

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 636

September Term, 2016

MATT P. LAVINE

v.

STATE OF MARYLAND

Arthur,
Leahy,
Reed,

JJ.

Opinion by Leahy, J.

Filed: May 17, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Matt P. Lavine (“Appellant”) is an attorney licensed to practice in the State of Maryland. He represented Lewis Moise, who was scheduled to stand trial for criminal charges in the Circuit Court for Worcester County on February 16, 2016. Appellant motioned the court to reschedule the trial because he had another trial in Anne Arundel County on February 17, 2016. On February 4, 2016, the court denied the motion. The next day, Appellant motioned the court to reconsider. On Friday, February 12, 2016, the court denied that motion as well.

Appellant and his client both failed to appear on February 16. After the case was called, the circuit court found by clear and convincing evidence that Appellant was in constructive criminal contempt, but indicated that it would set a date for a hearing at which Appellant could purge himself. One week later, the court issued a written order clarifying that it found Appellant in *direct* criminal contempt by clear and convincing evidence, but still deferred imposing sanctions until Appellant’s scheduled hearing.

Nearly two months later, the court held a hearing to consider Appellant’s direct criminal contempt. At the outset of the hearing, Appellant, through counsel, challenged the court’s failure to permit him discovery and complained that the court had not followed the proper procedure for either direct or constructive criminal contempt—the court had not issued a show cause order or followed Maryland Rule 4-202 informing Appellant of his right to counsel or right to confront witnesses. The court responded that the hearing would no longer be limited to sentencing—as it had planned originally—so “[i]n effect,” Appellant would get his “quote, full-blown hearing, unquote.” Appellant asked the

presiding judge to recuse himself based on the fact that he was the judge who found Appellant in contempt originally. The judge declined to do so and denied the remainder of Appellant’s motions before proceeding to hear testimony from three witnesses—including Appellant himself. The court then found Appellant guilty of constructive criminal contempt beyond a reasonable doubt and imposed a sanction of \$1,000. The court offered to strike the finding of contempt if Appellant would pay his fine and waive his right to appeal. Appellant declined the court’s offer and filed his timely appeal to this court.

Appellant presents three questions for our review.¹ But on appeal, the State concedes that the circuit court failed to follow the procedures for imposing contempt sanctions set out in the Maryland Rules by failing to provide Appellant adequate notice or afford him his jury trial right. We agree with both parties on this point. We hold that the circuit court erred by not following the procedures required by Maryland Rules 15-203 through -207 and affording Appellant his full panoply of due process rights.

DISCUSSION

Appellant spent much of his briefing and time at oral argument re-litigating factual disputes from his contempt hearing. Because we agree that the circuit court committed

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1. “Did the prosecutor’s failure to call an active case and the court’s failure to determine whether a case was at issue preclude the obligation of the Appellant to appear?”
2. “Were the lower court’s errors in applying Maryland law harmless?”
3. “Was the finding of contempt supported by the law and facts and free of prosecutorial and judicial misconduct?”

reversible legal error, we will not address Appellant’s factual complaints.

Appellant’s legal arguments largely mirror those made by his counsel at the April 20 hearing before the circuit court. The State outlines many of these same infirmities in its own brief, conceding that the circuit court committed reversible error by not sanctioning Appellant summarily or, alternatively, issuing a summons pursuant to Maryland Rules 15-204 and -205 and providing Appellant his jury trial right pursuant to Maryland Rules 15-204, -205 and 4-246.

Maryland Rules §§ 15-201 through -208 govern contempt proceedings in Maryland. *King v. State*, 400 Md. 419, 431 (2007). Maryland “recognize[s] two forms of contempt—direct and constructive—and two types of each form—criminal and civil. Direct contempt is committed in the presence of the trial judge or so near to him or her as to interrupt the court’s proceedings, while constructive contempt is any other form of contempt.” *P. Smith v. State*, 382 Md. 329, 338 (2004) (citations omitted). In a proceeding for criminal contempt—as opposed to civil—a contemnor is due “additional criminal safeguards.” *State v. Roll and Scholl*, 267 Md. 714, 730 (1973). For instance, “[t]he burden of proof is increased,” and “the accused cannot be compelled to testify against himself[.]” *Id.* at 731. This is because “[c]riminal contempt is a crime in every fundamental respect.” *Mitchell v. State*, 320 Md. 756, 761 (1990). Thus “due process principles ‘will ordinarily require that a person charged with criminal contempt be given certain fundamental rights available to a defendant in any other criminal case[.]’” *Dorsey v. State*, 356 Md. 324, 342 (1999) (quoting *Mitchell*, 320 Md. at 761).

“A long-established exception exists, however, in the case of direct contempt.” *Mitchell*, 320 Md. at 761. Because “direct contempt procedures are designed to fill the need for immediate vindication of the dignity of the court[,]” *Roll and Scholl*, 267 Md. at 733, this exception to normal due process enables courts to sanction blatantly contemptuous behavior promptly and effectively. *Dorsey*, 356 Md. at 343. But the need to exempt ordinary due process “is not required in the case of constructive criminal contempt.” *Id.* Thus, in a constructive criminal contempt proceeding, “the panoply of fundamental due process rights” attaches, *Roll and Scholl*, 267 Md. at 731, as does the statutory right to a jury trial. *Dorsey*, 356 Md. at 348. Because of these vital distinctions, “[w]e must [] fit the contempt into the direct or constructive mold so as to determine what procedures must be adhered to in conducting the proceedings.” *Roll and Scholl*, 267 Md. at 731.

Maryland Rule 15-203 permits a court to impose sanctions summarily against a person who commits direct civil or criminal contempt. When a court finds and announces that a person is in direct contempt of court, it “may defer imposition of sanctions until the conclusion of the proceeding during which the contempt was committed.” *Id.* The court must issue an order of contempt “[e]ither before sanctions are imposed, or promptly thereafter.” Md. Rule 15-203(b). The Court of Appeals has explained that a punishment is “summary” if imposed immediately “without the usual formal procedures.” *J. Smith v. State*, 394 Md. 184, 215 (2006). “The purpose of a summary conviction for direct criminal contempt is to punish immediately the contemnor for his or her behavior and vindicate the

authority and dignity of the court, serving both as a specific and general deterrent.” *P. Smith*, 382 Md. at 338. Although the Rule 15-203 “plainly contemplates” a deferral of sanctions, it only permits a “*de minimis* passage of time. Specifically, the court may defer the imposition of sanctions until the conclusion of the underlying proceeding.” *King*, 400 Md. at 442. But imposing sanctions “weeks after the contumacious conduct ignores the purpose for which sanctions are imposed summarily, i.e., to vindicate the court so that ‘a court . . . [will] not be at the mercy of the obstreperous and uncouth.’” *Id.* (citation omitted, alteration in *King*).

If the court does not sanction a direct contempt summarily, its decision not to do so is an election to forego Rule 15-203 sanctions and proceed under Rule 15-204 instead. *Id.* at 436. Then what began as a direct contempt finding must “be conducted like a constructive contempt proceeding” pursuant to Rules 15-204 through -207. *Id.* at 441. Aside from a delay in the court’s imposition of sanctions, the Court of Appeals has identified other indicators that a trial judge has elected to proceed under Rule 15-204 instead of -203. The fact that a court holds “an independently docketed proceeding in which to dispense sanctions is entirely inconsistent with the concept of summary proceedings.” *J. Smith*, 394 Md. at 215. Additionally, “engag[ing] in an involved colloquy” with the contemnor, permitting the contemnor’s attorney “to present mitigating argument, and solicit[ing] sentencing recommendations” from the State and the contemnor is inconsistent with the summary nature of a proceeding pursuant to Rule 15-203. *Usiak v. State*, 413 Md. 384, 402 (2010). Not even the need to fix an inconsistency in the original

order would permit the circuit court to extend the meaning of the term “summary.” *Usiak*, 413 Md. at 391.

Returning the case *sub judice*, it is clear that the circuit court’s imposition of contempt sanctions was inconsistent with the Maryland Rules and reversible error. At the February 16 hearing when Appellant failed to appear, the circuit court elected to find Appellant in constructive contempt—as opposed to finding Appellant in direct contempt and imposing sanctions summarily—either immediately or “promptly thereafter.” Md. Rule 15-203(b). Additionally, the court applied the wrong standard of proof in its oral ruling on February 16 and its written order that followed—finding Appellant guilty by clear and convincing evidence rather than beyond a reasonable doubt. *See Roll and Scholl*, 267 Md. at 728. The court compounded its errors when, in its written order, it amended its initial finding of constructive contempt and found Appellant in direct contempt, but deferred sanctioning Appellant until Appellant appeared at a hearing on the issue. If the court wished to find Appellant in direct contempt, Rule 15-203 required it to impose sanctions summarily as part of the underlying case. *See King*, 400 Md. at 435-36. Once the court elected to schedule a hearing to allow Appellant to purge himself, the sanction was no longer summary. The Maryland Rules then required it to proceed under 15-204, treating the case as one of constructive contempt pursuant to Rules 15-205 and -207, and afford Appellant his full panoply of fundamental due process rights,” *Roll and Scholl*, 267 Md. at 731, including his statutory right to a jury trial. *Dorsey*, 356 Md. at 348.

Under Rule 4-212, the clerk of the circuit court must issue a summons that

“advise[s] the defendant to appear in person at the time and place specified or, in the court, to appear or have counsel enter an appearance in writing at or before that time.” Md. Rule 4-212. The clerk must also attach to the summons a copy of the charging document. *Id.* Here, the court did not issue a charging document. As a result, the court failed to provide Appellant adequate notice of the nature of the proceeding. The harm of this error was made clear by the exchange between the court and Appellant’s counsel at the April 20 hearing, when the court first indicated the hearing was limited to sentencing before expanding it to a “full-blown hearing” only after Appellant objected to the proceeding’s nature and scope.

The circuit court likewise erred by overruling Appellant’s objection to the form of notice and Appellant’s request for a recess to prepare his case once the nature of the proceeding became clear. The court erred further by denying Appellant his right to a jury trial pursuant to Rule 4-246. Although the United States Constitution does not require states to provide a jury trial for more minor contempt proceedings, in Maryland, except when the court imposes summary sanctions for direct contempt, statutory law affords contemnors the right to a jury trial. *Dorsey*, 356 Md. at 346-47. Because the court here scheduled a hearing resembling one for constructive contempt, Maryland law required it to provide Appellant a jury trial or to secure a waiver of that right. *Id.*

**JUDGMENT OF THE CIRCUIT
COURT FOR WORCESTER
COUNTY VACATED. COSTS TO
BE PAID BY WORCESTER
COUNTY.**