

Judgment rendered December 14, 2005.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 40,548-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

MIKE LONG

Plaintiff-Respondent

Versus

BEVERLY HUTCHINS

Defendant-Respondent

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 486,935

Honorable Roy L. Brun, Judge

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State of Louisiana and
Charles C. Foti, Jr.

* * * * *

Before BROWN, STEWART and MOORE, JJ.

STEWART, J., concurs with written reasons.
BROWN, C.J., dissents with written reasons.

MOORE, J.

Mike Long was found guilty of constructive contempt of court for violating an injunction in favor of his former paramour and business partner, Beverly Hutchins (now Beverly Drum), and Ms. Drum's daughter. The district court sentenced him to 120 days in jail with 100 days suspended, pursuant to La. R.S. 13:4611 (1)(b). On Long's application, this court granted a stay order and a writ vacating the conviction and sentence. Subsequently, the State of Louisiana filed an application for rehearing which this court granted, vacating its prior writ ruling and ordering an appeal. For the reasons expressed, we clarify our previous order, vacate the conviction and sentence, and remand.

The matter arose in the course of litigation by Long to obtain corporate documents and personal property that Ms. Drum allegedly would not return to him. On August 6, 2004, by the agreement of the parties, the court rendered judgment enjoining Long from directly or indirectly contacting Ms. Drum or her daughter. On February 11, 2005, Ms. Drum filed the instant rule for contempt, alleging that she had received some 12 e-mails, several cards, a book and a flower arrangement from Long in violation of the injunction.

Ms. Drum's rule was heard on May 16, 2005. Ms. Drum called Long to testify, but claiming that the matter was criminal in nature, Long asserted his right against self-incrimination. Ms. Drum and her daughter then testified and she rested her case. Long orally moved for judgment of acquittal; the district court denied this and immediately sentenced Long to 120 days in jail, with 100 suspended. Long objected that he had not been

permitted to put on his case. The court called the objection an abuse of process and “nonsense”: “You had an opportunity to put your witness on. Your witness was called, he took the Fifth Amendment, and you didn’t tell me that he wanted to undertake the Fifth Amendment.” Long took the instant writ, which this court later converted to an appeal.

Long correctly argued, both at the contempt rule and in briefs to this court, that this matter is one of *criminal* contempt. When the object of a proceeding is to punish a person for disobeying a court order, the proceeding is for criminal contempt. *State in Int. of R.J.S.*, 493 So. 2d 1199 (La. 1986). As we explained in *Johnson & Placke v. Norris*, 38,300 (La. App. 2 Cir. 5/12/04), 874 So. 2d 340, *writ denied*, 2004-1478 (La. 9/24/04), 882 So. 2d 1137:

[A] fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a completed act of disobedience such that the contemnor cannot avoid or abbreviate the confinement through later compliance – the defendant is furnished no key and he cannot shorten his term by promising not to repeat the offense.

Criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings. *Hicks on behalf of Feiock v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423 (1988). Criminal contempt is a crime in every fundamental respect, and the defendant in a criminal contempt proceeding is entitled to basic constitutional protections. *Richey v. Richey*, 98-1195 (La. App. 3 Cir. 3/10/99), 733 So. 2d 618, *writ denied*, 99-2122 (La. 10/29/99), 749 So. 2d 639. In *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477 (1968), the court delineated these safeguards:

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. (Internal citations omitted.)

The courts of this state have frequently reaffirmed this standard.

State v. Austin, 374 So. 2d 1252 (La. 1979); *Richey v. Richey, supra*; *Robards v. Robards*, 01-1100 (La. App. 5 Cir. 1/29/02), 807 So. 2d 1111.

A simple review of this record shows that the district court did not permit Long to present a defense. The judgment of contempt is therefore invalid. *Richey v. Richey, supra*; *Robards v. Robards, supra*; *State v. Anderson*, 2004-1567 (La. App. 4 Cir. 3/9/05), 899 So. 2d 93; *Fellman v. Mercantile Fire & Marine Ins. Co.*, 116 La. 733, 41 So. 53 (1906) (“[W]here the judge has no personal knowledge of the matter imputed as contempt, he should not pass sentence without having afforded the party a full opportunity to present his defense.”). It is of no moment that Long previously invoked his right against self-incrimination. If he chooses to take the stand, he is subject to cross-examination over matters addressed on direct. *State v. Rhodes*, 337 So. 2d 207 (La. 1976).

Moreover, the maximum penalty for contempt is 12 months, La. R.S. 13:4611 (1)(b); this entitles the accused to trial by a jury of six members, all of whom must concur to render a verdict, La. Const. art. 1, § 17; La. C. Cr. P. art. 779 A. The record shows that Long was never advised of this right. Finally, the district court remarked that the evidence “shows” that Long

contacted Ms. Drum and her daughter after the injunction. This does not reflect a finding that every element of the offense was proved beyond a reasonable doubt. *Lutke v. Lutke*, 33,001 (La. App. 2 Cir. 2/1/00), 750 So. 2d 512. The judgment is invalid for these deficiencies as well.

In one of our previous writ rulings, this court stated that the defendant in a criminal contempt proceeding was entitled to the right of prosecution by an appropriate prosecuting authority. Because we find that Long was denied the right to present a defense, never advised of his right to a jury trial, and perhaps convicted on an inadequate burden of proof, we pretermitt any consideration of the need for an “appropriate prosecuting authority.” While La. Const. art. 5, § 26(B) appears to require a district attorney or his designated assistant “to have charge of every criminal prosecution,” the Code of Civil Procedure provides that a rule to show cause for contempt may issue “on the court’s own motion or on the motion of a party to the action or proceeding[.]” La. C. C. P. art. 225 A. Moreover, jurisprudence recognizes the courts’ independent power to impose submission to their lawful mandates. *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 114 S. Ct. 2552 (1994). We are aware of no Louisiana case to hold that contempt cases must be prosecuted by the district attorney or his designated assistant. We therefore clarify our prior ruling to conform to the statement of due process rights enumerated in *Bloom v. Illinois, supra*, *Richey v. Richey, supra*, and this opinion.

**PREVIOUS ORDER CLARIFIED; JUDGMENT REVERSED,
AND CASE REMANDED.**

STEWART, J., concurring.

I concur in the majority's result, as I believe that Mr. Long's conviction must be reversed. Clearly, Mr. Long was deprived of basic constitutional rights in the criminal contempt proceeding. These deprivations were recognized in our prior writ order. The writ order also recognized that this criminal matter was not instituted by an appropriate prosecuting authority. The majority opinion avoids this issue.

Because the purpose of the contempt proceeding was to punish Mr. Long for disobeying a court order, the proceeding was a criminal contempt proceeding. *Richey v. Richey*, 98-1195 (La. App. 3d Cir. 3/10/99), 733 So. 2d 618, *writ denied*, 99-2122 (La. 10/29/99), 749 So. 2d 639. The proceeding was clearly penal in nature as Mr. Long was subject to incarceration with no purge clause. *Id.* Under La. R.S. 13:4611(1)(b), Mr. Long was subject to a "fine of not more than one thousand dollars, or by imprisonment for not more than twelve months, or both" This penalty provision entitled Mr. Long to trial by a jury of six persons. See La. Const. art. I, §17. Mr. Long was also entitled to all the constitutional protections due a defendant in a criminal trial. *Richey, supra*. These would include the presumption of innocence, the right to trial by jury or waiver of jury trial, the privilege against self-incrimination, the right to present a defense and testify in one's own defense, the right to proof of the elements of the crime beyond a

reasonable doubt, and the right to appeal any conviction.

Because Mr. Long was subject to a strictly criminal proceeding wherein he had the right to a jury trial, he was also entitled to have the matter prosecuted in the appropriate manner by the district attorney. As alluded to by the majority opinion, there is a glaring conflict between La. Const. art. 5, § 26(B), which provides that the district attorney “shall have charge of every criminal prosecution by the state in his district,” and La. C.C.P. art. 225(A), which provides that a rule for contempt may issue “on the court’s own motion or on motion of a party to the action or proceeding.” The majority sidesteps this conflict, which was the reason for granting rehearing, by simply concluding that there is no jurisprudence holding that contempt cases “must be prosecuted by the district attorney or his designated assistant.” However, we should not ignore this inherent constitutional defect created legislatively in order to make contempt proceedings more convenient for trial judges. Our job is not to provide convenience but to uphold the constitutions and laws of the United States and the State of Louisiana.

Because the district attorney is the party charged with conducting criminal prosecutions in this state, criminal contempt proceedings in which the penalty entitles the defendant to a trial by jury should be brought to the district attorney for prosecution. A criminal proceeding in which the defendant is entitled to a jury trial as well as all

constitutional protections requires the constitutionally mandated prosecution by the district attorney and not trial by a private party before a trial judge.

Lastly, we granted rehearing after the attorney general responded to our original writ order claiming that it called into question the constitutionality of various state statutes. While the attorney general is entitled to notice under La. R.S. 13:4448 prior to adjudication of the constitutionality of a statute, nothing in our writ order gave the attorney general standing to intervene in this matter. The attorney general's intervention in this matter is perplexing in that as lead prosecutor for the state he would seemingly want to defend the constitutional duties of the district attorneys under La. Const. art. 5, §26(B) to prosecute criminal matters in this state.

For these reasons, I respectfully concur.

BROWN, C.J., Dissenting,

The reason this panel granted a rehearing was to address the question of whether a party in a civil lawsuit, in this case, Beverly Hutchins, could in fact initiate a constructive contempt action which had as its disposition a determinate/unconditional sentence imposed upon the offending party, Mike Long. Constructive contempt can result in either remedial action in which the penalty may be removed or purged by complying with the court's order; or punishment in which the penalty is unconditional, such as a fine and/or time in jail. The distinction between the two determines the standard of proof and as well as the procedure to be employed by the court.

The penalty imposed in this case was arguably both remedial and punitive. In punitive (criminal) contempt the offender is afforded more extensive due process rights. In *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988), ***a case initiated by a litigant*** in a civil action for child support and one in which the punishment was unconditional, the U.S. Supreme Court found that the due process protections enumerated by Amendments V, VI, and XIV of the U.S. Constitution were applicable. These rights include such fundamental safeguards as a speedy and public trial, by an impartial jury/judge; information as to the nature and cause of the accusation; ability to confront the witnesses against him; compulsory process for obtaining witnesses in his favor; the assistance of counsel for his defense; and, the privilege against self-incrimination. In *Young v. United States*, 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987) and, more recently in *International*

Union, United Mine Workers v. Bagwell, 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994), the U.S. Supreme Court held that due process in criminal contempt cases did not impose upon the states the requirement that charges be initiated by an independent state prosecutor.

Louisiana Code of Civil Procedure article 224(2) provides that constructive contempt includes the wilful disobedience of any lawful judgment, order, mandate, writ, or process of the court. Article 225 specifically provides Hutchins with standing to move the court to consider whether Long was guilty of contempt as a result of his failure to abide by the prior court order enjoining contact, direct or indirect, with Hutchins or her daughter. In *Jackson Avenue Foundation v. Lassair*, 03-1759 (La. App. 4th Cir. 06/02/04), 876 So. 2d 926, the court specifically upheld the right of a litigant to initiate and prove a punitive contempt charge for the violation of an injunction.

Counsel for Long argues that La. C.C.P. art. 225 is in conflict with the Louisiana Constitutional article giving the district attorney “charge of every criminal prosecution *by the state* in his district.” (Emphasis added). Contempt resulting in punishment in civil cases has inherently civil purposes and, in fact, provides benefits to a party (or parties) to the action. These cases are litigated as an extension of the underlying civil action without any special prosecutorial powers such as the use of a grand jury to obtain records, procure testimony or grants of immunity. Rather, in civil cases the parties are on an equal footing.

Typically, litigants in small claims, domestic, and landlord-tenant cases obtain orders establishing their rights and file contempt motions for their enforcement. This is not what was envisioned by the term “criminal prosecutions by the state” in La. Const. Art. V, § 26(B). Criminal prosecutions are instituted by the district attorney while contempt proceedings are initiated by the allegedly aggrieved party. This is because the private party has obtained an order benefitting that party. The private party is aware of the violation and can bring it to the court’s attention. In criminal prosecutions “by the state,” the police first investigate, and then the state, through the district attorney, brings the matter to court. Because contempts are fundamentally matters of private interest in a way that criminal prosecutions by the state are not, there is no conflict between the statute and Louisiana’s constitution.

The confusion is exacerbated in that the sanction imposed is typically determined by the evidence adduced at the hearing. Thus, the classification of the proceedings as remedial (civil) or punitive (criminal) is determined at the end of the hearing, rather than at the outset. This method of determining whether the action for contempt is civil or criminal is backwards as the focus is not on the conduct but the punishment imposed.

This is a matter of great importance for the trial courts and there is little jurisprudential guidance. This is the type of case which could qualify for *en banc* consideration.