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Contempt: Refining the Borders of Court Presence

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COMMENTS

CONTEMPT: REFINING THE BORDERS OF COURT PRESENCE*

In re Heathcock, 696 F.2d 1362 (11th Cir. 1983)

Appellants violated a federal district court's temporary restraining orders by picketing their place of employment.[1] The issuing judge went to the picket site, determined appellants had knowledge of the orders, and ordered their arrest.[2] Based on his observations at the picket site,[3] the judge summarily sentenced appellants for criminal contempt.[4] On appeal, the convicted pickets argued summary punishment was improper because the violations occurred in the presence of the judge, not in the presence of the court.[5] The Eleventh Circuit Court of Appeals reversed the convictions and HELD, the judge must be in a properly convened hearing and performing a traditional judicial function to meet the presence of the court requirement of Rule 42(a).[6]

Editor's note: This case comment received the George W. Milam award for the most outstanding comment written in the 1983 Fall semester.

1. 696 F.2d 1362, 1363 (11th Cir. 1983). Upon employer's motion, the court had granted a temporary restraining order because the dispute was subject to a collective bargaining agreement that included grievance procedures and a no-strike clause. Appellants disregarded this order and decided to strike. The court then issued a civil contempt show cause order. When notified of appellants' continued disobedience, the court issued a supplemental restraining order and ordered the United States Marshal to serve appellants with a criminal contempt show cause order. Continued disobedience prompted the judge's trip to the picket site. *Id.* at 1363-64.

2. *Id.* at 1364. After identifying himself, the judge personally questioned each appellant as to his knowledge of the orders. *Id.*

3. No witnesses were called at the summary contempt proceedings to validate the judge's finding of criminal contempt. *Id.*

4. Criminal contempts are acts committed in disrepect of the court or which obstruct the administration of justice. By contrast, civil contempts consist of the failure to do something which the court has ordered done for the benefit of another party. A civil contempt is not an offense against the court's dignity, but against the party for whom the court issued its order. BLACK'S LAW DICTIONARY 289 (5th ed. 1979).

5. *Id.* at 1364. Appellants were sentenced under FED. R. CRIM. P. 42(a) which provides: "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." In addition to contending the contempt was outside the court's presence, appellants argued that the summary sentence was an abuse of discretion, and that the judge was an adversary rather than an arbiter. The state countered that presence of the judge is equivalent to presence of the court because the capacity in which the judge is serving determines whether the court is present. 696 F.2d at 1364.

6. *Id.* at 1366. The judicial proceedings need not occur in the formal setting of a courtroom to satisfy the "actual presence of the court" requirement of Rule 42(a). The court stated

The power to punish contempt has traditionally been considered essential to the existence and protection of all courts.[7] At common law, only contempt committed in open court was punishable immediately; contempt occurring elsewhere required further proof or inquiry in adversarial proceedings.[8] Congress bestowed general contempt powers on federal courts when they were established.[9] However, the enabling clause did not contain the common law limitations on the use of summary proceedings.[10] Only after serious abuse of the power to punish contempt summarily[11] did Congress enact the current restrictions on summary proceedings.[12]

The Supreme Court upheld the constitutionality of summary punishment for contempt in the leading case of *Ex parte Terry*.[13] Terry had been summarily convicted of criminal contempt for attacking a marshal in open court.[14] In a petition for a writ of habeas corpus, he

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that "for rule 42(a) purposes, a judicial proceeding may be held anywhere as long as the proceeding is properly convened, the judge is performing a judicial function, and the usual decorum is observed." *Id.*

7. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873). *See also* 4 W. BLACKSTONE, COMMENTARIES 286, 287 (1750) (contempt power "results from first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.").

8. 4 W. BLACKSTONE, COMMENTARIES 286-87.

9. *See* Judiciary Act of 1789, ch. 20, § 17(a), 1 Stat. 83 (1845), which provided district courts with the "power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

10. *Id.*

11. James H. Peck, a federal district judge, imprisoned and disbarred an attorney who published an unfavorable opinion of one of Peck's decisions while it was on appeal. Impeachment proceedings were unsuccessful. *See generally* A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833). Peck's acquittal immediately prompted Congress to redefine the contempt power, Nye v. United States, 313 U.S. 33, 45-48 (1941). *See also* Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in Inferior Federal Courts - A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1024-29 (1924); Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 430 (1928).

12. *See* Judiciary Act of 1789, ch. 20, § 17(a), 1 Stat. 83 (1845), *amended by* Act of 1831, ch. 99 § 1, 4 Stat. 487 (1831), which provided in relevant part:

> [T]he power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice.

The current version appears at 18 U.S.C. § 401 (1982) and provides in relevant part: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as — (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." *See generally* Bloom v. Illinois, 391 U.S. 194, 203-08 (1968) (reviews general history of contempt power while emphasizing continual restriction of summary power).

13. 128 U.S. 289 (1888).

14. *Id.* at 298-300. Terry assaulted a marshal who was following court orders to remove Terry's wife from the courtroom for misbehavior. Terry left the courtroom after the assault, but

argued the contempt sentence was invalid because he was not given notice and an opportunity to be heard.[15] Conceding that the power to punish contempt summarily is arbitrary in nature and liable to abuse,[16] the Court nevertheless held the summary procedure did not violate Terry's due process rights[17] and accordingly denied the writ.[18] The need to maintain order in judicial proceedings[19] and prevent interference with the administration of court business[20] justified this exception to traditional due process requirements.[21]

In *Cooke v. United States*,[22] the Court expressly limited the use of summary proceedings to contempt committed in open court.[23] Cooke had been summarily punished for delivering a contemptuous letter to a judge in his chambers during a recess of an unrelated case.[24] The Supreme Court held that in proceedings for contempt not committed in open court, the accused must be given notice of the charges and an opportunity to present a defense.[25] Summary punishment is justified only when the contempt occurs in open court and immediate action is necessary to preserve the court's authority and dignity.[26] The Court noted that summary power must be exercised

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was brought back to be sentenced.

15. *Id.* at 297. Terry argued the order of contempt violated his constitutional right to due process because it was made in his absence and the proceedings were instituted without notifying him or presenting him with an opportunity to defend. *Id.* at 291-97.

16. *Id.* at 313. *See* United States v. Wilson, 421 U.S. 309, 319 (1975) ("[t]he authority under Rule 42(a) to punish summarily can be abused"); Sacher v. United States, 343 U.S. 1, 12 (1952) ("[t]hat contempt power over counsel, summary or otherwise, is capable of abuse is certain"), *reh'g denied*, 343 U.S. 931 (1952). *See also* United States v. Marshall, 451 F.2d 372, 374 (9th Cir. 1971) ("[t]he ever present danger that these summary powers may be abused has brought us to view their exercise with caution and circumspection"); Bloom v. Illinois, 391 U.S. 194, 207 (1968) (history of summary power "makes clear the need for effective safeguards against that power's abuse").

17. 128 U.S. at 307-08, *citing* 4 W. BLACKSTONE, COMMENTARIES 286.

18. *Id.* at 314.

19. *Id.* at 307. *See* Bloom v. Illinois, 391 U.S. 194, 209-10 (1968) (Rule 42(a) rests on the "need to maintain order" and a "deliberate atmosphere").

20. 128 U.S. at 307.

21. *See* Sacher v. United States, 343 U.S. 1, 36 (1952) (Frankfurter, J., dissenting) ("Summary punishment of contempt is concededly an exception to the requirements of due process. Necessity dictates the departure."); Fisher v. Pace, 336 U.S. 155, 167 (1948) (Murphy, J., dissenting) ("[t]he contempt power is an extraordinary remedy, an exception to our tradition of fair and complete hearings"), *reh'g denied*, 336 U.S. 928.

22. 267 U.S. 517 (1925).

23. *Id.* at 537.

24. *Id.* at 519-21. Cooke, an attorney, received an unfavorable verdict for his client in a prior trial before the judge. Additional related proceedings were pending before the same judge. In the letter, Cooke accused the judge of favoritism, derogated the judge's character, and requested the judge to recuse himself from the pending proceedings. *Id.* at 519-21.

25. *Id.* at 537.

26. 267 U.S. at 534-36. *See also* Harris v. United States, 382 U.S. 162, 164-67 (1967) (summary punishment may be justified when "speedy punishment" is necessary to restore

cautiously to avoid imposing arbitrary or oppressive punishment.[27] Because the contempt in *Cooke* did not occur in open court,[28] the Court reversed the summary conviction.[29]

In *In re Oliver*,[30] the Court explained that for a contempt to occur in open court, all elements of the offense must be personally observed by the judge.[31] Knowledge acquired from the testimony of others would not justify a conviction without a trial and the opportunity to present a defense.[32] In *Oliver*, the state trial judge was conducting secret, one-man grand jury proceedings in accordance with Michigan law.[33] A witness believed to have committed perjury during the proceedings was summarily punished for contempt.[34] Because the judge's conclusion that the witness testified falsely was partially based on prior testimony of other witnesses,[35] the Supreme Court held the contempt did not occur in open court. The summary conviction was, therefore, an unconstitutional denial of due process.[36] Moreover, because the alleged perjury was committed in secret proceedings, the summary contempt conviction was not essential to prevent demoralization of the court's authority before the public.[37]

The instant case presented the opportunity to clarify when a judge assumes the role of court and thus satisfies the presence requirements of Rule 42(a).[38] Because summary punishment always im-

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court's order and dignity, but should not be used where hearing and notice would be effective).

27. 267 U.S. at 539. *See* Fisher v. Pace, 336 U.S. 155, 163 (1949) (Douglas, J., dissenting) (summary power's "exercise must be narrowly confined lest it become an instrument of tyranny"), *reh'g denied*, 336 U.S. 928 (1949).

28. 267 U.S. at 534.

29. *Id.* at 540.

30. 333 U.S. 257 (1948).

31. *Id.* at 275.

32. *Id.*

33. *Id.* at 258. For a discussion of the policies underlying the Michigan law, see *id.* at 261-62.

34. *Id.* at 258-59.

35. *Id.* at 259.

36. *Id.* at 276-77. The United States Supreme Court accordingly reversed the state court's denial of habeas corpus. *Id.* at 278. The Michigan Supreme Court dismissed the writ in *In re* Oliver, 318 Mich. 7, 27 N.W.2d 323 (1947) (writ dismissed by an equally divided court) and explained the grounds for dismissal in the companion case of *In re* Hartley, 317 Mich. 441, 27 N.W.2d 48 (1947). *See generally* Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 51 N.Y.U. L. REV. 34, 42-43 (1976) (the Supreme Court's standards for application of summary power by federal courts have gradually developed into constitutional doctrines that are thus equally applicable to state courts).

37. *Id.* at 275.

38. 696 F.2d 1362. None of the cases previously discussed were decided under FED. R. CRIM. P. 42(a). The cases are nonetheless significant because they delineate the constitutional limitations of summary contempt power and because 42(a) is merely a "re-statement of existing law," Offutt v. United States, 348 U.S. 11, 14-15 (1954); 18 U.S.C. App. Rule 42(a) (1982) (Notes of Advisory Committee on Rules). *See* Brown v. United States, 359 U.S. 41, 51 (1959) (Rule 42(a) "simply makes more explicit the long settled usages of law"), *rev'd on other*

plicates the due process rights of an alleged offender,[39] the circuit court decided constitutional considerations favored a narrow construction of Rule 42(a).[40] Such a construction accorded with the traditionally narrow interpretation of summary authority.[41]

The instant court recognized the presence of the judge performing a judicial function is a relevant but not dispositive factor in meeting the presence of the court requirement of Rule 42(a).[42] While conceding the judge functioned in his factfinding capacity when he visited the picket site, the court was concerned about the informal manner in which the judicial role was performed.[43] No hearing for the collection of evidence was convened, and no notice was given to the relevant parties. The court held that, in addition to the presence of a judge performing a judicial function, Rule 42(a) required a degree of formality normally associated with the courtroom setting.[44] At a minimum, the judge must be in a properly convened hearing with the usual notice and opportunity to participate provided to the appropriate parties.[45]

The instant case refines earlier Supreme Court decisions concerning the presence requirements of summary contempt power. In both *Cooke* and *Oliver*, the Supreme Court held that contempt committed before a judge was not committed in open court. In neither case did the contempt take place when the judge was performing a duty traditionally associated with the judiciary.[46] By contrast, in the instant case the contempt occurred while the judge was carrying out the traditional judicial task of factfinding.[47] Nevertheless, the court similarly held that the contempt was not committed in open court. By requiring courtroom formalities in addition to the presence of a judge

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grounds, Harris v. United States, 382 U.S. 162 (1965).

39. For a discussion of the various due process considerations implicated by summary contempt power, see generally Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283, 327-40 (1962).

40. 696 F.2d at 1365.

41. *Id.* The instant court noted that ever since Congress acted to restrain unbridled use of summary power, see *supra* note 12 and accompanying text, courts have limited that power to instances where immediate vindication of the court's authority was necessary. 696 F.2d at 1365.

42. 696 F.2d at 1366.

43. *Id.*

44. *Id.*

45. *Id.*

46. In *Cooke*, the contempt occurred in the judge's chambers during a recess, see *supra* note 24 and accompanying text. The judge in *Oliver* was not performing a traditional judicial function in presiding over secret, one-man grand jury proceedings, although he was performing a judicial function according to Michigan law. *See* Brief for Respondent, *reprinted in* 92 L. Ed. 685 (1948).

47. The judge went to the picket site to "observe violations of his orders," 696 F.2d at 1364. The instant court "admitted that the judge acted in a factfinding role much like that performed by any judge in a criminal contempt situation." *Id.* at 1366.

performing a judicial function, the instant court implicitly recognized that the absence of both these requisites was decisive in *Cooke* and *Oliver*.[48]

In addition to conforming with precedent, the instant decision comports with the original legislative desire to quell the judiciary's abusive use of summary power.[49] A contrary ruling would have violated this intent by allowing judges to become mobile courts summarily sentencing the disobedient. The instant court prevented this possibility by limiting the place and circumstances in which summary authority exists and by insuring a more traditional adversary context for summary punishment.

The instant decision demonstrates sensitivity to policies underlying summary contempt power.[50] *Terry* permitted summary punishment for disruptions in judicial proceedings that threatened the proper administration of the court's business.[51] Likewise, *Cooke* required an immediate need to preserve authority and dignity in the courtroom.[52] The judge's actions in the instant case can be justified by none of these policies. Because no proceedings were held, the need to maintain order in judicial proceedings did not arise.[53] The continued picketing did not hamper the court in administering its business. Insuring compliance with judicial orders is the role of the executive branch, not the judiciary. Furthermore, the alleged misconduct occurred outside the courtroom setting and therefore did not directly threaten the court's dignity and authority.[54] Finally, the facts reveal no urgent need to immediately punish the contempt without providing the offenders with notice and an opportunity to present a defense.[55]

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48. *See also* Bloom v. Illinois, 391 U.S. 194, 209-10 (1968) ("Although Rule 42(a) is based in part on the premise that it is not necessary specially to present the facts of a contempt which occurred in the very presence of the judge, it also rests on the need to maintain order and a deliberative atmosphere in the courtroom.").

49. *See supra* notes 11 & 12 and accompanying text. The general contempt statute has been virtually unchanged since its inception, which strongly suggests an extant legislative intent to curtail the same abuses that prompted the original statute's enactment.

50. For a general discussion of the contempt power and its underlying policies, see R. GOLDFARB, THE CONTEMPT POWER (1963).

51. *See supra* note 20 and accompanying text.

52. *See supra* note 26 and accompanying text.

53. No formal action was taken, such as initiating a hearing, to indicate that proceedings were in progress. 696 F.2d at 1364.

54. *Id. See also In re* Olivier, 333 U.S. 257, 278 (the right to be heard in open court is too important to be "whittled away under the guise of 'demoralization of authority' ").

55. 696 F.2d at 1367 (Fay, J., concurring). *See In re* Gustafson, 619 F.2d 1354, 1358 (9th Cir. 1980) ("Where time is not of essence provisions of 42(b) may be more appropriate to deal with contemptuous conduct since summary contempt is appropriate only where there is compelling need for immediate action."). *See also* Harris v. United States, 382 U.S. 162 (1965).

The instant decision's narrow construction of Rule 42(a) reflects the Supreme Court's concern that summary punishment can be arbitrary and oppressive.[56] Because summary proceedings always implicate the due process rights of the accused, a different holding would have expanded judicial power at the expense of individual liberties.[57] A broad interpretation of the contempt power would permit a judge to summarily punish disobedience of judicial orders merely by visiting the situs of disobedience. Summary contempt proceedings could thus conceivably replace the full due process procedures currently required for contempts occurring out of the courtroom,[58] and allow a judge to become investigator, arresting officer, prosecutor, judge and jury.[59] Disobedience of judicial orders, in itself, is not sufficiently distinctive to warrant imposing harsher punishment procedures than those imposed for disobedience of legislative decrees. As both *Terry* and the instant decision recognize, summary contempt power is a due process exception justifiable only by the need for order in the courtroom.

Judicial power to punish instantly is an extraordinary remedy[60] and should be used only in exceptional circumstances.[61] By confining

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56. *See supra* note 16. *See also* Sacher v. United States, 343 U.S. 1, 8 ("Summary punishment always, and rightly, is regarded with disfavor. . . ."), *reh'g denied*, 343 U.S. 931 (1952); Sedler, *supra* note 36 (discusses the Supreme Court's pattern of constraining judicial discretion to summarily punish for contempt).

57. *See supra* note 39. *See also* Bloom v. Illinois, 391 U.S. 194, 208 (need for court respect does not outweigh individual's interest in procedural protections when serious criminal punishment for contempt is contemplated).

58. All contempts, other than those committed in the actual presence of the court, are subject to FED. R. CRIM. P. 42(b). It provides:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

59. *See* Sedler, *supra* note 36, at 34. *See also* 8b J. MOORE, MOORE'S FEDERAL PRACTICE 42.05 (2d ed. 1983) (briefly discusses trial judges' tendency to use contempt power to facilitate prosecution).

60. "The contempt power is an extraordinary remedy, an exception to our tradition of fair and complete hearings. . . ." Fisher v. Pace, 336 U.S. 155 (1948) (Murphy, J., dissenting).

61. Normal hearing is required "except [in] those unusual situations envisioned by Rule 42(a) where instant action is necessary to protect the judicial institution itself," Harris v. United States, 382 U.S. 162, 167 (1965). *See also In re* Chaplain, 621 F.2d 1271, 1276 (4th Cir. 1980) (judge must first try to restore order by less drastic coercive alternatives), *cert. denied*

Rule 42(a)'s application to a courtroom environment, the instant court confined summary contempt authority to its original purpose of preserving the court's authority and dignity. The court well understood that summary power is a tool created to protect the judicial institution and that necessity, not expedience, should be the standard for gauging the validity of its application.

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sub nom., Chaplain v. United States, 449 U.S. 834 (1980).