University of Miami Law Review

Volume 23 | Number 4 Article 10

7-1-1969

Criminal Contempt: A Means to Circumvent the Criminal Statutes of Limitations

Joseph Teichman

CASES NOTED

CRIMINAL CONTEMPT: A MEANS TO CIRCUMVENT THE CRIMINAL STATUTES OF LIMITATIONS

The appellant filed suit for divorce, setting forth a false address for his wife in his complaint and affidavit for constructive service. Appearing in the Dade County Circuit Court, he testified that he was sending his wife from $250 to $350 per month and that she knew about the divorce suit. Three years later, the appellee-wife filed a petition requesting the court to issue a contempt order for appellant's failure to make child support payments of $7,000, and the court issued an order to show cause for failure to comply with the divorce decree. At the hearing before the court, when appellant was absent but represented by counsel, appellee testified that she had never received child support payments, that her husband had sent her to Peru, and that she did not know she had been divorced until so notified by her lawyer. When the hearing was recommenced, appellant appeared without counsel and admitted that his previous testimony had been false, whereupon the court vacated the divorce decree and sentenced him to 60 days for criminal contempt. Appellant contended that he was guilty only of indirect rather than direct criminal contempt, and that he could not be punished for contempt because the statute of limitations for the crime of perjury had run before any party had moved to vacate the final decree. On appeal to the Third District Court of Appeal, *held*, affirmed: The contempt was direct because it was committed in the presence of the court and therefore governed by the procedural requirements of Rule 1.830, Florida Rules of Criminal Procedure.[1] The court held, *inter alia*, that the statute of limitations for perjury was no bar to the contempt punishment. *Chavez-Rey v. Chavez-Rey*, 213 So.2d 596 (Fla. 3d Dist. 1968).

The issue here presented, one of first impression in Florida, is whether a crime barred from prosecution by the statute of limitations is punishable when relabeled "direct contempt." The decision of the Third District means that the substantive right to the protection of the statute of limitations can be circumvented by use of the contempt pro-

1. FLA. R. CRIM. P. 1.830:
A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt shall include a recital of those facts upon which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against him and inquire as to whether he has any cause to show why he should not be adjudged guilty of contempt by the court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

cedure. Therefore, what cannot be done directly can be done indirectly, through the issuance of a criminal contempt citation.

In support of its decision the court relied on only one case, *Tracy Loan & Trust Co. v. Openshaw Investment Co.*[2] There the defendant had offered false testimony in a previous suit for divorce, disclaiming ownership of property which he now claimed. His opponents, none of whom included his former wife, sought an estoppel based on the divorce suit to prevent defendant from asserting his ownership. The Supreme Court of Utah denied the estoppel, rationalizing that the truth in a later action is preferable to an estoppel when there has been no reliance on previous false testimony. The Utah court declared that the defendant was not beyond the reach of a citation for contempt, even though the statute of limitations had run against any perjury that might have been committed in the divorce action.

It is not clear whether the court in *Tracy* intended punishment for criminal contempt. No criminal contempt action was ever instigated against the defendant, even in a subsequent suit initiated by his former wife for back alimony.[3] The most that can be said is that reference to the statute of limitations in *Tracy* was dictum, which was not translated into law when the opportunity arose in the subsequent suit for back alimony.

Florida courts may cite persons for contempt when they perjure themselves.[4] For perjury to be punished as direct contempt, however, there are three requirements: 1) there must be an obstructive effect, 2) the court must have judicial knowledge of falsity, and 3) the question must be pertinent to the issue.[5]

Although criminal contempt has been classified as a proceeding inherent in the court,[6] rather than a crime or a criminal case, there has been no difficulty for all the federal courts and a majority of the state courts which have directly decided the issue to determine that time limitations do indeed govern the courts' power to sentence for direct contempt.[7] Furthermore, criminal contempt has recently been defined by the Supreme Court of the United States[8] as a crime in the ordinary sense, punishable by fine, imprisonment, or both.

2. 102 Utah 509, 132 P.2d 388 (1942).
3. Openshaw v. Openshaw, 105 Utah 574, 144 P.2d 528 (1943).
4. Parham v. Kohler, 134 So.2d 274 (Fla. 3d Dist. 1961).
5. State *ex rel.* Laramie v. Boggs, 151 So.2d 456 (Fla. 2d Dist. 1963). In a prior case, Vega v. Vega, 110 So.2d 29 (3d Dist. 1959), the Circuit Court of Dade County refused to hear a motion to vacate a decree which was obtained through the husband's perjured testimony in a previous ex parte proceeding in which he falsely testified that he did not know his wife's whereabouts. The complaining divorced wife was cited for contempt when the court learned by inquiry that she had lived with her husband two months prior to rendition of the divorce. The Third District reversed, stating that the court should have ruled only on the husband's fraud, and that there was no basis to inquire into the wife's motives in bringing the perjured testimony to the court's attention. *Vega* is almost on point with *Chavez-Rey*, yet no criminal contempt citation as to the husband was discussed.
6. Ballengee v. State, 144 So.2d 68 (Fla. 2d Dist. 1962).
7. *Annot.*, 100 A.L.R.2d 439 (1965).
8. Bloom v. Illinois, 391 U.S. 194 (1968).

The trend in the Supreme Court's decisions establishing the time restriction on the power to sentence for past offenses began in 1805. In *Adams v. Woods* the court said:

> In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.[9]

The statement referred to a debt incurred by an act to which the court applied the criminal statute of limitations, finding that the civil act was penal in nature. Justice Holmes, in *Gompers v. United States*,[10] used the words of *Adams v. Woods* in holding that a theory upon which actions might be brought at any increment of time would be utterly repugnant to our laws.

The leading Supreme Court case on the subject is *Pendergast v. United States*.[11] There the petitioners had fraudulently testified before a federal court. On appeal to the Eighth Circuit,[12] that court affirmed, relying on a Nebraska Supreme Court decision.[13] The United States Supreme Court reversed the Eighth Circuit's ruling and found that, although the perjury was criminal contempt under the federal statute which provided for power in the federal courts to punish contempts committed in their presence,[14] the federal criminal statute of limitations[15] barred the criminal contempt action. Florida has a similar statute,[16] except that all actions except those involving capital crimes are subject to a two year limitation.

The *Pendergast* case appears to be the first definite application of the criminal statutes to criminal contempt cases. Previously, the rule had been settled that a time limitation would apply to contempts committed out of the presence of the courts.[17] However, prior to *Pendergast*, the

9. 6 U.S. (2 Cranch) 336, 342 (1805).

10. 233 U.S. 604, 613 (1914).

11. 317 U.S. 412 (1943).

12. Pendergast v. United States, 128 F.2d 676 (8th Cir. 1943).

13. In State *ex rel.* Wright v. Barlow, 132 Neb. 166, 271 N.W. 282 (1937), the court upheld a criminal contempt sentence which had been maintained after the running of the statute of limitations applicable to misdemeanors, stating that it had searched in vain and could find no statute that limited the time in which an action charging criminal contempt could be maintained. Unless the defendant could show his rights had been prejudiced, the action was not barred by lapse of time. The court emphasized that a prosecution for criminal contempt is governed by the strict rules applicable to criminal prosecutions, and the proceedings are of a criminal nature. This reasoning is difficult to justify, since the court could simply have applied the general criminal limitations statute.

14. JUDICIAL CODE § 268, 28 U.S.C. § 385 (1940).

15. 18 U.S.C. § 1044 (1940), as amended, 18 U.S.C. § 3282 (1964) provides that: No person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

16. FLA. STAT. § 932.05 (1967) provides that:
All offenses not punishable with death, save as hereinafter provided, shall be prosecuted within two years after the same shall have been committed . . . .

17. Gompers v. United States, 233 U.S. 604 (1914), *approved by* United States v. Goldman, 277 U.S. 229 (1928).

federal courts had adhered to the reasonable time doctrine which made laches rather than limitations a defense to criminal contempt.

Currently it appears that the majority of those states which have decided the issue hold that a time limitation controls.[18] The Missouri Supreme Court in *Osborne v. Owsley*[19] declared that criminal contempt proceedings are not criminal cases within the meaning of the constitution, statutes, or case law of Missouri. The case before the court was a felony, however, and since the statute in the case did not apply to a felony, the statement in *Owsley* is dictum. In *Brewer v. State*,[20] the Mississippi court applied the rule that in constructive contempts, the misdemeanor statutes of limitations of two years would be adopted by analogy.

Pate v. Toler,[21] an Arkansas case, held that the statute of limitations will bar a direct contempt citation. In *Beattie v. People*[22] the Illinois court was barred by the statute of limitations from punishing an attorney for contempt when he had given false testimony in a divorce action. Kentucky[23] and Washington[24] have held similarly. The New Jersey court in *In re Jibb*[25] unanimously overturned a direct contempt sentence, declaring that where there is concurrent jurisdiction for the same cause of action, if the legal remedy has been barred by the lapse of time then the equitable remedy will also be barred.

Although not directly faced with the issue, Alabama impliedly considered whether the statute of limitations will bar an action for perjury committed in the presence of the court in a divorce action. In *Hartigan v. Hartigan*,[26] the court set aside a divorce decree procured by perjured testimony. Though the court was highly indignant, it noted that the perjurers had immunized themselves from retaliation by waiting for the running of the statute before asking the court to modify its decree.

May contempt be issued even after term? The court in *Joyce v. Hicky*[27] said that a criminal contempt citation may be issued after an original proceeding has been finally adjudicated. Furthermore, the termination of the original proceeding will not preclude issuing a citation based upon acts performed during a legitimate inquiry with respect to that proceeding. But the question of how long after term a criminal contempt citation may be issued is left unanswered. Bringing this problem into sharper focus is the scholarly discussion in *American Insurance Co.*

---

18. *Annot.*, 100 A.L.R.2d 439 (1965); *see also* Note, *Federal Procedure—Applicability of Statute of Limitations to Contempt Actions*, 31 GEO. L.J. 340 (1943).

19. 364 Mo. 544, 264 S.W.2d 332, *cert. denied*, 348 U.S. 822 (1954).

20. 176 Miss. 803, 170 So. 540 (1936).

21. 190 Ark. 465, 79 S.W.2d 444 (1935).

22. 33 Ill. App. 651 (1889).

23. Gordon v. Commonwealth, 141 Ky. 461, 133 S.W. 206 (1911).

24. State v. Phipps, 174 Wash. 443, 24 P.2d 1073 (1933).

25. 123 N.J. Eq. 251, 197 A. 12 (1938), *discussed in* Note, *Contempt—Application of Statute of Limitations to Criminal Contempt in Equity*, 3 UNIV. NEWARK L.R. 102 (1938).

26. 272 Ala. 67, 128 So.2d 725 (1961).

27. 337 Mass. 118, 147 N.E.2d 187 (1958).

v. Lucas,[28] where the court said that in vacating a decree procured by bribery, the same court may adopt an appropriate procedure by reopening the case. If such a power were not present, the court would be powerless to protect itself against outrageous conduct. By reopening the case two established rules of public policy are brought into conflict: the desirability of finality of decrees after term based on the public policy that there must be an end to litigation, and the protection of judicial action based on the public policy that courts of justice must not be used as instruments to effectuate fraud or injustice. The court said that one rule must give way to the other. It stated that before Congress had passed criminal laws to aid this public policy of protecting the courts, the remedies of contempt and "unclean hands" had been devised by early Anglo-Saxon law. The court further stated:

> [S]o long as there remains anything which a court can do in a particular litigation to protect its integrity we think it has the power to act, provided only, that such action is based upon a full opportunity for hearing by all interested parties.

American Insurance left unanswered whether a statute of limitations could prevent the court from exerting its authority to protect its integrity. When read in the light of the *Pendergast* rule, *American Insurance* appears to be restricted to the applicable federal criminal statute of limitations in its power to vindicate its authority by the use of contempt proceedings. Thus one finds in the statute of limitations the point where the public policy of protecting the courts' integrity gives way to that of seeking an end to litigation.

A sampling of cases reveals that judicial decrees may be set aside for after-discovered fraud perpetrated on the court.[29] Furthermore, since *Pendergast*, all the federal courts and the majority of state courts which have decided the point restrict the sui generis action of criminal contempt with a statute of limitations.[30] Although the precise issue of whether the statute of limitations applies has not often come before appellate courts, a vast number of these courts have upheld the setting aside of prior decrees for extrinsic fraud. The cautious use of the remedy of contempt is revealed by the relatively few punishments accompanying these decisions to vacate.

In *Bloom v. Illinois*[31] the petitioner, who was given a two year sentence for criminal contempt for offering a forged will into the probate court, claimed he was entitled to trial by jury. The Supreme Court of the United States sustained Bloom's argument, defining criminal con-

28. 38 F. Supp. 926, 932 (D.C. Mo. 1941).

29. Halloran v. Blue and White Liberty Cab Co., 253 Minn. 436, 92 N.W.2d 794 (1958); Goetz v. Gunsch, 80 N.W.2d 548 (N.D. 1956); Davidson v. Ream, 175 App. Div. 760, 162 N.Y.S. 375 (1916).

30. *Annot.*, 100 A.L.R.2d 439 (1965).

31. 391 U.S. 194 (1968).

tempt as a crime in the ordinary sense—a public wrong punishable by fine or imprisonment. The court said that serious contempt was entitled to the constitutional guaranty of a jury trial, whereas a non-serious contempt would not necessarily be entitled to a jury trial. Whether or not the criminal contempt was serious would be determined by the severity of the punishment inflicted by the offended court. Although Bloom's offense appears to have been indirect criminal contempt, the court specifically discussed disorders committed in the courtroom (direct criminal contempts). It stated, however, that since they were petty offenses there would be no problem with the right to jury trial. Thus, the Supreme Court defines a direct criminal contempt as a crime in the ordinary sense, entitled to trial by jury if it is not a petty offense.

In the instant case the Third District Court correctly decided that the defendant was not entitled to trial by jury within the guidelines set out by *Bloom*. The court, bound by the mandate of *Bloom*, said that there would be no jury trial because the offense was not sufficiently serious but ignored the definition which was prerequisite to determining that a jury trial was not warranted, the definition that direct criminal contempt is a crime in the ordinary sense. Had the court applied this rule of law, it is not unreasonable to assume that it would have applied the criminal statute of limitations.[32] Since *Pendergast* and *Bloom* are applicable to the states, it is submitted that the statute of limitations[33] must be applied to both indirect and direct criminal contempt if there is to be equal protection under the Florida laws.

JOSEPH TEICHMAN

DOG OWNER'S LIABILITY IN NON-BITE SITUATIONS: DUTY v. CAUSE—BARKING UP THE WRONG TREE

Defendant's male German shepherd was loose in the defendant's backyard for the purpose of stud service to another defendant's female shepherd. The backyard was enclosed by a four-foot-high chain link fence which was parallel with and adjacent to the sidewalk upon which the plaintiff's twelve-year-old son and two friends were walking. The dogs charged the fence and barked, frightening the children as they passed and causing them to run into the street where plaintiff's son was fatally injured by an oncoming automobile. The circuit court granted the dog owner's motion for summary judgment. On appeal to the Court of Appeal for the Third District, *held*, reversed: A jury should be permitted to determine whether, under the specific facts of this case, the

32. FLA. STAT. § 932.05 (1967).
33. *Id.*