



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

July 29, 1998

Larry W. Powers, Director
Spartanburg County Detention Facility
950 California Avenue
Spartanburg, South Carolina 29303-2184

Re: Informal Opinion

Dear Mr. Powers:

You have asked whether an individual held in civil contempt is eligible for good time credits. Included with your request is a copy of an Order issued by the Honorable David F. Anderson, Associate Probate Judge for Spartanburg County.

The Order finds an individual in contempt of Court in that he had "willfully failed to comply with earlier instructions and orders of this Court" in certain instances and that "he had failed to respond to subpoenas to appear, that he had failed to appear and respond in an earlier Rule to Show Cause hearing, and that he had failed to produce and turn over assets belonging to Ms. Swink."

As a result, the Court ordered the defendant to "be confined at the Spartanburg County Detention Facility for a period of six months." The Court also provided that it "may consider this matter when and if [the defendant] sees fit to accomplish those tasks previously ordered."

You have indicated that in your discussions with the Associate Probate Judge, the Judge "would be willing to consider [the defendant's] release on good-time when he is eligible."

Law / Analysis

S.C. Code Ann. Sec. 14-23-310 provides that the probate court "may keep order in court and punish any contempt of his authority in like manner as such contempt might

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be punished in the circuit or Supreme Court." In Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988), the Supreme Court confirmed the authority of a probate judge to find an individual guilty of direct contempt. Moreover, in Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 917 (1982), the Court advised that

[t]he power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.

277 S.C., at 382.

Most recently, in Poston v. Poston, Op. No. 24802 (June 8, 1998), the Court explained the difference between criminal and civil contempt in the following way:

[a]n unconditional penalty is criminal in nature because it is 'solely and exclusively punitive in nature.'" Hicks v. Feiock, 485 U.S. at 633, 108 S.Ct. at 1430, 99 L.Ed.2d at 732 (citing Penfield Co. v. SEC, 330 U.S. 585, 593, 67 S.Ct. 918, 922, 91 L.Ed. 1117, 1124 (1947)). "The relief 'cannot undo or remedy what has been done nor afford any compensation and the contemnor cannot shorten the term by promising not to repeat his offense.'" Hicks v. Feiock, 485 U.S. at 633, 108 S.Ct. at 1430, 99 L.Ed.2d at 732 (citing Gompers v. Buck's Stove & Range Co., 221 U.S. at 442, 31 S.Ct. at 498, 55 L.Ed. at 806). "If the relief provided is a sentence of imprisonment, ... it is punitive if the sentence is limited to imprisonment for a definite period." Hicks v. Feiock, 485 U.S. at 632, 108 S.Ct. at 1429, 99 L.Ed.2d at 731; see also State v. Magazine, *supra*. If the sanction is a fine, it is punitive when it is paid to the court. However, a fine that is payable to the court may be remedial when the contemnor can avoid paying the fine simply by performing the affirmative act required by the court's order. Hicks v. Feiock, *supra*; State v. Magazine, *supra*.

In civil contempt cases, the sanctions are conditioned on compliance with the court's order. Hick v. Feiock, *supra*; State v. Magazine, *supra*. "The conditional nature of the punishment renders the relief civil in nature because the

contemnor 'can end the sentence and discharge himself at any moment by doing what he had previously refused to do.'" Hicks v. Feiock, 485 U.S. at 633, 108 S.Ct. at 1430, 99 L.Ed.2d at 732 (citing Gompers v. Buck's Stove and Range Co., 221 S.C. at 442, 31 S.Ct. at 498, 55 L.Ed. at 806). "If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order" Hicks v. Feiock, 485 U.S. at 632, 108 S.Ct. at 1429, 99 L.Ed.2d at 731. "Those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets.'" Hicks v. Feiock, 485 U.S. at 633, 108 S.Ct. at 1430, 99 L.Ed.2d at 732 (citing Penfield Co. v. SEC, 330 U.S. at 590, 67 S.Ct. at 921, 91 L.Ed. at 1123).

Slip Op. at ____.

The Court provided several examples of both civil contempt and criminal contempt. Civil contempt included situations where

- I. The contemnor is ordered to pay a fine to the court; however, he may purge himself of the fine by complying with the prior court order.
- II. The contemnor is given a jail sentence to be served until he agrees to comply with the prior court order.
- III. The contemnor is ordered to pay a fine/damages to complainant and is ordered to pay a fine to the court; however, the contemnor may purge himself of the fine payable to the court by complying with the prior court order.
- IV. The contemnor is ordered to pay a fine/damages to complainant and is given a jail sentence to be served until he agrees to comply with the prior court order.

Among the examples given to illustrate criminal contempt sanctions were the following:

- I. The contemnor is ordered to pay a fine to the court. Even if the contemnor performs the affirmative act

required by the prior court order, the fine must still be paid.

- II. The contemnor is sentenced to jail for a definite period of time. Even if the contemnor performs the affirmative act required by the prior court order, the contemnor must still serve the entire jail sentence.
- III. The contemnor is given a choice between paying a fine to the court or serving a definite period of time in jail. The contemnor must do one or the other, thus he cannot purge himself entirely of the sanction.

Id. Applying the foregoing principles, the Poston Court found it to be "impossible to determine whether the contempt sanction in this case is criminal or civil." In its view, "[t]he contempt order is not clear; instead, it is a hybrid because the sanction has characteristics of both civil and criminal contempt." Therefore, remand to the Family Court was necessary to "clarify its intent and issue an order setting forth a contempt sanction that is either clearly criminal or clearly civil" Id.

Thus, in essence, it is a matter for the court holding an individual in contempt to determine whether it intends that contempt sanction to be civil or criminal in nature. It appears from the face of the Order which you have provided that the Court may have intended its sanction to be "civil" contempt inasmuch as the Order states that "[t]he court may reconsider the matter when and if [the defendant] sees fit to accomplish those tasks previously ordered." However, I would note that the Court's Order does use the phrase "may consider" as though obedience of the Order by the defendant might or might not purge the contempt. Thus, only the Court which issued the Order can determine if the contempt is civil or criminal.

This Office, in a previous Opinion, has concluded that where the contempt is truly civil, good-time credits authorized by § 24-13-210, are not applicable. In Op. Atty. Gen., Op. No. 77-213 (July 8, 1977), we stated the following

Section 24-13-210 provides that persons confined in this State for a definite term may in proper instances be entitled to a deduction from the term of his sentence for good behavior. Inasmuch as punishment for civil contempt is by its nature for an indefinite period which the incarcerated person may terminate at any time though compliance with the court's original order, it is certain in our opinion that provisions of

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§ 24-13-210 would have no application to persons confined for civil contempt.

This Opinion is supported by other authorities. In Ex Parte ACLY, 711 S.W.2d 627 (1986), the Texas Supreme Court concluded that a good time statute does not apply to civil contempt. And the Attorney General of Wisconsin, in OAG 20-85 (June 11, 1985) has similarly ruled. He stated, as this Office did in its opinion, that "[s]ince the civil contempt order is remedial and coercive in nature, the sentence is indefinite: the inmate wins release, or "purges" the contempt, upon compliance with the court order which led to his incarceration in the first place." The Wisconsin Attorney General further elaborated that

[w]hen imposing a sentence for civil contempt, the judge must clearly spell out what the contemnor must do to purge the contempt If the contemnor serves all six months, it is only because he chose never to comply with the court's order It is both logically and mathematically impossible to compute fractions of indefinite sentences, such as those imposed upon civil contemnors. ... One might question why civil and criminal contemnors should be treated differently regarding their eligibility for good time credit. The answer is simply because the civil contemnor does not need to earn time for good behavior

In other words, the rationale of these authorities is that, because the civil contemnor "holds the keys to his incarceration, good time credits are not part of his indefinite and indeterminate sentence.

Of course, the application of this rule ultimately depends upon whether the Court intended the contempt to be civil or criminal. Only the Court itself can speak on this issue. Poston v. Poston, supra.

It is also worthy of note that the Order commands the Spartanburg County Detention Facility to confine the defendant "for a period of six months ..." unless the Court "reconsiders this matter when and if [the defendant] sees fit to accomplish those tasks previously ordered." As we have previously recognized,

[t]he law recognizes as a fundamental tenet the idea that:

[t]he duty of an officer in executing the mandate of a judicial order in the nature of a commitment is purely ministerial and

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his power with respect thereto is limited and restricted to compliance with its terms.

Firmly established also is the following principle:

[t]he custodian of a prison on receiving a commitment can only do what the commitment orders him to do, that is receive and safely keep the prisoner, so that the prisoner may then be discharged in due course of law.

Op. Atty. Gen., May 8, 1995. Again, the Order provides for the custodian of the prisoner only to release the individual either at the end of six months or if the Court reconsiders in light of compliance with the Order. No mention is made of good-time credits or any early release for any other reason.

In my judgment, the best option would be for you to receive clarification from the Court regarding whether the Order was intended to constitute civil or criminal contempt. See, State v. Bevilacqua, 316 S.C. 122, 447 S.E.2d 213 (S.C. App. 1984) ["[i]f the Department (of Mental Health) believed there was a problem with the instant order, wise counsel would have dictated it should, through appropriate intervention, sought relief from the family or an appellate court."] If the Court has indicated to you that it has no objection to good-time credits, such may be an indication that criminal contempt was intended. If, on the other hand, civil contempt was contemplated, although good-time credits are not authorized in such circumstances, it remains in the discretion of the Court as to when the individual will actually be released from custody, either having complied with the Court's order, or at the end of six months, or at some earlier date.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an