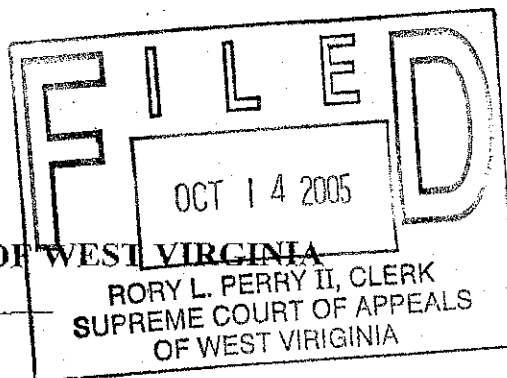


No. 32722

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston



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

BRIEF OF APPELLEE  
JUDGE ANDREW N. FRYE, JR.

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## I. INTRODUCTION

Of central importance to this appeal is the fact that the underlying proceeding is an abuse and neglect case governed by Article 6, Chapter 49 of the West Virginia Code. This Court has recognized that: "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention." Syl. Pt. 1, in part, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991). This Court has further recognized that "The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syl. Pt. 5, Carlita B., 185 W. Va. 613, 408 S.E.2d 365. This clear and unequivocal guidance established by this Court indicates that all stages of an abuse and neglect proceeding, including the removal of children from the home, must be afforded high priority so that abused and neglected children are protected. These fundamental principles apply with equal force to all participants in an abuse and neglect case, including Sheriff Kimble. As a law enforcement officer, Sheriff Kimble was required to serve an emergency removal order, but refused and, thereby, failed to afford the order the priority status established by law.

## II. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE CIRCUIT COURT

The Appellee is Judge Andrew N. Frye, Jr., Circuit Judge for the Twenty-First Judicial Circuit of West Virginia. The Appellant is Sheriff Charles Kimble, the former Sheriff for

Grant County, West Virginia. The appeal in this case arises from contempt proceedings conducted by Judge Frye because Sheriff Kimble refused to serve a removal order in the underlying abuse and neglect proceeding brought pursuant to Chapter 49, Article 6 of the West Virginia Code.

The abuse and neglect case involves four minor children: Megan B., Amber G.B., William Z.Q.B. and Sheehan B. Two adults, Bonnie B. and Allen O., are the adult respondents. Bonnie B. is the mother and custodian of all four of the children. Allen O. lives with Bonnie B., is the father of the youngest child, and is a custodian of all four children. Neither of the respondents in the abuse and neglect case are parties to this appeal.

On September 10, 2004, Grant County Magistrate Willard Earle signed an Order Ratifying Emergency Custody that was orally confirmed by Circuit Judge Philip B. Jordan, in accordance with appropriate procedures for such emergency orders. When he signed the order, Magistrate Earle was acting in his capacity as juvenile referee for Grant County. Sheriff Kimble refused to serve the order.

At a hearing on September 15, 2004, Judge Frye was informed of the refusal. Subsequently, Judge Frye entered a Show Cause Order that ordered Sheriff Kimble to appear more than ten days later on September 29, 2004, to show cause why he failed to discharge his lawful duty to serve the removal order. On September 28, 2004, Sheriff Kimble requested a continuance of the hearing which was granted. The contempt proceeding was rescheduled for October 6, 2004.

At the contempt hearing on October 6, 2004, Sheriff Kimble appeared without counsel and indicated that he was waiving his right to counsel. The Court heard testimony from Sheriff Kimble and Magistrate Earle. The proceedings were recorded by Imojean M. Burgess, Certified Court Reporter.

Subsequent to the hearing, Judge Frye entered a Contempt Order that found that the Order Ratifying Emergency Custody was lawful and that Sheriff Kimble refused to remove the children from an abusive home. Judge Frye also found that Sheriff Kimble's refusal resulted in a delay of the children's removal, and the delay placed the children at increased risk. Judge Frye further concluded that service of the order took priority over Sheriff Kimble's plans for a staff meeting. Based upon the undisputed facts, Judge Frye found that Sheriff Kimble was in contempt of court. He imposed a narrowly tailored remedy that required Sheriff Kimble to write letters of apology to each of the minor children; required him to serve a ten-day jail sentence that was immediately suspended and could be purged by allowing him to complete 120 hours of community service at Burlington United Methodist Family Services Campus; and further ordered him to compose a memorandum to his staff that child abuse and neglect cases are of the highest priority and must be afforded prompt attention.

### III. STATEMENT OF FACTS

On September 10, 2004, Cary Ours (hereinafter "Ms. Ours"), a social worker, interviewed Amber G.B. and Megan B., two of the minor children, at their school. (See

Application for Order Ratifying Emergency Custody, hereinafter "Application"). Megan B. has some type of mental disability, perhaps autism, so her interview did not give Ms. Ours much information. Amber G.B., however, told Ms. Ours that Allen O. regularly beats the children with a leather belt. Amber G.B. also stated that she had been choked by him. Additionally, Amber G.B. reported that her sister Megan B., who is low-functioning, is made to stand in the corner for excessively long periods of time. Amber G.B. further described in detail specific facts showing that the adult respondents drink to excess and use illegal drugs in the children's presence. She also described two instances of domestic violence in detail. Amber G.B. also told Ms. Ours that they are questioned about any interviews with social workers and that she was "really afraid" about going home on October 10, 2004. (See Application).

Based upon these interviews, Ms. Ours applied for an order granting emergency custody to DHHR. The application was presented to Magistrate Earle, serving as Grant County juvenile referee. After properly conducting an *ex parte* hearing, Magistrate Earle found that the children had been subject to "domestic violence, physical (extreme) punishment, emotional trauma, and drug use by the caretakers." (See Order Ratifying Emergency Custody, hereinafter "Emergency Custody Order"). Based upon those specific

findings, Magistrate Earle granted custody to the DHHR, and his order was orally confirmed by Judge Jordan.<sup>1</sup>

After the emergency custody order was entered, Ms. Ours went to Sheriff Kimble's office to obtain the assistance of a deputy to serve the custody order and to assist with the removal. (See Transcript of October 6, 2005 Hearing, p. 4, line 20). The plan was to serve the order before the children arrived home. Based upon Megan B.'s behavior and Amber G.B.'s statements, there was fear for the children's safety, especially if the adult respondents learned about the interviews of the children by Ms. Ours. (See Application).

When Ms. Ours first requested service of the order, Sheriff Kimble refused because he planned to conduct a staff meeting. At the hearing on October 6, 2004, Sheriff Kimble testified that he was concerned about a theft that had occurred in his office, but he did not relay this information to Ms. Ours. (See Transcript, p. 2, lines 16-24; p. 3, lines 1-13). Ms. Ours then returned to Magistrate Earle. In light of Sheriff Kimble's refusal, Magistrate Earle personally went to Sheriff Kimble's office and told him that the order had to be served and that the order took precedence over other matters because it was a child welfare order. (Transcript, p. 5, lines 8-11). However, Sheriff Kimble refused by stating: "I will give you anything after the meeting. I will be done by 5:00 o'clock.' I think I even said, '*short of murder*, my deputies and my tax deputies will be in this meeting.'" (Transcript, p. 2, lines 16-

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<sup>1</sup>West Virginia Code § 49-6-3(c) establishes the emergency procedure which was followed in this case.

20) (emphasis added). He, therefore, placed the safety and removal of the children at a lower priority than his staff meeting, even though he could have sent a deputy of his choice with Ms. Ours. Further, Sheriff Kimble testified that he was upset about the theft, but did not testify that the circumstances of the theft indicated that each and every staff member was under suspicion.

At some point during the exchange between Magistrate Earle and Sheriff Kimble, Keith Martin, a West Virginia State Trooper, appeared. After Sheriff Kimble refused to serve the order, Trooper Martin volunteered to serve it, even though he had come to the courthouse to obtain a search warrant. (Transcript, p. 3, lines 4-7; p. 6, lines 11-20). Although Trooper Martin arranged for service of the order, it was not served until approximately 6:00 or 7:00 o'clock. (Transcript, p. 7, lines 13-15). This delay in service subjected the children to the risk of reprisal from the adult respondents. As set forth in the Application:

Amber said all the children are questioned every day if "Social Workers" have been to the school to talk to them. If they say that someone was there to talk with them, then the children get beaten. Amber said that she was really afraid of going home today, because of finally telling about the things that are going on in her home. (See Application).

There is absolutely no evidence in the record that indicates Sheriff Kimble took any action or even asked about the children after 5:00. In fact, he testified that "[A]nd I don't know whether my deputies went on the mountain. I don't know whether the state troopers went on the mountain or who went on the mountain. I am not sure. I never did know. That

is my story.” (Transcript, p. 3, lines 15-22). Based upon his own testimony, Sheriff Kimble absolved himself of any further duty, or even concern for the children once he refused to serve the Emergency Custody Order.

On September 15, 2004, Judge Frye was informed of Sheriff Kimble’s refusal to serve the Emergency Custody Order. Based upon his legitimate concern for the children’s safety, he entered a Show Cause Order specifying that the Court:

[B]ecame aware of the Grant County Sheriff’s refusal on September 10, 2004, to accompany the Department of Health and Human Resources Child Protective Services Worker to the above referenced children’s residence to assist in the removal of said children and to serve the parents with the Emergency Removal Order entered by Magistrate Earle. (See Show Cause Order signed September 17, 2004).

The next paragraph of the Show Cause Order directed that “Sheriff Kimble is hereby ORDERED to appear before this Court on September 29, 2004 at the hour of 9:00 a.m. to show cause why he failed to discharge his statutorily required duties in this matter.” (See Show Cause Order). The Show Cause Order, signed on September 17, 2004, therefore, expressly notified Sheriff Kimble both of the nature and the factual basis for the hearing.

One day before the scheduled hearing on September 29, 2004, Sheriff Kimble requested a continuance from Judge Frye. The hearing was rescheduled for October 6, 2004. Sheriff Kimble, therefore, had a total of 19 days to obtain counsel or otherwise prepare for the hearing.

At the beginning of the hearing on October 6, 2004, Judge Frye stated on the record that the purpose of the hearing was for Sheriff Kimble "to show cause why he failed to discharge his duties in this matter." (Transcript, p. 1, lines 15-16). After this statement, Judge Frye informed Sheriff Kimble that he was entitled to have counsel represent him.

Judge Frye then directly asked Sheriff Kimble: "Do you desire to have a lawyer to represent you?" (Transcript, p. 1, lines 15-16). In response, Sheriff Kimble said "No, sir." (Transcript, p. 1, line 17). Judge Frye then asked whether he was waiving his right to counsel. Sheriff Kimble responded, "Yes, sir." (Transcript, p. 1, line 18).

After this inquiry, Sheriff Kimble then testified about his refusal to serve the order and assist with the removal. During the course of his testimony, Judge Frye did not question Sheriff Kimble. Rather, he gave Sheriff Kimble wide latitude to explain in his own words why he failed to serve the order. In support of his position, Sheriff Kimble testified that some "major funds" had been stolen from his office and that he suspected a member of his staff. (Transcript, p. 2, lines 13-16). He testified that it was necessary to have all his deputies and tax deputies attend this meeting. Although he suspected an employee, he never took any action against an employee, such as discharging one. (See Contempt Order). Further, Sheriff Kimble gave no indication that the theft posed some type of imminent danger of future harm.

After Sheriff Kimble completed his testimony, Magistrate Earle testified with regard to the Emergency Custody Order. He testified that he personally went to Sheriff Kimble to tell him that order was a child welfare order and that it had to be served.

Magistrate Earle testified:

I said, "But you don't understand. This situation here is a child welfare case. It takes precedence or is very important compared to any other situation that may be going on now. It is very important and it needs to be served." (Transcript, p. 5 lines 9-14).

After Sheriff Kimble refused to serve the order, Trooper Martin then arranged to serve the order. However, he was unable to have the Emergency Custody Order served in the evening, until approximately 6:00 or 7:00 p.m. Therefore, the children were in the care of the adult respondents for a period of several hours, even though they had expressed fear of physical violence if the adult respondents discovered that Amber G.B. and Megan B. had talked with a social worker about the conditions in the home. (See Application).

#### IV. ARGUMENT

**A. The Type and Purpose of the Sanctions Identifies this Contempt Matter as Civil in Nature.**

This Court has recognized that "contempts need not be wholly civil nor altogether civil." Floyd v. Watson, 163 W. Va. 65, 70, 254 S.E.2d 687, 690 (1979). This Court has further recognized that: "The same act may constitute both civil and criminal contempt and contempts may be neither wholly civil nor altogether criminal but may partake of the characteristics of both." Hendershot v. Handlan, 162 W. Va. 175, 178, 248 S.E.2d 273, 275

(1978). The underlying act itself does not determine whether the contempt matter is criminal or civil.

The purpose of the sanctions, rather, determines whether the contempt is classified as civil or criminal. This Court has held that: "Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting or assuring the right of that party under the order, the contempt is civil." Syl. Pt. 2, State ex rel. Robinson v. Michael, 166 W. Va. 660, 276 S.E.2d 812 (1981).

In addition to the purpose of the sanction, the type of sanction imposed determines whether a contempt is classified as civil or criminal. This Court held that:

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. Syl. Pt. 3, Robinson.

Further identifying the differences between civil and criminal contempt, this Court held that "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." Syl. Pt. 5, Robinson. Therefore, a criminal contempt sanction is one that imposes a definite term of imprisonment with no method except an appeal to avoid the sentence. Similarly, a fine set for a specified amount constitutes an appropriate

criminal contempt sanction. These remedies are distinct from a civil contempt sanction which permissibly involves a jail sentence that may be purged by the performance of a specific act.

The first sanction imposed by Judge Frye, a letter of apology to each of the children, plainly indicates that Judge Frye imposed the contempt sanctions for the benefit of the four minor children who were lawfully entitled to protection from their abusive parents. Secondly, Judge Frye required Sheriff Kimble to compose a memorandum to his staff that clearly identified child abuse and neglect cases as the highest priority. This second sanction was a remedial measure by Judge Frye to ensure that any children similarly situated to the children placed at risk in this case would be afforded the protection established by law. Because the sanctions serve to vindicate the rights of the children and protect the rights of other children who would be the subject of future emergency removal orders, the contempt in this case was clearly civil in nature.

Judge Frye also ordered a limited period of incarceration, but immediately suspended the sentence to allow Sheriff Kimble to purge himself of the contempt by performing community service at the Burlington United Methodist Family Services Campus. The fact that the contempt could be purged, the primary feature of an incarceration involving civil contempt, squarely categorizes the contempt as civil, rather than criminal. Sheriff Kimble has argued that the community service is some form of "alternative" sentencing, not a method through which contempt can be purged. This reasoning is flawed, however, because

the community service option allowed Sheriff Kimble to immediately avoid incarceration. Similar to the memorandum to the Sheriff's staff, the purpose of the sanction was to benefit children similarly situated to the children in this case. The incarceration sanction, therefore, clearly demonstrates that the contempt was civil, not criminal, because it could be purged by a reasonable act.

**B. Judge Frye Ensured That Sheriff Kimble Received All the Due Process Protections Required in a Civil Contempt Case.**

The conclusion that the contempt is civil, as opposed to criminal, is not an exercise in semantics. Seeking reversal of the contempt order, Sheriff Kimble argues in his first and third assignment of error that the proceeding was flawed because he was not prosecuted by a prosecuting attorney and because he was not afforded a jury trial. However, the rights to a jury trial and prosecution by a prosecuting attorney only attach to criminal contempt proceedings, not to civil contempt proceedings. Syl. Pt. 2, Hendershot v. Hendershot, 164 W. Va. 190, 263 S.E.2d 90 (1980); Syl. Pt. 2, State ex rel. Koppers Co. v. Int'l Union of Oil, 171 W. Va. 290, 298 S.E.2d 827 (1982).

A limited set of procedural protections applies to civil contempt cases. In civil contempt proceedings, a person may not be incarcerated unless the judge hears sworn testimony. Syl. Pt. 1, Smoot v. Dingess, 160 W. Va. 558, 236 S.E.2d 468 (1977). Civil contempt proceedings must also be placed on the record by a court reporter so that a person incarcerated for civil contempt may appeal the proceedings. Syl. Pt. 2, Smoot, 160 W. Va.

558, 236 S.E.2d 468. These are the due process protections that are afforded a civil contemner.

In these civil contempt proceedings, Judge Frye heard sworn testimony from Sheriff Kimble and Magistrate Earle. The contempt proceedings were transcribed by Imojean M. Burgess, Certified Court Reporter for Judge Frye. (See Transcript). Further, Judge Frye rescheduled the proceedings at Sheriff Kimble's request so that Sheriff Kimble had ample time and opportunity to obtain counsel and prepare for the hearing. However, Sheriff Kimble chose to proceed without counsel. The record unequivocally demonstrates that Sheriff Kimble was afforded all procedural protections due, and that he essentially took the position that he did nothing wrong.

In his fourth assignment of error, Sheriff Kimble further argues that the proceeding was flawed because the rules of evidence were not applied. Sheriff Kimble does not, however, identify any specific statement testified to by Magistrate Earle that prejudiced him. Rather, he only asserts that the informal nature of these proceedings made him unaware that he could be found in contempt. Sheriff Kimble, however, chose to invite this error by waiving his right to counsel and by failing to make any objection to any of the hearsay statements that were admitted.

**C. The Show Cause Order Provided Adequate Notice Because It Informed Sheriff Kimble of the Nature of the Proceedings and the Material Facts.**

In his second assignment of error, Sheriff Kimble argues that he was not provided adequate notice of the proceedings. The basis for his argument is that the word "contempt"

was not included in the Show Cause Order or was not used by Judge Frye at the beginning of the hearing. It is undisputed, however, that Sheriff Kimble received the Show Cause Order and that it informed him that Judge Frye would address Sheriff Kimble's refusal to serve the Emergency Custody Order.

This Court has recognized that an alleged contemner must be provided with notice of the proceedings and an opportunity to be heard. State ex rel. Zirkle v. Fox, 203 W. Va. 668, 510 S.E.2d 502 (1998). This Court has further recognized that an alleged contemner must be provided with notice of the alleged acts that constitute the contempt. P.G. & H. Coal Co. v. Int'l Union, U.M.W.A., 182 W. Va. 569, 390 S.E.2d 551 (1990). However, there are no specific requirements that govern the type of the notice required or the contents of the notice. Because a trial judge has broad discretion to fashion contempt sanctions, it would be impracticable, if not impossible, for a notice to list all possible sanctions.

In this case, it is undisputed that Sheriff Kimble received a copy of the Show Cause Order which notified him of the subject proceedings. The Show Cause Order expressly identified the underlying abuse and neglect case and Sheriff Kimble's refusal to provide a deputy to assist in the removal of the children. Additionally, Sheriff Kimble showed no hesitation to proceed with the hearing. After Judge Frye noted appearances and prior procedure in the case, Judge Frye said he wanted to hear why Sheriff Kimble failed to comply with Magistrate Earle's order. At this point, Sheriff Kimble did not hesitate, nor did he question Judge Frye about the nature of the proceedings. Rather, he launched into his

rationalization for refusing to serve the emergency removal order. Further, Sheriff Kimble was the elected Sheriff of Grant County nearing completion of his second four-year term and was not a novice to legal proceedings. It is disingenuous, if not incredulous, to now argue that he was "surprised" about the possibility that he could be sanctioned for failure to obey a court order.

**D. Sheriff Kimble Cannot Evade the Contempt Findings Because the Emergency Custody Order Was a Lawful Order of the Grant County Circuit Court and Because Sheriff Kimble Was Lawfully Required to Serve the Order.**

As a premise for his fifth assignment of error, Sheriff Kimble argues that West Virginia Code § 61-5-26(d) only allows a court to find a person in contempt for disobedience of the court's own orders. This premise, however, misstates and misconstrues the intent and purpose of West Virginia Code § 61-5-26. With regard to this statute, this Court has held that West Virginia Code § 61-5-26 is a limitation on the ability of a court to *summarily* punish a contemner. State v. Boyd, 166 W. Va. 690, 276 S.E.2d 829 (1981). The instant case did not, however, involve the summary punishment of Sheriff Kimble.

Sheriff Kimble next argues that the finding of contempt fails because the Emergency Custody Order was signed by Magistrate Earle, not Judge Frye himself; and that a court, under West Virginia Code § 61-5-26(d), cannot find a litigant in contempt of a different court's orders. This argument, however, fails to take into account that the Emergency Custody Order was an order of the Grant County Circuit Court. In this case, Magistrate Earle was acting in his capacity as the juvenile referee of the Grant County Circuit Court as

allowed by West Virginia Code § 49-6-3(c). Further, the order was orally confirmed by Judge Jordan, Circuit Judge for Grant County. The fact that the Emergency Custody Order was signed by Magistrate Earle does not allow Sheriff Kimble to escape the conclusion that a valid Grant County Circuit Order was entered and that Sheriff Kimble was in contempt for refusing to serve it.

In his fifth assignment of error, Sheriff Kimble further takes the remarkable position that the Order Ratifying Emergency Custody did not expressly require his office to serve the order. However, the West Virginia Constitution authorizes the West Virginia Legislature to “designate the courts and officers and deputies thereof who shall have the power to issue, execute or serve such writs, warrants or any other process as may be prescribed by law . . . .” W. Va. Const. art. 8, § 12.<sup>2</sup>

Consistent with this grant of authority, the Legislature has established that: “The clerk of every court from whose office may be issued any process, original, mesne, or final, or any *order* or decree to be served on any person, *shall* unless the party interested or his attorney, direct otherwise, *deliver the same to the sheriff* or other proper officer of the county for

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<sup>2</sup>Article 8, Section 12 of the West Virginia Constitution states in full: The Legislature may designate the courts and officers or deputies thereof who shall have the power to issue, execute or serve such writs, warrants or any other process as may be prescribed by law, and may specify before what courts or officers thereof such writs, warrants or other process shall be returnable. The Legislature may also designate the courts and officers or deputies thereof who shall have the power to admit persons to bail. No person exercising such powers shall be compensated therefor on a fee basis.

which the court is held, if it is to be executed therein . . .” W. Va. Code § 56-3-6<sup>3</sup> (emphasis added). The Legislature has further established that “It shall be the duty of each sheriff to execute all civil and criminal process from any magistrate court which may be directed to such sheriff . . .” W. Va. Code § 50-1-14(a)<sup>4</sup> (emphasis added). Therefore, it is the lawful duty of the sheriff to serve orders even when an order does not expressly direct a deputy sheriff to serve the order.

When confronted with this type of refusal to carry out judicial orders, this Court has recognized that a court may impose contempt sanctions upon law enforcement officers who fail to perform their lawfully prescribed duty in a particular case. When two deputy sheriffs

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<sup>3</sup>West Virginia Code § 56-3-6 provides in full: The clerk of every court from whose office may be issued any process, original, mesne or final, or any order or decree to be served on any person, shall, unless the party interested, or his attorney, direct otherwise, deliver the same to the sheriff or other proper officer of the county for which the court is held, if it is to be executed therein, and if it is to be executed in any other county, shall enclose the same in an envelope properly addressed to the sheriff or other proper officer thereof, pay the postage thereon and mail it in the post office. Documentation of service of process will be according to rules promulgated by the supreme court of appeals.

<sup>4</sup>West Virginia Code § 50-1-14(a) states: It shall be the duty of each sheriff to execute all civil and criminal process from any magistrate court which may be directed to such sheriff. Process shall be served in the same manner as provided by law for process from circuit courts.

Subject to the supervision of the chief justice of the Supreme Court of Appeals or of the judge of the circuit court, or the chief judge thereof if there is more than one judge of the circuit court, it shall be the duty of the sheriff, or his or her designated deputy, to serve as bailiff of a magistrate court upon the request of the magistrate. Such service shall also be subject to such administrative rules as may be promulgated by the Supreme Court of Appeals. A writ of mandamus shall lie on behalf of a magistrate to enforce the provisions of this section.

disobeyed an orally (telephonic) issued stay order of this Court and released a prisoner to Florida officials, this Court found that the deputies were in contempt. State ex rel. Walker v. Giardina, 170 W. Va. 483, 294 S.E.2d 900 (1982). Although the facts of Walker do not involve an abuse and neglect case, Walker is relevant to the instant case because it unequivocally requires deputy sheriffs to execute or carry out lawfully issued orders in particular cases at the necessary times. Walker is also applicable to this case because it upheld the validity of oral orders. In this case, Magistrate Earle's statements to Sheriff Kimble were further lawful orders that Sheriff Kimble chose to ignore.

**E. The Undisputed Evidence Is More than Sufficient to Support the Finding That Sheriff Kimble Was in Contempt of Court.**

In his last assignment of error, Sheriff Kimble argues that the evidence was insufficient to find in him in criminal contempt of court. Assuming, *arguendo*, that this matter constituted criminal contempt, the standard of proof required is guilt beyond a reasonable doubt. State ex rel. Continental Coal Co. v. Bittner, 102 W. Va. 677, 136 S.E. 202 (1926). In challenges to the sufficiency of the evidence in criminal cases: "[T]he relevant inquiry is whether, after *viewing the evidence in the light most favorable to the prosecution*, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, in part, State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995) (emphasis added).

It is undisputed that Ms. Ours brought the order to Sheriff Kimble's office to be served so that the children could be removed either prior to their return home or immediately

when they returned home. Sheriff Kimble admits that he refused to serve the order before his staff meeting, even though Magistrate Earle told him it was a child welfare order and that it needed to be served right away. Under the facts of this case and because the order was an Emergency Custody Order, Sheriff Kimble's refusal to serve the order at the time directed was clearly sufficient to find that Sheriff Kimble was guilty of contempt beyond a reasonable doubt.

Sheriff Kimble has further attempted to rationalize and minimize his actions by arguing that he believed Trooper Martin agreed to serve the order. This argument is flawed because Trooper Martin only volunteered to serve the order after Sheriff Kimble refused. At the hearing, Sheriff Kimble testified:

I said, "I will give you anything after the meeting. I will be done by 5:00 o'clock." I think I even said, "Short of murder, my deputies and tax deputies will be in this meeting."  
(Transcript, p. 2, lines 17-20).

Only after this emphatic refusal did Trooper Martin volunteer to serve the order. Viewing the evidence in its entirety, it is easily concluded that Sheriff Kimble flatly and knowingly refused to serve the order and, therefore, was in contempt.

When reviewing the factual sufficiency for cases involving civil contempt, this Court held that: "[T]he underlying factual findings are reviewed under a clearly erroneous standard . . ." Syl. Pt. 1, in part, Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996). Sheriff Kimble's own testimony indicates that he refused to serve the order at the directed time, and his refusal to do so resulted in an increased risk to the children. Additionally,

Magistrate Earle's testimony confirms the salient feature of Sheriff Kimble's own testimony – he chose to place the Emergency Custody Order at a lower priority than his staff meeting. The record, therefore, provides ample support for the finding that Sheriff Kimble was in contempt and for the conclusion that Judge Frye did not clearly err when he made this finding.

#### V. CONCLUSION

Although Sheriff Kimble has attempted to rationalize and minimize his refusal to carry out a court order, Judge Frye's finding of contempt was correct because Sheriff Kimble refused to afford the Emergency Custody Order the priority status accorded to it by law. The remedial purpose of the contempt sanctions imposed by Judge Frye was to ensure that emergency custody orders that protect the children, in abuse and neglect cases, would be promptly carried out and enforced. The purpose and the type of sanctions imposed point to one conclusion: this contempt matter was civil in nature. Therefore, the procedural errors claimed by Sheriff Kimble do not provide a basis to reverse the Contempt Order.

WHEREFORE, the Appellee, Judge Andrew N. Frye, Jr., respectfully requests that this Court affirm the finding of civil contempt and the imposition of sanctions as set forth in the Contempt Order.

HONORABLE ANDREW N. FRYE, JR.,  
Circuit Judge  
Appellee

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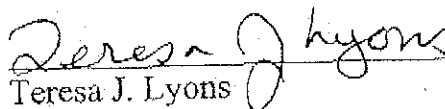
Counsel for Appellee Frye

CERTIFICATE OF SERVICE

I, Teresa J. Lyons, do hereby certify that I served a true and correct copy of the foregoing *Brief of Appellee Judge Andrew N. Frye, Jr.*, by U.S. First Class Mail, postage prepaid, this 14<sup>th</sup> day of October, 2005, upon the following:

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