

SUPREME COURT, SUFFOLK COUNTY

SPECIAL TERM

GEORGE SASSOWER,

Petitioner,

vs.

HON. ERNEST L. SIGNORELLI and
SHERIFF OF SUFFOLK COUNTY,
Defendants.

BY McINERNEY

J. S. C.

DATED July 28

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AUG 2 1977

DEPARTMENT OF LAW
NEW YORK CITY OFFICEHON. LOUIS J. LEFKOWITZ
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Deputy Assistant Attorney General
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By: MICHAEL P. BAZELL, ESQ.
County Center
Riverhead, New York 11901GEORGE SASSOWER, ESQ.
Petitioner Pro Se
75 Wykagyl Station
New Rochelle, New York 10804

This is a hearing upon a writ of habeas corpus testing the validity of a contempt order incarcerating the contemnor to the County jail for 30 days and directing the issuance of a warrant to carry out such sentence.

The contempt order containing the essential recitals reads as follows:

"On reading and filing the orders of the Surrogate's Court of Suffolk County dated March 9, 1976 and March 25, 1977, and upon all the proceedings heretofore had herein, and it further appearing that an order was duly made on April 28th, 1977 and personally served upon GEORGE SASSOWER in open court in which the said GEORGE SASSOWER was ordered to transmit to the temporary administrator of the estate of EUGENE PAUL KELLY, Anthony Mastroianni, Public Administrator of Suffolk County, all books, papers and other property of the estate of EUGENE PAUL KELLY in the possession of GEORGE SASSOWER, or under his control on or before May 5, 1977, and it further appearing that the said GEORGE SASSOWER failed to comply with said order, and that he was directed to appear in court on June 1, 1977 to commence the trial in this proceeding, and that the matter was adjourned upon application by the said GEORGE SASSOWER to June 15, 1977 for the trial of this proceeding, and that on June 15, 1977 said GEORGE SASSOWER appeared in open court and after inquiry by the court as to whether the books, papers and other property of the estate of EUGENE PAUL KELLY had been turned over by MR. SASSOWER to the Public Administrator, and he having admitted that he had not

EXHIBIT "R"

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complied with the order of this court dated April 28, 1977, and at that time the court having given MR. SASSOWER the opportunity to be heard, and to explain his conduct in failing to obey said lawful order of this court, and he having failed to offer to the court any excuse for his wilful disobedience of the said court order, and upon further questioning by the court said GEORGE SASSOWER, having stated that he would comply with said order to turn over all books, records and other property of the estate of EUGENE PAUL KELLY to the Public Administrator on or before June 22, 1977, and the court having further advised GEORGE SASSOWER that upon his failure to do so would result in the said GEORGE SASSOWER being found in criminal contempt of the Surrogate's Court for his defiant and contemptuous conduct having been committed in the immediate presence of the court and his failure to comply with the order of this court dated April 28, 1977, and on June 22, 1977, the said GEORGE SASSOWER having defaulted in appearing in court, and a hearing having been conducted by the court at which time the Deputy Public Administrator testified under oath that GEORGE SASSOWER had not complied with the directives of this court directing the said GEORGE SASSOWER to turn over to the Public Administrator the books, papers and other property of the estate of EUGENE PAUL KELLY in his possession or under his control, it is now, on motion of VINCENT G. BERGER, JR., Attorney for the Public Administrator of Suffolk County,

"ORDERED AND ADJUDGED that the said GEORGE SASSOWER is guilty of criminal contempt of court committed in the immediate presence of the court by reason of his failure to obey the lawful order and directions of this court dated April 28, 1977 and June 15, 1977 respectively, and the said conduct tending to impair the respect due its authority, and further impairing and prejudicing the rights of the parties in this proceeding as hereinabove set forth, and it is further

"ORDERED AND ADJUDGED that the said GEORGE SASSOWER be imprisoned in close custody in the jail of the County of Suffolk for a period of 30 days, and it is further

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"ORDERED AND ADJUDGED that a warrant shall issue to carry out and effect the provisions of this final order.

"S/ ERNEST L. SIGMORELLI

"ERNEST L. SIGMORELLI, Surrogate."

The contemnor was apprehended and put in jail from whence he secured this writ.

The issue before this Court is whether a judge of a court can summarily find an attorney guilty of a criminal contempt and immediately impose a jail sentence upon him, when the attorney was not present before him when the adjudication was made, and when it was necessary for the Court to take testimony to determine whether the contempt had been committed.

At the outset, the attorney general argues that a review of the court's action cannot be had under a writ of habeas corpus, citing People ex rel. Verdi v. McQuade, 245 App. Div. 768, 280 N.Y.S. 903. However, under the circumstances of this case it may be. People v. Zweig, 32 A.D. 2d 659, 300 N.Y.S. 2d 651.

The differences between a punitive and remedial contempt are described in Samuel Gompers, et al, v. Buck's Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492.

In the present case, the respondent agrees that the contempt, if any, was a criminal contempt and so the rule stated in Re Oliver, 33 U.S. 257, 274, 68 S.Ct. 499, 508, citing Cooke v. U. S., 267 U.S. 517, 45 S.Ct. 390, is applicable.

"That the holding in the Terry case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in Cooke

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v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was opportunity for defense." * * * * "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exceptions to these due process requirements include only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority * * * before the public.' If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke case, that the accused be accorded notice and a fair hearing as above set out."

Finally, the court states:

"The Terry case and others like it provide no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence."

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In a somewhat analogous situation, attorneys who did not appear in court as directed were summarily adjudicated in contempt. U. S. v. Delehanty, 488 Fed. Rep 306, 398. The attorneys argued that their non-appearance was not an act which occurred within the actual presence of the court, and so no summary contempt was possible. The court agreed:

"We find that this matter should not have been dealt with summarily. While the absence of the appellants was obvious to the court, the reasons for their absence was not."

The law of New York is in conformity with these standards. In Social Service Employees Union v. Saypol, 23 A.D. 2d 55, 258 N.Y.S. 2d 246, petitioners sought the annulment of court orders adjudging them "guilty of a criminal contempt of court committed in the immediate view and presence of the court." The petition was granted and the adjudication of contempt was annulled. The lower court had specifically directed the petitioners to return to their employment, to inform their union membership that the court had directed them also to return to work, and directed the petitioners to return before the court at 2:30 P. M. to report to the court regarding their obedience to the order. Upon the petitioners' return they were asked by the court if they had obeyed the directions. After their answer that they had not, they were summarily adjudged to be in contempt. Obviously, these facts are closely parallel to the present situation in the application of the legal theory of contempt.

The court stated at page 248:

"A criminal contempt in the 'immediate view and presence of the court may be punished summarily if the acts constituting such contempt

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are seen or heard by the presiding judge so that he can assert of his own knowledge the facts constituting the contempt in the mandate of commitment' (Matter of Douglas v. Adel, 269 N.Y. 144, 146-147, 199 N.E. 35, 36-37). The orders adjudging petitioners in contempt do not recite any 'court-disturbing misconduct' (In re Oliver, 333 U.S. 257, 275, 68 S.Ct. 499, 92 L.Ed. 682; see Judiciary Law, §750, subd. A, par. 1). The acts they rely on as constituting the contempt consist of disobeying the interim restraint in the December 30, 1964 order to show cause, the provisions of the January 7, 1965 injunctive order, and the court's above-quoted oral directions. As is evident from respondent's requirement that petitioners return to the courtroom and report regarding their obedience, any acts of disobedience did not occur in the court's 'immediate view and presence' (cf. Brown v. United States, 359 U.S. 41, 51, 79 S.Ct. 539, 3 L.Ed. 2d 609)."

A reading of the minutes of the proceeding held herein discloses that the contemnor was held in contempt on 22 June, 1977, for the disobedience of an order dated 28 April, 1977, and the further order given in open court on 15 June 1977. At that time the contemnor was not in court, and in addition the fact of his non-compliance could only be ascertained by the testimony of a third party, also in the absence of the contemnor. Under the above authority, this may not be done. The respondent cites as authority to the contrary, the case of Cirillo v. Warden of City Prison, Brooklyn, 11 N.Y. 2d 51, 226 N.Y.S. 2d 398. The case can be distinguished in that the defendant there was present at the adjudication of his contempt and the court at pages 56, 401, made the observation that "Perhaps the real question is as to whether under all the circumstances the County Court gave relater a reasonable opportunity to prepare his defense and to be heard in defense. The answer must be based on this particular record." The dissent by Froessel, J., seems more orthodox.

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The writ is allowed, and the adjudication of contempt annulled, without prejudice to such other contempt proceedings as the court may be advised to bring.

Settle order on notice.

[Handwritten signature]
J. S. C.