Notre Dame Law Review

Volume 4 | Issue 8 Article 5

5-1-1929

Contempt and Executive Power to Pardon, Part II

Paul M. Butler

CONTEMPT AND EXECUTIVE POWER TO PARDON

By PAUL M. BUTLER

PART II

Has the executive branch of national or state government the power and authority to interfere with the action of the judicial branch in the preservation of its authority and dignity by the pardon of a contemner of a certain court of the judicial department?

It is a generally admitted principle of law that the executive pardoning power does not extend to civil contempts, and such a proposition has been followed by the courts called upon to decide the question.[1]

The basis for such a conclusion can be deduced from the definition of civil contempt. The proceeding taken in a civil contempt is one that is intended to protect the rights of an individual who has been offended by the contemner. Such a contempt is that of a violator of an injunction, or an order for the payment of a certain sum for the support of children during pendency of divorce actions. In such cases, contempt proceedings are instituted primarily in the interest of the individual for whose protection and benefit the original order was entered, notwithstanding the fact that the violation of such order is a direct affrontery to the court and in derogations of its authority. Thus, it may be seen that one act may be both a civil and a criminal contempt of court.

A well-reasoned and very ably presented discussion of this principle is found in the opinion of Justice Owen of the Supreme Court of Wisconsin in the case of State ex. rel. Rodd vs. Verage,[2] from which we quote:

> "It is argued on behalf of the governor that the pardoning power thus conferred upon him is similar to

1 Re Nevitt, 117 Fed. 448. State ex. rel. Rodd vs. Verage, 187 N. W. (Wis.) 830. Taylor vs. Goodrich, 40 S. W. (Texas) 515. People ex. rel. Brundage v. Peters, 137 N. E. (Ill.) 118.

2 187 N. W. 830-834.

> the power exercised by the King of England. At common law the King exercised the power of pardon in certain, but not in all, classes of contempt cases. He could not pardon 'where private justice is principally concerned in the prosecution of offenders.' Jones' Blackstone, bk. 4. Sec. 445. 'Though the King may remit the punishment due to public justice,—he cannot confer a favor which may deprive another of his subects of a right.' Chitty, Crim. Law, 472. In other words, the King's power to pardon did not extend to those cases where punishment in the nature of contempt was inflicted for the purpose of securing to a suitor private rights which it was the duty of the court to enforce. This is well recognized, and there is no authority to the contrary."

It can be readily seen that the adoption of a contrary principle in this question would defeat the very purpose for which courts were created—the protection of individual rights. The courts would lose the power necessary to the proper and full enforcement of their orders. It is essential, therefore, that the courts possess not only the power and authority to order the commission or omission of certain acts by an individual, but also the means necessary to their complete execution, unrestrained by executive or legislative interference.

The application of the executive pardoning power to criminal contempt has not met with the same unanimity of opinion as in the case of civil contempt. The exact point has not been raised many times, and, in the few instances of record it may be said that it has given rise to a sharp conflict.

It has been decided in the courts of last resort in four states that the power to pardon in case of criminal contempt rests with the governor,[1] and the United States Supreme Court, in an opinion written by able Chief Justice Taft in the case of Ex parte Grossman,[2] decided that the pardoning power of the President under the Constitution extends to criminal contempts of court.

---

1 State of New Mexico vs. Magee Publishing Co., et al, 1924. 224 Pac. (New Mex.) 1928. State ex rel. Van Orden vs. Sauvinet (1872), 13 Am. Rep. (La.) 115. Sharp vs. State (1844) 49 S. W. (Tenn.) 752. Ex Parte Heikey (1899) 4 Smedes & M. (Miss.) 751.

2 Ex parte Grossman (1925) 267 U. S. 87, 45 Sup. Ct. Rep, 332.

On the other hand, the supreme court of Texas in its decision in the case of Taylor vs. Goodrich (1897),[3] is the only court that has directly concluded that executive pardoning power does not extend to contempt, either civil or criminal. The Supreme Court of Wisconsin (1922),[4] and the United States Circuit Court of Appeals (1902),[5] however, in obiter remarks, sustained the principle adopted by the Texas court. The opinion of the United States District court for the Northern District of Illinois in United States vs. Grossman (1924),[1] in which the President's power to pardon criminal contempt was denied, was overruled by the United States Supreme Court in Ex parte Grossman, supra.

Let us first consider in detail the most recent decision of a state court in which the power was upheld—the noted case of Carl C. Magee, New Mexico publisher and editor.[2] He was adjudged guilty of criminal contempt by a district court for the printing, publication and circulation of articles written by him, attacking the district court for its conviction of him for the offense of criminal libel. In its opinion, the court proceeded directly to a discussion of the state's constitutional provision relative to the governor's power of pardon and its applicability to criminal contempt. The court was divided on the question, two to one.

The dissenting opinion of District Judge Ryan is worthy of commendation for its persuasive logic and exhaustic discussion of the question. This able exposition of the principle, together with the obiter dicta of the Supreme Court of Wisconsin in State ex rel. Rodd vs. Verage, sets forth fully the basis for the denial of the executive pardon power in criminal contempts.

This, and cases to which its opinion refers as precedents upon the point, construe the state's constitutional grant of pardoning power as including the power to pardon for criminal contempts of court, upon the theory that criminal contempt is an *offense* within the purview of constitutional provisions granting to the governor power to give reprieves and pardons, after

3 25 Tex. Civ. App. 114, 40 S. W, 515.
4 State ex. rel. Rodd vs. Verage 187 N. W, (Wis,) 830.
5 Re Nevitt 117 Fed. 448.
1 1 Fed. (2nd) 941.
2 Supra.

conviction, for all *offenses*, with the usual exceptions of treason and impeachment.

Both the controlling and dissenting opinions in the Magee case discuss the cases previously decided. A study of the two conflicting opinions of the Supreme Court of New Mexico will prove instructive and enlightening on the propositions herein considered, and will either add to, or subtract from, the weight of cases cited herein and decided before the consideration of this case, according to the individual beliefs and convictions of each reader. To quote one paragraph of the major opinion will suffice to present the position taken by the majority of the court in this case:[1]

> "From all that has been said, we have reached the firm conclusion that criminal contempt is an offense arising from a contumacious act against the authority of the court and is not one against the presiding judge personally. In such an instance, the judge merely represents the sovereignty in the realm of its judicial department of government. The offense is therefore one against the community when considered as a social entity . . . it is one against the state, and the state, being the offended party, has the power to extend grace or forgiveness. That power is exercised through another department of the government, namely, the executive, and when he has granted the same, the subject is freed and the incident closed. In the first instance the sovereign state is represented by its judicial department, acting through the particular court against which the contumacy is directed, and in the second instance, by the executive department, acting through the governor. . . . . In response, it is trite to say that the power to pardon is not inherent in any official, board or body. It is vested in the sovereign people, and they have the power to repose it in any official or body which they deem wise and expedient. In this state, it has been vested in the Governor. The people in the adoption of the Constitution, reposed it in that officer. With the wisdom of such action we are not concerned. Neither does the wisdom or propriety of its exer-

1 224 Pac. 1035.

cise by that department of the state enter into this case. . . . ."

A very forceful paragraph of the dissenting opinion, in which Judge Ryan stresses a very potent objection to the exercise of pardoning power by the executive in cases of contempt, is as follows:[2]

> "The Governor of an American state is not only the repository of those powers constitutionally conferred upon him, but he is the titular head and actual leader of the particular party which put him in office, and as such he is not insensitive to political draughts—a consideration which most strongly denies any intent or purpose on the paprt of those who designed our fundamental law to press upon the judicial process the dead hand of political expediency. On the contrary, a vigorus independent judiciary is the very bulwark of our institutions. The Constitution reflects such a conception of the judiciary. . . . . The question concerns a constitutional existence of power; that granted, it may be exercised in any of the instances above stated and to the frustration of judicial power as indicated. Only, if the extension of the pardon power to criminal contempt be clearly indicated by the language of the Constitution should the pardon in this case be upheld; not by forcible reading that intent into the provision examined."

The obiter remarks of the Supreme Court of Wisconsin in State ex rel. Rodd vs. Verage,[3] raise many of the important questions that must be carefully considered before a correct conclusion can be reached. Limitations necessarily placed upon this discussion prevent a detailed consideration, but the writer briefly presents them to the reader in the words of Justice Owen:[4]

> "Now is it possible that the people intended that executive should possess a veto over the exercise of the power vested in the courts to punish for a contempt and disobedience of their lawful orders? Is not such a power repugnant to the entire governmental scheme of our

2 224 Pac. 1047.
3 187 N. W. 830.
4 187 N. W. 830-841.

> Constitution? Is it not destructive of a power of the judiciary essential to enable it to perform its functions? Does it not make the judiciary a dependent, and not an independent, branch of government? Does it not constitute power in the governor to grant absolution to those who scout and scoff the authority of the court? That such a power would not generally be exercised by the governor may be conceded, but is not the fact that its exercise would have such effect sufficient reason for believing that the people never intended to lodge the power with the Governor? Does not the power to pardon in such cases involve the power to nullify the authority of the court to enforce obedience, just as the power to tax involves the power to destroy? Does not the very purpose of the power, inherent in the courts, negative by the strongest implication the existence elsewhere of authority for its nullification?"

We pass now to a consideration of the decision that gave rise to the preparation of this article . . . State vs. Shumaker.[1] The Supreme Court of Indiana was called upon to pass judgment upon the effect of a pardon extended by the governor to the defendant, who had been previously convicted of an indirect criminal contempt of that court.

In an opinion written by Justice Travis, and concurred in by Justices Myers and Willoughby, and from which Chief Justice Martin and Justice Gemmill dissented, the court held that the pardon given to the contemner was void, because of the want of power on the part of the governor to grant such a pardon. The court concluded that the Governor of Indiana has no further power relating to pardons than that which is derived by him from the Constitution of Indiana and the laws enacted thereunder. The only constitutional or statutory provision relating generally to the scope of the pardoning power is Section 17, Article 5 of the state constitution, which is as follows:

> "He (the governor) shall have the power to grant reprieves, commutations and pardons, after convictions, for all offenses except treason and cases of impeachment,

1 164 N. E. (Ind.) 408.

subject to such regulations as may be provided by law. . . . ."

The court expressly held that a contempt of court is not such an *offense*, as was intended to be subject to the governor's power to pardon, for the following reasons: (a) No jury trial is provided for in trials of individuals accused of contempt of court (and it may be added that changes of venue are not allowed); (b) "In no instance has it been shown to this court by respondent that any jurisdiction has held that any character of contempt is a crime within the meaning of the Constitution" and "such proceedings (as contempt of court proceedings) are summary in character even though presented by information, and are incidental to the proper administration of justice and the unintimidated and unembarrassed functioning of the court;" (c) The Constitution provides that crimes and misdemeanors shall be defined, and punishment therefor fixed by statutes of the state, and not otherwise, and contempt of court is neither so defined nor is punishment therefor fixed.

It was the opinion of the majority of judges

> "that the stability of government as laid out and maintained by the people is best conducted under the division as made by them, that each department exercise its own delegated powers, and that each department, unless otherwise hindered by the Constitution, exercise such inherent powers as will protect it in the performance of its major duty. . . . . By reason of the inherent power of the court to receive a charge of contempt and to try the cause, it has the power to enforce the execution of its judgment, notwithstanding the power to pardon granted to the Executive Department—the Governor."

Thus, it may be seen that the early cases of the state of Louisiana,[1] Tennessee[2], and Mississippi[3] have been strengthened by the addition of the Magee case as an authority, while the early Texas case of Taylor vs. Goodrich[4] has been supplemented by the recent Indiana decision and upheld in the obiter remarks

1 State ex rel. Van Orden v. Savinet, supra.
2 Sharp v. State, supra.
3 Ex parte Hickey, supra.
4 Supra.

of the Supreme Court of Wisconsin[5] and the United States Circuit Court of Appeals.[6]

The authorities cited demonstrate clearly the conflict in opinion, and fail to place on either side of the proposition a clear weight of authority. It is the opinion of the writer that the power of the executive to pardon in cases of criminal contempt should not be recognized, and that the opinions of the Supreme Courts of Wisconsin and Indiana clearly and concisely state what should be the law on this point.

The times are noted for the ever-increasing and alarming disregard for the authority and the dignity of our courts, and every safeguard must be thrown about them to protect them and to preserve popular respect for their power and position in the safeguarding of individual liberties. This can be accomplished only by the exercise by the courts of the powers and means to protect the judicial system from the corrosive and destructive influences of laws which invade the domain of individual liberty and result in a diminishing public faith in, and respect for, governmental agencies, and such exercise by the courts must be free from any interference or control on the part of any other branch of the state or national government.

Such an argument is summed up in the language of the Georgia Court of Appeals in its opinion in the case of In re Fite,[1] which is as follows:

> "The power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith, and the moral influence of the courts is gone and respect for the law is destroyed. Other departments of the government may outlive unjust criticism, and may still render servire to the people, even when unfairly assailed, but when confidence in the courts is gone, respect for the law itself will speedily disappear, and society will become the prey of fraud, violence and crime. The one element in government and society which the people desire above all things else to keep from the taint of suspicion is the administration of justice in the courts. . . . . If courts fail to enforce respect, if they

5 State ex rel. Rodd vs. Verage, supra.
6 Re Nivett, supra.
1 76 S. E. (Ga.) 397-404.

do not strive to preserve their independence and to maintain inviolate their judicial integrity, they will not only lose their own self-respect, but will be recreant to the duty they owe to the state. If the court is scandalized, the integrity of the judges impeached by gross, defamatory libels of their character and their decisions, the consequences are far more hurtful than in cases of direct contempts, committed in their presence."