



STATE OF KANSAS

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Curt T. Schneider
Attorney General

December 15, 1975

ATTORNEY GENERAL OPINION NO. 75-456

Mr. Thomas M. Tuggle
Assistant City Attorney
People's Savings & Loan Building
Suite A - Post Office Box 277
Concordia, Kansas 66901

Re: Municipal Courts--Procedure--Contempt

Synopsis: If a nonindigent person who is convicted of an offense in municipal court and sentenced to pay a fine therefor willfully refuses to pay said fine, the court has no authority to commit said defendant to jail until the fine is paid. However, such willful refusal may be proceeded against as a direct or indirect contempt, for which the court is empowered to commit to jail the contemnor. The accused in such a contempt proceeding is entitled to written notice of the charge of contempt against him and an opportunity to be heard thereon, except for directly contemptuous conduct accompanying the refusal which disturbs the orderly procedure of the court. The accused contemnor is entitled to retain and be represented by counsel in such contempt proceedings, except for contempts based upon aggravated, court-disturbing conduct.

* * *

Dear Mr. Tuggle:

You advise that instances have occurred in the Municipal Court of the City of Concordia in which persons who have been convicted of an ordinance violation and have been sentenced to pay a fine therefor have willfully refused to pay the fine. You request my opinion concerning the proper procedures available to the court in such instances.

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First, you inquire whether the judge of a municipal court may commit a convicted defendant to jail until the fine is paid. At the outset, it is important to mention two cases. In *Williams v. Illinois*, 399 U.S. 235, 26 L. Ed. 2d 586, 90 S. Ct. 2018 (1970), the Court considered a case in which an indigent defendant had been sentenced to the maximum sentence of one year's imprisonment and a \$500 fine, the judgment of conviction providing, as permitted by state statute, that if the defendant were in default of the monetary payment at the expiration of his term of imprisonment, he could remain in jail to "work off" the fine at the statutory rate of \$5 per day. Concluding that "when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay," the Court held that the defendant could not be imprisoned solely because of indigency. In *Tate v. Short*, 401 U.S. 395, 28 L. Ed. 2d 130, 91 S. Ct. 668 (1971), the defendant had been convicted of nine traffic offenses, punishable by fines only, and was fined a total of \$425. Unable to pay the fine, he was ordered to prison for 85 days, being credited \$5 per day for each day toward payment of the fine. Following *Williams*, the Court again stated thus:

"Since Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine." 401 U.S. at 399.

The Court cautioned, however, thus:

"We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U.S. at 400-401.

Given an instance in which a convicted defendant willfully refuses to pay the fine imposed by the court, and is not indigent and therefore unable to pay the fine, the question you pose is whether the court may commit the defendant to jail until the fine is paid. K.S.A. 22-3425, of the Kansas Code of Criminal Procedure, prescribes a procedure for such cases:

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"(1) When a defendant is adjudged to pay a fine and costs, the court may order him to be committed to the county jail until such fine and costs are paid or may make an order providing for the payment of such fines and costs in installments.

(2) Any person confined in the county jail for failure to pay a fine or costs may be released by the court which imposed sentence, upon satisfactory proof that such person is unable to pay such fine and costs."

The code of criminal procedure is not in its entirety applicable, however, to municipal courts. K.S.A. 22-2102 directs that it "shall have application to proceedings in police and municipal courts only when specifically provided by law." In the code of procedure for municipal courts, there is no precise analog to K.S.A. 22-3425. K.S.A. 1974 Supp. 12-4103 provides generally only that if "no procedure is provided by this code, the court shall proceed in any lawful manner consistent with any applicable law and not inconsistent with this code." K.S.A. 22-3425 not being directly applicable to municipal courts, I cannot but conclude that the court may not order confinement of a nonindigent defendant for such period of time until the fine is paid.

You inquire, secondly, whether the deliberate refusal to pay a fine which is imposed by the judge of a municipal court is punishable as contempt, and if so, whether it must be proceeded against as a direct or an indirect contempt. K.S.A. 1974 Supp. 12-4510 states thus in pertinent part:

"When a fine is levied as punishment, the municipal judge or clerk of the municipal court shall issue a statement setting forth the amount of the fine and the manner of payment. *Failure to pay in the manner specified may constitute contempt of court.*"
[Emphasis supplied.]

K.S.A. 1974 Supp. 12-4106 provides that the municipal judge

"may fine or imprison for contempt committed in court or for failure to obey process issued

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by him, in the same manner and to the same extent as the district court."

Contempts are classified by K.S.A. 20-1202 thus:

"That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence, are direct contempts. All others are indirect contempts."

If an accused person, upon conviction and imposition of a sentence to pay a fine, announces to the court that he or she refuses to pay the fine so imposed, such willful refusal thus announced in the presence of the court constitutes a direct contempt, in my judgment. If, however, the accused person who has been convicted and sentenced to payment of a fine does not announce or disclose his willful refusal to and in the presence of the court, but merely fails to remit payment within the period of time provided in the statement issued by the judge or clerk prescribing the manner of payment, such refusal constitutes an indirect contempt, in my judgment, to be proceeded against as provided by K.S.A. 20-1204.

You ask whether it is permissible to proceed by accusation and order to show cause in a case of direct contempt which could have been proceeded against summarily but was not. K.S.A. 20-1203 states that a "direct contempt *may* be punished summarily without written accusation against the person arraigned. . . ." [Emphasis supplied.] In *Courtney v. Schroeder*, 348 U.S. 933, 99 L. Ed. 732 (1955), the Court reversed the decision in *Re Ferris*, 175 Kan. 704, 267 P.2d 190 (1954), on the authority of *Re Oliver*, 333 U.S. 257, 92 L. Ed. 682, 68 S. Ct. 499 (1948), in which the Court set aside a summary contempt proceeding in which the contemnor had been summarily committed to jail. One ground of the decision was that the alleged contemnor had not been granted a reasonable opportunity to be heard on the contempt charge:

"We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A persons' right to reasonable notice against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a

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minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U.S. at 273.

The Court pointed out that it had previously upheld the power of a court to proceed summarily to punish certain conduct committed in open court without notice, testimony or hearing, citing *Ex parte Terry*, 128 U.S. 289, 32 L. Ed. 405, 9 S. Ct. 77. However, the Court emphasized that such a departure from the accepted standards of due process was permissible only for court-disturbing misconduct which occurred in the court's immediate presence, of which the judge had personal knowledge acquired by his own observation of the contemptuous conduct, and that such summary procedure was permitted only against such conduct as created an "'open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public'" that if "'not instantly suppressed and punished, demoralization of the court's authority will follow.'"

In view of the fact that notice and opportunity to be heard are now required equally for direct and indirect contempts, there appears to be little material difference between the proceedings constitutionally permissible under K.S.A. 29-1203 and -1204, insofar as they affect the rights of the alleged contemnor. Thus, in my judgment, it is entirely permissible to proceed by accusation and order to show cause against a case of direct contempt which was not proceeded against at the time it occurred.

Lastly, you inquire whether an attorney must be appointed to represent a person accused of contempt of court if imprisonment is likely to be imposed as punishment for the contempt. The right to employ and be represented by counsel in contempt proceeding is discussed at some length in an annotation at 52 A.L.R.3d 1002 *et seq.* Generally speaking, an accused contemnor enjoys the right to retain and be represented by counsel in a contempt proceeding which may lead to confinement, except for directly contemptuous court-disturbing conduct committed in the presence of the judge and of which he has direct knowledge by personal observation. In the instances which prompted your inquiry, the willful refusal to pay a fine was not based, as I understand it, upon indigency. Thus, there arises here no question of the right to appointment of counsel to represent the alleged indigent contemnor. Where, however, a person is charged with contempt for failure to remit a fine at the time ordered by the judge or clerk of the court, and an accusation in contempt is filed which may lead to confinement of the accused upon a finding of contempt, the courts may very well conclude that because of the possibility of confinement, legally indigent accused should be afforded the right to counsel.

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To recapitulate, it is my opinion that, first, if a nonindigent person convicted of an offense in the municipal court refuses to pay the fine imposed by the sentence of the court, the judge of that court has no authority to commit the defendant to jail until the fine is paid; secondly, that refusal to pay a fine by a nonindigent defendant may be proceeded against as a direct contempt if the refusal is announced and stated in the presence of the judge in court or in chambers, and as an indirect contempt if the refusal is disclosed otherwise; third, that in any event, the accused contemnor is entitled to a written accusation and an opportunity to be heard on the contempt charge based upon such refusal to pay the fine, unless said refusal is accompanied by court-disturbing conduct committed in the presence of the court and personally observed by the judge; and lastly, that the accused contemnor in such an instance is entitled to retain and be represented by counsel in the proceeding.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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