellant explained that he brought his business records with him, and that the statements would show what his profits were and how hard it was for him to meet the obligations for child support. He said he was not hiding any of his income. Once again, the records were not offered or admitted as exhibits.

Appellant also tried to explain that he and the mother of one of his children were attempting to reach a new agreement on shared parenting that would lessen his monetary obligation for child support in regard to that son because he has the son in his care and custody for a much greater time than is reflected in the original orders in the case. The trial court [*5] interrupted him, however, saying that matter was not before the court.

The trial court then ruled that appellant had failed to purge his contempt, and ordered the imposition of both thirty day sentences, to be served consecutively. In response to protestations from appellant that he had sincerely tried to meet his obligations, the trial court said that when

self-employed persons could not meet their obligations, it was time for them to get a "regular job through a regular employer." When appellant pleaded that he would lose his business if forced to serve sixty days in jail, the trial court replied that appellant knew that before he arrived for the hearing, and he should have purged his contempt.

The record shows that after the trial court filed its judgments ordering appellant to serve a total of sixty days in jail, appellant filed a motion for reconsideration. On May 25, 2000, the trial court denied appellant's motions for reconsideration. The trial court also denied subsequent requests from appellant for a stay of his sentences. Appellant then filed his notices of appeal, and this court consolidated them. This court also granted appellant's request for a stay of his sentences [*6] so that his appeal would not be rendered moot.

1 Appellant presented several documents to support his motion for reconsideration to show that he had hired an attorney for the hearing, why the attorney did not arrive, and that he had some evidence to support the assertions he made at the hearing that he had made some payment for which CSEA did not credit him. This court cannot rely upon that information, however, because a motion for reconsideration in a trial court is a nullity. See *Pitts v. Ohio Dept. Of Transportation (1981)*, 67 Ohio St. 2d 378, 380, 423 N.E.2d 1105.

In support of his first assignment of error, appellant argues that he was denied due process at the hearing on CSEA's motion to impose the sentences for contempt because he did not knowingly, voluntarily or intelligently waive his right to counsel in this case. He stated that he did hire an attorney to represent him in the hearing and that when the court could not reach his counsel by telephone to learn why his counsel was not [*7] present for the hearing, the trial court forced him to proceed without representation.

We note that appellee, CSEA, did not file a brief in this case. Therefore, applying *App.R. 18(C)* we find that the record presented supports this court accepting as correct appellant's statement that he did not knowingly, voluntarily or willingly waive his right to representation at the hearing. The record does not include a written waiver of counsel from appellant and does not contain any discussion in the hearing transcript between the trial judge and appellant to show that appellant was knowingly, voluntarily and intelligently waiving his right to counsel. See *State v. Grimes (1984)*, 17 Ohio App. 3d 71, 72-73, 477 N.E.2d 1219; *Moran v. Colaner*, 1999 Ohio App. LEXIS 3351 (July 19, 1999), Tuscarawas App. No. 1998 AP 090105, unreported; and *State v. Donahoe*, 1991 Ohio App. LEXIS 1153 (March 21, 1991), Greene App. No. 90CA55, unreported.

We next consider the nature of the contempt powers that were exercised by the trial court in this case. As the Ninth District Court of Appeals discussed in an analogous case:

"It has been stated that 'sentences for criminal contempt are punitive in nature and are designed to vindicate [*8] the authority of the court.' *** Criminal contempt 'is usually characterized by an unconditional prison sentence.' *** By contrast, 'civil contempt is to coerce the contemnor in order to obtain compliance with the lawful orders of the court.' *** In civil contempt the 'contemnor is said to carry the keys of his prison in his own pocket *** since he will be freed if he agrees to do as ordered.' *Winkler v. Winkler (1991)*, 81 Ohio App. 3d 199, 201, 610 N.E.2d 1022. (Citations omitted.)

After reviewing the transcript from these consolidated cases, we conclude that the trial court was exercising its criminal contempt powers because it was clearly no longer attempting to coerce appellant to pay his child support arrearages. ² Instead the trial court was punishing appellant for not complying with its previous orders. See *Winkler v. Winkler (1991)*, 81 Ohio App. 3d 199, 201, 610 N.E.2d 1022. As the Ninth District Court of Appeals explained:

2 The record shows that after the trial court said it was going to impose the sentences, appellant repeatedly asked the trial court what he could do to avoid being jailed, and the trial court told appellant it was "too late" that he had been given time to purge his contempt and that the trial court had "no choice" but to jail appellant. These statements show that the trial court was more interested in punishment, than in coercing payment from the contemnor.

[*9] "Once the contempt power is classified as criminal, the contemnor is entitled to those rights and constitutional privileges afforded a defendant in a criminal action. *** The most important of these are the contemnor's right to due process and to have the complainant prove the contempt beyond a reasonable doubt." *Id. at 202.*

In this case, appellant was not afforded his full due process rights. CSEA was permitted to prove its case against appellant by having its attorney make representations to the court. The record shows that appellant would have benefited from having counsel to challenge the statements and assumptions voiced by the CSEA attorney regarding appellant's failure to pay and CSEA's belief that appellant was not being forthright about his ability to pay. Appellant's counsel could have introduced evidence to show that appellant did engage in a good faith effort to purge his contempt and was not underemployed or hiding his income. This information was relevant, because the issue under consideration was whether appellant had attempted in good faith to comply with the court orders for purging his contempt for child support owed. See, *id. at 203.* [*10] The information should have been considered by the trial court before it decided beyond a reasonable doubt that appellant had not made a good faith effort to comply with its orders and was in willful violation of its contempt orders. Appellant's first assignment of error is well-taken.

In support of his second assignment of error, appellant says that if this court is not persuaded by his arguments in his first assignment of error that he was constitutionally entitled to counsel or that he did not make a knowing, intelligent and voluntary waiver of counsel, he asserts an alternative argument that the trial court abused its discretion when it went forward with the hearing knowing that appellant had hired an attorney, who failed to appear for unknown reasons. As our discussion of the first assignment of error shows, this court has already found that appellant was entitled to counsel at the hearing. We have further ruled that the record does not show that appellant made a knowing, intelligent and voluntary waiver of his right to counsel. Accordingly, appellant's alternative argument is rendered moot and the second assignment of error is not well-taken.

In support of his third assignment [*11] of error, appellant argues that the trial court abused its discretion when it failed to consider the information he tried to present to show that he had made a good faith effort to purge the court's contempt orders, and that he had an inability to pay the full amounts owed. In our discussion of the first assignment of error, this court noted that the trial court should have considered the information appellant was attempting to present to show that he had made at least partial payments, that he was unable to pay the full amounts owed but was making a good faith effort to comply, and that he was not hiding income and was not underemployed. Accordingly, appellant's third assignment of error is well-taken.

The judgments of the Erie County Court of Common Pleas, Juvenile Division, are reversed. This case is remanded for further proceedings consistent with this decision. Appellee CSEA is ordered to pay the court costs of this appeal.

JUDGMENTS REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*, amended 1/1/98.

George M. Glasser, J.

Richard W. Knepper, J.

Mark L. Pietrykowski, P.J.

[*12] CONCUR.

Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.