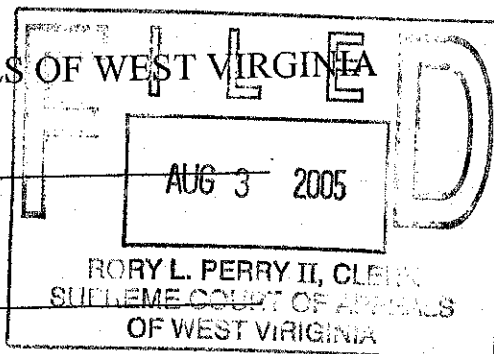


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No. 32722

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



IN RE: MEGAN B., AMBER G.B.,
WILLIAM Z.Q.B., and SHEEHAN B.

FROM THE CIRCUIT COURT OF GRANT COUNTY

**BRIEF OF APPELLANT
SHERIFF CHARLES KIMBLE**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: MEGAN B., AMBER G.B.,
WILLIAM Z.Q.B., and SHEEHAN B.

Case No. 32722

FROM THE CIRCUIT COURT OF GRANT COUNTY

**BRIEF OF APPELLANT
SHERIFF CHARLES KIMBLE**

**KIND OF PROCEEDING AND NATURE OF
THE RULING IN THE CIRCUIT COURT**

Appellant Sheriff Charles Kimble seeks a reversal of the Grant County Circuit Court's Order entered on October 12, 2004 ("Contempt Order") finding Sheriff Kimble (hereafter, "Appellant") to be guilty of criminal contempt of court and ordering, *inter alia*, that Appellant be incarcerated for ten days with loss of pay or, alternatively, that Appellant complete 120 hours of community service within a specified period of time.

By Order entered on June 7, 2005, this Court granted Appellant's petition for appeal and ordered that this proceeding "be heard, submitted and determined upon the original record, briefs of counsel and oral argument, if requested by the parties."

The Circuit Court proceeding from which the Contempt Order arises is a child abuse and neglect case, the outcome and merits of which are not relevant to this appeal. The Contempt Order arises as a result of a Show Cause Order entered by the Honorable Andrew N. Frye, Jr., on September 17, 2004, stating that the Court had become aware of the alleged refusal by Appellant, the elected Sheriff of Grant County (whose term has since expired) to accompany a D.H.H.R. Child Protective Services worker to assist in the removal of certain children from their parents' home and to serve those parents with an emergency removal order entered by Magistrate Earle on September 10, 2004.¹

The Show Cause Order directed that Appellant appear before the Circuit Court "to show cause why he failed to discharge his statutorily required duties in this matter." The Show Cause Order did not state that the show cause proceeding was in the nature of a contempt proceeding, nor was Appellant otherwise advised or aware that the Circuit Court considered the proceeding to be a contempt proceeding.

After a continuance due to Appellant's absence while on vacation, the show cause hearing was held on October 6, 2004. Participants in the show cause

¹ The emergency removal order did not order Appellant to accompany the Child Protective Services worker or to serve the order; it ratified the custody of the subject children with the Department of Health and Human Resources, but did not, by its terms, require any action on the part of the Sheriff of Grant County.

hearing were Appellant and Magistrate Earle; the Circuit Court inquired of both of them regarding the events of September 10, 2004, the date that Appellant had allegedly refused to accompany the Child Protective Services worker and serve the emergency removal order. No attorneys were present² and the Circuit Court did not advise the participants that the proceeding was a contempt proceeding. After hearing from both Appellant and Magistrate Earle, the Circuit Court, found, on the record, "that the Sheriff's Office on the 10th of September did disobey the officer of this Court, Magistrate Earle, with failing to serve lawful process and Orders of that Court to remove these children from the home" (Tr., p.10). The Circuit Court proceeded to find "that the Sheriff of Grant County is in contempt of this Court" and said that the Circuit Court would "consider what is appropriate punishment . . . and render a written Opinion thereto in due time" (Tr., pp. 10-11); prior to the finding of contempt, the Circuit Court had never advised Appellant that the show cause hearing was, in reality, a contempt proceeding or that Appellant was facing punishment of any type.

Subsequent to the show cause hearing, the Circuit Court entered its Contempt Order, on October 12, 2004. Appellant sought, from the Circuit Court, a stay of the Contempt Order; after a hearing, held on October 28, 2004, the Circuit

² The Circuit Court *did* ask Appellant if he desired counsel; Appellant stated that he waived his right to counsel (Transcript of October 6, 2004, show cause hearing [hereinafter, "Tr."], p.1).

Court granted a limited stay, until November 12, 2004, to permit Appellant's counsel to apply to this Court for a further stay. This Court, by Order entered on November 10, 2004, stayed the Circuit Court Contempt Order "pending the resolution of the petition for appeal or the expiration of the time prescribed by law for the filing of petitions for appeal."

STATEMENT OF THE FACTS OF THE CASE

The facts relevant to this appeal are contained in just four documents - - (1) The emergency removal order entered by the Magistrate on September 10, 2004; (2) the Show Cause Order entered by the Circuit Court on September 17, 2004; (3) the transcript of the show cause hearing held on October 6, 2004; and (4) the Contempt Order entered by the Circuit Court on October 12, 2004.

Apparently the Circuit Court was advised of Appellant's alleged refusal to accompany a Child Protective Services Worker to assist in removing certain children from their home and to serve an emergency removal order upon the parents of the children. This information caused the Circuit Court to issue a Show Cause Order directing "Sheriff Kimble . . . to appear before this Court . . . to show cause why he failed to discharge his statutorily required duties in this matter." The Show Cause Order did not refer to the proceedings as *contempt* proceedings.

At the inception of the show cause hearing, the Circuit Court stated that it "was made aware" of the refusal, by the Sheriff of Grant County, to execute Magistrate Earle's Order in the abuse and neglect case and that the Circuit Court consequently issued the Show Cause Order (Tr., p.1). The Circuit Court did not advise Appellant that he was involved in a contempt proceeding or that he may be subject to sanctions of any kind; the Circuit Court merely advised Appellant that he "was entitled to counsel in this matter" (Appellant stating that he waived his right to counsel) (Tr., p.1).

The Circuit Court then inquired of Appellant, "I will hear what reasons you have for failure to comply with the Order of the Magistrate Court" (Tr., p.1). The Circuit Court, after Appellant's response (Tr., pp.2-3), inquired of Magistrate Earle as to the events of September 10, 2004 (Tr., pp. 4-7) and permitted Appellant and Magistrate Earle to offer additional comments (Tr., pp. 7-10). As of the conclusion of the testimony, the Circuit Court still had not advised Appellant that he was involved in a contempt proceeding.

As noted above ("Kind of Proceeding and Nature of the Ruling in the Circuit Court"), the Circuit Court, after the conclusion of the testimony in the show cause hearing, found Appellant to be in contempt of court and stated that a written

opinion would be forthcoming, addressing what would be "appropriate punishment for the Sheriff of Grant County" (Tr., pp. 10-11).

On October 12, 2004, the Circuit Court entered a Contempt Order, making various factual findings and conclusions of law. Among those findings and conclusions, the Circuit Court found that "Sheriff Kimble's refusal to promptly act at the request of the Magistrate in this matter constitutes contempt of this Court" (Finding "18"). The Circuit Court, in Findings "13", "14", and "15", concluded that Appellant's contempt was "criminal" contempt (being "concerned primarily with the dignity of the Court itself"), that the Circuit Court had the ability to act "summarily" ("where the sentence contemplated by the Court is less than six months"), and that a monetary fine, as punishment for criminal contempt, is presumed to be "trivial."

The sanctions imposed upon Appellant by the Contempt Order were as follows:

1. Appellant was ordered to compose letters of apology to the children involved in the abuse and neglect case;
2. Appellant was ordered to serve "ten days incarceration at the Potomac Highland Regional Jail", commencing the morning after the Contempt Order was entered;

3. Appellant was ordered to forfeit his pay as Sheriff of Grant County during the ten days of his incarceration;

4. Appellant's jail sentence and forfeiture of pay was suspended, contingent upon the completion of 120 hours of community service at a family services campus in Mineral County, West Virginia, the 120 hours to be completed within the next 80 days (by the completion of Appellant's term as Sheriff), with incarceration to be substituted for any community service hours not then completed; and

5. Appellant was ordered to compose a memorandum for his staff in the Sheriff's office, advising that abuse and neglect cases are "of the highest priority" and "shall be afforded prompt attention."

The evidence presented at the show cause hearing showed that Appellant and Magistrate Earle agreed as to much of what occurred on September 10, 2004. Both Appellant and Magistrate Earle testified that a Child Protective Services worker approached Appellant late in the afternoon regarding service of the abuse and neglect papers (Tr., pp. 2,4). Appellant acknowledged that he told the Child Protective Services worker that he was about to begin a very important meeting with his staff, but that he could have the papers served after the meeting; the Child Protective Services worker relayed that information to Magistrate Earle (Tr., pp. 2,4). Just after

Appellant's discussion with the Child Protective Services worker, Appellant met with Magistrate Earle and told him the same thing he had told the Child Protective Services worker (Tr., pp. 2,5); Magistrate Earle did not recall Trooper Martin being there at the time, but Appellant recollected that he was there (Tr., pp. 2,5). After Appellant and Magistrate Earle discussed the situation, including the importance of Appellant's meeting and the importance of serving the papers, Trooper Martin volunteered to "take care of" serving the papers (Tr., pp. 3,5,6). Appellant thought that Trooper Martin's agreeing to serve the papers was the "end of it" (Tr., p.8), and the papers were in fact served by the State Police (Tr., p. 7). The entire September 10, 2004, scenario apparently took just a few minutes and Appellant was satisfied that the Magistrate's needs had been met: ". . . When Trooper Martin made the statement that he would take care of it, that was the end of it and we all went our separate ways" (Tr., p.8). The clear inference to be drawn from the evidence presented at the show cause hearing is that even though there was some debate between Appellant and Magistrate Earle about priorities, the issue appears to have been resolved by the State Police agreeing to serve the papers; the papers were served and Appellant was able to have his meeting. It is clear, notwithstanding any other inference that can be drawn from the evidence, that Appellant did not *refuse* to serve the papers, but only that he wanted to finish his meeting before he did so (Tr., pp. 2-3, 5-6).

**ASSIGNMENT OF ERRORS RELIED UPON/MANNER
IN WHICH THEY WERE DECIDED IN THE CIRCUIT COURT**

1. Appellant assigns as error the Circuit Court's failure to provide him, in this criminal contempt proceeding, his constitutionally-guaranteed right to a jury trial.
2. Appellant assigns as error the Circuit Court's failure to provide him any notice, or otherwise advise him, that he was the subject of, or even involved in, a contempt proceeding, and that he may be thereby subject to sanctions or imprisonment.
3. Appellant assigns as error the Circuit Court's failure to provide for prosecution by a prosecuting attorney.
4. Appellant assigns as error the Circuit Court's conducting a criminal contempt show cause hearing without application of the rules of evidence applicable to criminal proceedings.
5. Appellant assigns as error the Circuit Court's finding of criminal contempt, under §61-5-26(d), *West Virginia Code*: (A) when Appellant's alleged disobedience was not of an order of the Circuit Court, but of an order of the

Magistrate Court, and (B) when there was, in fact, no "order" directing Appellant to take certain action.

6. Appellant assigns as error the Circuit Court's finding of criminal contempt when the evidence was insufficient to justify such a finding beyond a reasonable doubt.

None of the above errors were discussed in the Circuit Court. The only Circuit Court proceeding was the brief show cause hearing attended by Appellant and Magistrate Earle; no attorneys were present, and the only on-the-record ruling was the Circuit Court's finding that Appellant was guilty of criminal contempt, in violation of §61-5-26, *West Virginia Code*.

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DISCUSSION OF LAW

I.

THE CIRCUIT COURT ERRED IN FAILING TO PROVIDE APPELLANT, IN THIS CRIMINAL CONTEMPT PROCEEDING, WITH HIS CONSTITUTIONALLY-GUARANTEED RIGHT TO A JURY TRIAL; APPELLANT’S DUE PROCESS RIGHTS WERE THUS VIOLATED.

As a point of departure, it is clear that the contempt proceeding in this case is a criminal contempt proceeding. The Circuit Court, in its Contempt Order of October 12, 2004 (Finding "13"), specifically defines "criminal contempt" (as being "concerned primarily with the dignity of the Court itself"). More importantly, however, the law is clear that a contempt is deemed criminal "if the purpose served by the sanction is to punish the contemner for an affront to the dignity of the Court",

rather than "to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action", *State ex rel. UMWA International Union v Maynard*, 176 W.Va. 131, 135; 342 S.E.2d 96, 100 (1985) [internal quotations and citations omitted]. *UMWA International Union* notes the different sanctions that mark the distinction between civil and criminal contempt: "The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner . . . or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order The appropriate sanction in a criminal contempt case is an order sentencing the contemner to a definite term of imprisonment or an order requiring the contemner to pay a fine in a determined amount", 176 W.Va., at 135; 342 S.E.2d, at 100 [internal quotations and citations omitted].

The instant case is not one wherein the contemner has the ability to "purge" the contempt by complying with a court order; Appellant's alleged contempt already occurred more than a month before the Contempt Order and the alleged contempt could not have been undone or corrected by Appellant. Appellant's sentence was for a definite, unpurgable, term of imprisonment. The fact that

Appellant, by virtue of the Contempt Order, had the ability to elect an alternative sentence (community service) does not change the nature of this case from one of criminal contempt; the alternative sentence would not be a purging of the contempt, and Appellant (had he elected the alternative sentence) still faced jail time if he did not fully complete the 120 hours community service obligation in 80 days. Further, Appellant certainly had no obligation to elect the alternative sentence, nor could he have done anything to purge the contempt and avoid the alternative sentence.

This case being one of criminal contempt, the Circuit Court committed constitutional error in not affording Appellant a jury trial. *Hendershot v. Hendershot*, 164 W.Va. 190, 263 S.E.2d 90 (1980) is clear; a jury trial is guaranteed by the West Virginia Constitution (Article 3, §14, *West Virginia Constitution*) whenever the penalty imposed in a criminal contempt case involves any period of incarceration. *Hendershot* determined that the summary disposition provisions of §61-5-26, *West Virginia Code*, relied upon by the Circuit Court in this case as support for its acting "summarily", is unconstitutional if incarceration is involved. In holding §61-5-26 unconstitutional as stated, *Hendershot* also invalidated those provisions of the earlier case of *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 220 S.E.2d 672 (1975), which formed the basis for the Circuit Court's

procedural approach in finding Appellant guilty of contempt (Contempt Order, Finding "14").

Hendershot has been followed by this Court in *State ex rel. Walker v. Giardina*, 170 W.Va. 483, 294 S.E.2d 900 (1982), a case involving a failure to comply with this Court's order for a stay of execution of circuit court extradition proceedings: "We recognize that *Hendershot v. Hendershot* . . . mandates a jury trial where a criminal contempt is involved and there is the possibility of a determinate jail sentence. While *Hendershot v. Hendershot* . . . dealt with a criminal contempt in a circuit court, its rationale for a jury trial was constitutionally based, and, therefore, must be deemed to impose a similar limitation on our criminal contempt power", 170 W.Va., at 491, 294 S.E.2d, at 908. *Hendershot* remains the law in West Virginia. Post-*Hendershot* contempt cases in which jury trials were not required have been cases involving either *civil* contempt or criminal contempt not involving incarceration. See *State v. Boyd*, 166 W.Va. 690, 276 S.E.2d 829 (1981); *State ex rel. UMWA International Union v. Maynard, supra.*; *In Re Yoho*, 171 W.Va. 625, 301 S.E.2d 581 (1983); *State v. Smarr*, 187 W.Va. 278, 418 S.E.2d 592 (1992). See also *Blakely v. Washington*³, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

³ The recent United States Supreme Court decision in *Blakely* holds that a state court cannot constitutionally enhance a defendant's sentence based on facts not found by a jury beyond a reasonable doubt or admitted by the defendant. *Blakely* would similarly

II.

THE CIRCUIT COURT ERRED IN FAILING TO PROVIDE APPELLANT ANY NOTICE, OR OTHERWISE ADVISE HIM, THAT HE WAS THE SUBJECT OF, OR EVEN INVOLVED IN, A CONTEMPT PROCEEDING, AND THAT HE MAY THEREBY BE SUBJECT TO SANCTIONS; APPELLANT'S DUE PROCESS RIGHTS WERE THUS VIOLATED.

As basic as Appellant's right to a jury trial is his right to have been given notice that he was the subject of a contempt proceeding. The record is clear that Appellant was *never advised* that he was involved in a contempt proceeding. The Show Cause Order of September 15, 2004, merely orders Appellant "to appear before this Court . . . to show cause why he failed to discharge his statutorily required duties in this matter"; the Show Cause Order does not advise that the proceeding was a contempt proceeding. At the show cause hearing of October 6, 2004, the Circuit Court, in its preliminary comments, stated that it "was made aware that on September the 10th the Sheriff of Grant County refused to execute a Department of Health and Human Resources Protective Service Order and removal of the children from the

apply in the case at bar. Appellant has admitted no facts amounting to guilt and there has been no jury finding of such facts. Under *Blakely*, therefore, as well as under *Hendershot*, the failure to provide a jury trial is fatal error.

home", noted that a Show Cause Order had been issued, and told Appellant that the Court "will hear the reasons you have for failure to comply with the Order of the Magistrate Court" (Tr., p.1); Appellant was not advised that the show cause hearing was a criminal contempt hearing or that he was facing imprisonment and fine if found to be guilty of criminal contempt.

It was only at the conclusion of the hearing, after Appellant and Magistrate Earle completed their responses to the Circuit Court's inquiry, that the word *contempt* was first used by the Circuit Court; the Circuit Court then found "that the Sheriff of Grant County is in *contempt* of this Court (emphasis added)" (Tr., p.10).

There is nothing more fundamental to our system of jurisprudence than the right to adequate notice and the right to be heard. "The most basic of the procedural safeguards guaranteed by the due process provisions of our state and federal constitutions are notice and the opportunity to be heard, which are essential to the jurisdiction of the court in any pending proceeding", *Chesapeake & Ohio System Federation, Brotherhood of Maintenance of Way Employees v. Hash*, 170 W.Va. 294, 294 S.E.2d 96 (1982). See also *State ex rel. Staley v. Hereford*, 131 W.Va. 84, 45 S.E.2d 738 (1947). In the case at bar, Appellant obviously received no notice whatsoever that he was being charged with criminal contempt. Even though

Appellant was afforded the right to be heard, that right is virtually useless unless the alleged offender is given notice of what exactly it is that he is being heard *about*. Even Appellant's waiver of counsel at the show cause hearing in this case is rendered essentially void because Appellant, being unaware that he was being charged with criminal contempt, cannot be held to have made an intelligent and valid waiver in the absence of notice of the charges against him and the potential for punishment.

In *In Re Yoho, supra*, a civil contempt proceeding, it was held that a defendant "must be informed about the contempt"; in *Yoho*, the contemner, before being held in contempt for refusing to testify before a grand jury, "was warned that his refusal was contempt of court and could result in his incarceration." See also Rule 42(b), *West Virginia Rules of Criminal Procedure*, requiring, in the case of a non-summary disposition of a criminal contempt charge, notice which "shall state the essential facts constituting the criminal contempt charged and describe it as such." Rule 42(a), *West Virginia Rules of Criminal Procedure*, provides for summary disposition only "for a criminal contempt committed in [the judge's] presence."

In *State ex rel. Walker v. Giardina, supra*, this Court, in charging certain jailers with contempuously disobeying this Court's order, issued a rule "to show cause, if any, why they should not be adjudged in contempt of this Court for disobedience of its order", 170 W.Va., at 486; 294 S.E.2d, at 900. *Schwartz v.*

United States, 217 F. 866 (4th Cir. 1914), arising out of a decision of the United States District Court, then sitting in Philippi, West Virginia, states the standard succinctly: "It is sufficient, in a proceeding for contempt, if the offense is set out, so that the defendant is clearly informed of the charges against him, and whether criminal or civil contempt is alleged, and this is to be determined by examination of the entire record."

An examination of the record in this case discloses, without doubt, that Appellant was not informed that he was being charged with criminal contempt and was not informed that he was facing imprisonment or any other sanction. Obviously, without his knowledge, Appellant's right to a full hearing was also compromised, as was his waiver of the assistance of counsel.

III.

THE CIRCUIT COURT ERRED IN FAILING TO PROVIDE APPELLANT WITH PROSECUTION BY A PROSECUTING ATTORNEY; APPELLANT'S DUE PROCESS RIGHTS WERE THUS VIOLATED.

In addition to the right to a jury trial and the right to proper notice, a person against whom contempt charges are brought has the right to be prosecuted by a state's attorney. *State ex rel. UMWA International Union v. Maynard*, 176 W.Va.,

at 135; 342 S.E.2d, at 100. See also *State ex rel. Walker v. Giardina*, 170 W.Va., at 492; 294 S.E.2d, at 909.

As clear as it has been shown that Appellant was denied a jury trial and the right to notice of the charges against him, it is equally clear that Appellant has been denied his right to be prosecuted by a state's attorney.

IV.

THE CIRCUIT COURT ERRED IN CONDUCTING A CRIMINAL CONTEMPT SHOW CAUSE HEARING WITHOUT APPLICATION OF THE RULES OF EVIDENCE APPLICABLE TO CRIMINAL PROCEEDINGS; APPELLANT'S DUE PROCESS RIGHTS WERE THUS VIOLATED.

In addition to the right to a jury trial, the right to proper notice, and the right to be prosecuted by a state's attorney, a person against whom contempt charges are brought has the right to have the rules of evidence applicable to criminal proceedings apply also to the contempt hearing, *State ex rel UMWA International Union v. Maynard*, 176 W.Va., at 134; 342 S.E.2d, at 99. See also *State ex rel. Browning v. Jarrell*, 156 W.Va. 256, 192 S.E.2d 493 (1972).

No effort was made by the Circuit Court to follow the *West Virginia Rules of Evidence*. The Court for example, permitted Magistrate Earle to testify as to hearsay statements made by both the Child Protective Services worker (Tr., p.4) and

by Trooper Martin (Tr., p.6). The hearing involved no procedural or evidentiary formalities - - again providing no clue to Appellant as to the nature of the charges against him (or that there were any charges against him) and the potential consequences of those charges.

V.

THE CIRCUIT COURT ERRED IN FINDING APPELLANT GUILTY OF CRIMINAL CONTEMPT, UNDER §61-5-26(d), WEST VIRGINIA CODE: (A) WHEN APPELLANT'S ALLEGED DISOBEDIENCE WAS NOT OF AN ORDER OF THE CIRCUIT COURT, BUT OF AN ORDER OF THE MAGISTRATE COURT, AND (B) WHEN THERE WAS, IN FACT, NO "ORDER" DIRECTING APPELLANT TO TAKE CERTAIN ACTION .

As the Circuit Court stated at the conclusion of the show cause hearing, Appellant was found guilty of criminal contempt, in violation of §61-5-26, *West Virginia Code*; more specifically, the applicable subsection of §61-5-26 would appear to be §61-5-26(d) ("disobedience to or resistance of any officer of the court, juror, witness, or other person, to any lawful process, judgment, decree or order of the said court").

A careful reading of §61-5-26(d) discloses that the contempts therein proscribed are contempts related to disobedience to orders, etc., of the court punishing the contempt - - "The courts . . . may issue attachment for contempt . . .

only in the following cases: (d) disobedience to . . . any lawful . . . *order of the said court* (emphasis added)." The contempt alleged to have been committed by Appellant was not a contempt of the Circuit Court's order, but was a contempt of the Magistrate Court's order. The statute does not, therefore, empower a circuit court to pursue a contempt charge unless it is alleged that its own order (the "order of said court") is being, or has been, disobeyed.

There being no statutory basis for the Circuit Court's action in this case, the Circuit Court's contempt finding must fail, irrespective of the other errors committed by the Circuit Court (as discussed above).

In addition to the conclusion that there is no statutory basis for the Circuit Court's action, the contempt finding must also fail because there is no factual basis for a finding that Appellant violated §61-5-26(d) in that there was no "lawful process, judgment, decree or order" for Appellant to have disobeyed or resisted. A review of Magistrate Earle's Order of September 10, 2004, discloses no mandate or direction that the Sheriff of Grant County take any action; service of the order is not addressed therein and the Magistrate's "lawful process and Order" (Tr., p. 10) were, in essence, simply the Magistrate's verbal request, not reflected in the Order, that the Sheriff assist in its execution. An order that has not been entered (or, really, even contemplated) cannot form the basis for a finding of contempt, *Ex parte Buskirk*, 72

F. 14 (1896). The Circuit Court has, in essence, found Appellant in contempt for allegedly violating a statute, §50-1-14(a), *West Virginia Code* (Contempt Order, Finding "10"), and not for violating an order of any court. A contempt finding for violation of a statute cannot be sustained.

VI.

THE CIRCUIT COURT ERRED IN FINDING APPELLANT GUILTY OF CRIMINAL CONTEMPT WHEN THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY SUCH A FINDING BEYOND A REASONABLE DOUBT.

The evidence presented at the show cause hearing is detailed in the Statement of the Facts of the Case, *supra*. A review of that evidence, in the light most adverse to Appellant, shows that Appellant did not refuse to serve the abuse and neglect papers; at worst, he elected to finish certain other business before serving the papers. A fair reading of the evidence, however, can easily lead to the conclusion that the State Trooper agreed to serve the papers, in consideration of the apparent conflict with Appellant's other important business, and that the issue had been thus worked out between the Trooper and Appellant without any contemptuous behavior whatsoever on behalf of Appellant; certainly that inference can easily be drawn from Appellant's belief that the Trooper's agreeing to serve the papers was the "end of it" (Tr., p. 8) -- a solution achieved by two law enforcement officers, both of whom were

cognizant of the Magistrate's wishes and neither of whom intended to treat them contemptuously.

The Circuit Court, in its Contempt Order, found that "the Sheriff of Grant County refused and disobeyed the Order of the Grant County Magistrate Court... ." (Finding "4"). For the reasons stated above, Appellant contends that this finding is unsupported by the evidence. The Circuit Court further found (in Finding "16") "beyond a reasonable doubt, that neither Sheriff Kimble nor his deputies accompanied the DHHR workers . . . to secure the children and serve process upon the parents." There is no question that Appellant did not accompany the DHHR workers, but that is not the issue here. The issue is whether Appellant willfully disobeyed a Magistrate's order, not who actually accompanied the DHHR workers; it is important to note that the Circuit Court's only announced finding "beyond a reasonable doubt" was Finding "16" - - that Appellant did not accompany the DHHR workers. The Contempt Order does not indicate what standard of proof was applied as to Finding "4" - - the alleged disobedience as to the Magistrate's order.

From the four corners of the Contempt Order, it is not apparent that the Circuit Court made the operative finding (Finding "4") beyond a reasonable doubt. Moreover, however, and more importantly, even when viewed in the light most favorable to the Circuit Court (acting, essentially, as a prosecutor), the evidence is

insufficient to establish beyond a reasonable doubt that Appellant committed an act amounting to criminal contempt.

RELIEF PRAYED FOR

Appellant prays that the Circuit Court's Contempt Order finding Appellant to be guilty of criminal contempt be reversed and that this matter be remanded for the entry of an appropriate order vacating such Contempt Order.

REQUEST FOR ORAL ARGUMENT

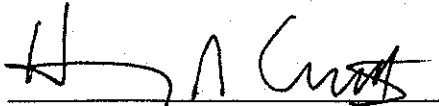
Appellant requests that he be permitted to present oral argument.

NOTE REGARDING PARTIES

Although the Petition for Appeal herein was served upon Grant County Prosecuting Attorney Dennis V. DiBenedetto, Mr. DiBenedetto has advised the undersigned that he consulted with the Clerk of this Court and that, since he was not involved in the Circuit Court proceedings herein, Mr. DiBenedetto need not appear further in this appeal. Although The Honorable Andrew N. Frye, Jr., has not made an appearance in this appeal, a copy of this Brief is being served upon Judge Frye as a party-in-interest.

Respectfully submitted,

CHARLES KIMBLE
By Counsel




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CERTIFICATE OF SERVICE

I, Harry A. Smith, III, counsel for Charles Kimble, Sheriff of Grant County, do hereby certify that on this date I served a true copy of the attached ***Brief of Appellant Sheriff Charles Kimble*** upon The Honorable Andrew N. Frye, Jr., Judge, 21st Judicial Circuit, by depositing true a copy of the same in the United States Mail with sufficient postage attached thereto, addressed as follows:

The Honorable Andrew N. Frye, Jr.
Judge, 21st Judicial Circuit
Grant County Courthouse
P.O. Box 446
107 Grove Street
Petersburg, WV 26857

Dated at Elkins, West Virginia, this the 2nd day of August, 2005.


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