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Contempt of Court -- Recent Developments

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Contempt of Court—Recent Developments

Historically, criminal contempt has been considered to be sui generis in that it is not a crime but is punishable by criminal sanctions.[1] However, in recent years a minority of the United States Supreme Court has comprehensively challenged the constitutionality of summary proceedings in criminal contempt. In *Green v. United States*[2] and *United States v. Barnett*[3] the dissenters, led by Justices Black and Douglas, argued that criminal contempts are crimes within the meaning of the Constitution and require a jury trial. In three recent cases the Supreme Court has shown a willingness to limit the extent of the contempt power but they have not, as yet, based their decisions on the Constitution.

In *Harris v. United States*[4] petitioner was granted immunity from prosecution by the district court and directed to answer the questions of a grand jury. After his refusal before the grand jury, and subsequently before the district court, the district judge, acting under the Federal Rules of Criminal Procedure Rule 42(a),[5] summarily adjudged Harris guilty of criminal contempt and sentenced him to one year in jail.

In a five-to-four decision the Supreme Court reversed and re-

[1] Bessette v. W.B. Conkey Co., 194 U.S. 324, 326 (1904).
[2] 356 U.S. 165 (1958).
[3] 376 U.S. 681 (1964).
[4] 382 U.S. 162 (1965).
[5] FED. R. CRIM. P. 42
(a) Summary Disposition. 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. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
(b) Disposition Upon Notice and Hearing. 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 any 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 the 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.

manded, and in doing so expressly overruled *Brown v. United States*.[6] The Court held that Harris was entitled to notice and hearing as provided for in Rule 42(b)[7] because summary disposition under Rule 42(a) is appropriate only in "unusual circumstances" occurring in the "actual presence of the court."

Although the Court held that the contempt was committed before the grand jury and, therefore, not in the "actual presence" of the Court,[8] the basis of the Court's decision seems to be the limitation of Rule 42(a) to "unusual circumstances." The Court argued that even if "we assume arguendo" that Rule 42(a) may at times reach testimonial episodes,[9] the actions of Harris did not necessitate summary punishment under Rule 42(a). The Court appears to be saying that even if the "actual presence" requirement is satisfied, the conduct of the contemnor must pose "an open threat to the orderly procedure of the court"[10] that necessitates "immediate penal vindication of the dignity of the court."[11] The facts in *Harris* do not indicate a serious threat to the court's orderly procedure and thus it was appropriate to afford him the procedural regularity and the procedural safeguards of Rule 42(b).

In *Cheff v. Schnackenberg*[12] petitioner was held in criminal contempt for having aided and abetted his company in violating a pendente lite order. The Court of Appeals for the Seventh Circuit, after denying the demand for a jury trial, found Cheff guilty of

[6] 359 U.S. 41 (1959). See note 8 *infra*.

[7] See note 5 *supra*.

[8] In Brown v. United States, 359 U.S. 41 (1959), under identical facts, the court had held that Rule 42(a) was the proper procedure because the grand jury is but an appendage of the court, dependent on the court to compel the testimony of witnesses. Pursuant to 18 U.S.C. § 401(1) (1966), federal courts have the power to punish criminal contempt committed in the "presence" of the court. Rule 42(a) requires "actual presence" for summary disposition. The requirement of "presence" under § 401(1) has been broadly construed and held applicable to misbehavior in the grand jury room, Carlson v. United States, 209 F.2d 209, 213 (1st Cir. 1954). Therefore, it seems that under § 401(1) the court in *Harris* had the power to punish the contemnor for his contemptuous act in the grand jury room. But since the court held that the real contempt was before the grand jury, even though the district court had the power to punish the contempt, the contemnor was entitled to the procedural regularity afforded in Rule 42(b).

[9] If Harris had refused to go before the grand jury and answer their questions, this would have been criminal contempt in the actual presence of the court and arguably could have been punished summarily.

[10] Cooke v. United States, 267 U.S. 517, 536 (1924).

[11] *Ibid.*

[12] 384 U.S. 373 (1966).

criminal contempt and imposed a six-month sentence. The Supreme Court granted certiorari limited to the question of whether, after denial of a demand for a jury trial, a six-month sentence is permissible under article III and the sixth amendment of the Constitution.

In a four-Justice ruling[13] the Court held that the sixth amendment did not require a jury trial in a proceeding that resulted only in a six-month sentence, the maximum permitted here for "petty offenses." However, in the interest of effective administration of the federal courts, the Court ruled that under their supervisory power[14] criminal contempt sentences exceeding six months may not be imposed unless there has been a jury trial or waiver thereof.[15]

Petitioner's chief contention was that criminal contempt proceedings are crimes within the meaning of article III, § 2[16] and the sixth amendment[17] regardless of whether they can be classified as petty offenses. In *United States v. Barnett*[18] the Court was superficially in accord with the precedents represented by a one-hundred-and-fifty-year-line of cases in holding that contempt is not a "crime" or "criminal prosecution." However, footnote twelve in *Barnett*, by way of dictum, indicated that summary disposition without a jury would be constitutionally limited to the penalty provided for petty offenses.[19] But, because this statement was contained in a terse, unexplained footnote, it was not certain how the dictum was to be applied. The opinion of the Court in *Cheff* adds little to the Barnett

[13] This four-Justice ruling affirming the contempt conviction, was made effective by the concurring opinion of Mr. Justice Harlan, in which Mr. Justice Stewart joined. Their concurrence was based on Green v. United States, 356 U.S. 165 (1958), where it was held that a jury trial is never constitutionally required in criminal contempt cases. Mr. Justice Douglas, with Mr. Justice Black concurring in the dissent, adhered to their previous argument that jury trials are constitutionally required in all criminal contempt cases.

[14] See McNabb v. United States, 318 U.S. 332 (1943).

[15] Cheff v. Schnackenberg, 384 U.S. 373 (1965).

[16] "The trial of all Crimes except in Cases of Impeachment, shall be by Jury . . . ." U.S. CONST. art. III, § 2.

[17] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

[18] 376 U.S. 681 (1964).

[19] The text of the footnote states: "Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." United States v. Barnett, 376 U.S. 681, 695 n.12 (1964).

dictum other than strengthening the petty offense distinction by referring to 18 U.S.C. § 1 (1964), which declares that an offense, the penalty for which does not exceed six months, is a petty offense.

In the consolidated cases of *Shillitani v. United States*[20] and *Pappadio v. United States*[21] petitioners refused to answer the questions of a grand jury after they had been ordered to answer by the district court. The district court found them guilty of criminal contempt in proceedings under Rule 42(b) and sentenced them to two years imprisonment with the proviso that they would be released sooner if and when they answered the questions of the grand jury. The court of appeals in construing the sentence as conditional, with the right of release upon compliance, rejected the constitutional objections that they were not indicted or given a jury trial. The Supreme Court with only Justice Harlan dissenting, limited the civil contempt sentences to the life of the grand jury. The basis for this decision was the Court's finding that the conditional nature of the sentences made this a civil proceeding for which indictment and jury trial are not constitutionally required.

The limitations imposed on the contempt power by the above cases reflect the influence of Justices Black and Douglas. But these cases also show the Court's intention to avoid constitutional problems. In *Harris* the Court, by reading the requirement of "unusual circumstances" into Rule 42(b), extended the minimal procedural due process protections of Rule 42(b) without basing their decision on the Constitution. In *Cheff*, the Court provided jury trials for criminal contempts in federal courts resulting in sentences of more than six months. This decision appears to be an important step in guaranteeing criminal contemnors the procedural protections of the Constitution. But, unlike the dictum in *Barnett*, the Court bases their decision on the supervisory power of the Court and thus indicates that they are not yet ready to accept Justice Black's and Justice Douglas's classification of contempt as a crime within the meaning of the Constitution. In the civil contempt area, as represented by *Shillitani*, summary commitment of civil contempt has gone unchallenged by the Supreme Court. Even such vigorous activists as Justices Black and Douglas have not questioned the constitutionality of

[20] 384 U.S. 364 (1966).
[21] *Ibid.*

summary proceedings in civil contempt.[22] The basis for this appears to be in the wording of the Constitution restricting application of article III, § 2[23] and the sixth amendment[24] to crimes and criminal prosecution respectively.

Therefore, it appears that the court is adhering to the argument that criminal contempt is sui generis and, since it is not a crime, does not require a jury trial within the meaning of article III, § 2 and the sixth amendment, viewed as of the time of the adoption of the Constitution. Justices Black and Douglas argue that the nature of the contempt power has undergone substantial change since the adoption of the Constitution and the Court should not hesitate to re-evaluate the contempt power in light of the "incredible transformation and growth" it has undergone.[25] This growth is demonstrated by the numerous situations in which the contempt power is now used and by the severity of the punishments that are being imposed.

These cases impose serious restrictions on the use of the contempt power but they do not clear up the confusion that surrounds the contempt area. The tests used by the Court to distinguish between civil and criminal contempt and to determine whether a jury trial is to be granted only compound the existing confusion.

The courts have often addressed themselves to the problem of satisfactorily distinguishing civil from criminal contempts.[26] The distinction is more than academic since all civil contempts are punished summarily. The Court in *Shillitani* looked at the character and purpose of the proceeding to determine whether the contempt was civil or criminal. But the character and purpose of the proceeding as a whole must be correlated with the nature of the penalty.[27] Where a fine or imprisonment imposed on the contemnor is "intended to be remedial by coercing the defendant to do what he

[22] Green v. United States, 356 U.S. 165, 197 (1958) (opinion of Black, J. dissenting). They are inclined, however, to construe contempt as criminal rather than as civil to insure the procedural safeguards of Rule 42(b). See Nye v. United States, 313 U.S. 33 (1941).

[23] See note 16 *supra.*

[24] See note 17 *supra.*

[25] Green v. United States, 356 U.S. 165, 208 (1958) (opinion of Black, J. dissenting).

[26] See generally Goldfarb, *The Varieties of the Contempt Power,* 13 SYRACUSE L. REV. 44, 46-58 (1961).

[27] Penfield v. Securities & Exch. Comm'n, 330 U.S. 585, 596 (1947).

had refused to do,"[28] the remedy is one for civil contempt. Where the sentence is punitive in its nature and imposed for the purpose of vindicating the authority of the court, the remedy is one for criminal contempt.[29] In *Shillitani*, the Court determined that the purpose of the proceeding was remedial by noting the presence of a purge clause. In turn, the purpose of the proceeding was a factor in determining the character of the proceeding. Therefore, although the Court was successful in correlating the character of the penalty with the character of the proceeding, the relief and procedure available to the contemnor became dependent, to some extent, upon the sentence imposed. Since the procedural rights attached to civil and criminal contempt are so different, this retrospective determination of the character of the proceeding may deprive the contemnor of his due process rights.

The *Cheff* decision indicates that the only criteria in determining whether a jury trial is to be granted is the severity of the sentence actually imposed. The dissenters in both *Barnett* and *Cheff* recognized that the length of the sentence should not be the only factor considered as this distinction is not supported by cases in the contempt field, nor in the field of petty offenses. Cases interpreting the petty offense exception to the jury trial requirement based their decision on the nature of the offense and the maximum potential sentence.[30] The Court in *Cheff* has set up an arbitrary distinction which requires the judge to know the evidence to be presented before the proceeding has actually begun.

It is apparent from these cases and the tests they set forth that the courts approach each case in an ad hoc manner and fail to connect their decision "with any body of law or legal principle."[31] An effective way to resolve the confusion in this area would be to treat both civil and criminal contempt alike. It does not appear that coercion is substantially different from punishment. In either case they may be mitigating circumstances that explain the contemnor's actions. It is submitted that the procedural safeguards available to the contemnor should not depend upon the purpose of the proceeding as the severity of the penalty and the stigma attached to those convicted

[28] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911).
[29] *Id.* at 441.
[30] Cheff v. Schnackenberg, 384 U.S. 373, 387 (1966).
[31] Goldfarb, *The Varieties of the Contempt Power*, 13 SYRACUSE L. REV. 44, 56 (1961).

of the offense may be the same whether it be a civil or criminal proceeding.

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Insurance—Statutory Definition of an Uninsured Motor Vehicle When the Liability Insurer is Insolvent or Denies Coverage

North Carolina General Statute section 20-279.21 defines a motor vehicle liability policy, contains certain requirements for provisions of owner's and operator's policies, and includes certain provisions to which such policies will be subject even though not contained in the policy. It provides that unless such coverage is rejected by the insured, no owner's policy shall be issued without coverage for the protection of the persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. The practical effect of this latter provision is that when a motorist driving what is determined under the statute to be an "uninsured motor vehicle" negligently injures another motorist covered by liability insurance with uninsured motorists coverage, the injured motorist can be compensated for his injuries up to the limits stated in the policy by his own liability insurer under that uninsured motorists coverage.

A question immediately arises. What is an "uninsured motor vehicle?" In 1965 the North Carolina General Assembly undertook to provide certain definitions of the term which had not been previously defined in the statute itself.

The North Carolina Supreme Court held in 1965 that a vehicle was uninsured when the liability of the negligent party causing the accident was not covered by the policy issued on the vehicle.[1] This decision was made without the benefit of the statutory definition of an uninsured motor vehicle.

After the amendments, North Carolina General Statute section 20-279.21(b)(3) provided that "under this section the term 'uninsured motor vehicle' shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make

[1] Buck v. United States Fid. & Guar. Co., 265 N.C. 285, 144 S.E.2d 34 (1965). The liability of the negligent party was not covered by the policy because he was driving the vehicle without the permission, knowledge or consent of the named insured.