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ARKANSAS COURT OF APPEALS

DIVISIONS I & IV

No. CV-18-587

TINA DAMRON APPELLANT V. STEWART DAMRON APPELLEE	**Opinion Delivered:** March 13, 2019 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04DR-14-435] HONORABLE BRAD KARREN, JUDGE AFFIRMED

RITA W. GRUBER, Chief Judge

Appellant Tina Damron appeals from an order of the Benton County Circuit Court finding her guilty on five counts of indirect criminal contempt pursuant to Arkansas Code Annotated section 16-10-108 (Repl. 2010). For her sole point on appeal, Ms. Damron contends that the court erred in failing to grant her a jury trial. We disagree and affirm.

Tina Damron and Stewart Damron divorced in 2014. The present contempt action arose out of their divorce case. On October 20, 2017, the circuit court ordered Ms. Damron to appear and show cause as to why she should not be held in contempt and incarcerated pursuant to Ark. Code Ann. § 16-10-108 for failure to comply with the circuit court's previous orders. The order listed at least eight alleged violations of specific court orders arising from the divorce proceedings, the substance of which are not at issue in this appeal. The show-cause hearing was set for December 7, 2017.

At the December 7, 2017 hearing, the following colloquy took place:

THE COURT: Pursuant to Ark. Code Ann. § 16-10-108, [Ms. Damron] is on notice as to the citation of contempt in this order dated October 20th as to which orders the Court is wanting to address. She was advised on October 20th of her right to counsel, her presumption of innocence, her right against self-incrimination, her right to confront and call witnesses and subpoena witnesses. The standard of proof is beyond a reasonable doubt. And this is pursuant to § 16-10-108, contempt is a Class C misdemeanor. Also under § 5-4-401 with the penalties being anything 30 days or less in the Benton County jail and $500 or less in a fine.

MS. DAMRON'S COUNSEL: And, Your Honor, since there are, I believe, eight counts, correct me if I'm wrong, of contempt that puts the maximum punishment range in this case of 240 days, which gets us over the six-month requirement necessary for my client to have a right to trial by jury in this case. We would like to invoke that right.

THE COURT: Denied. Thank you.

MS. DAMRON'S COUNSEL: Your Honor, one final one if I could. This—each one is punishable by up to 30 days but under the inherent powers doctrine,[1] you, of course, have the

[1]In interpreting Ark. Code Ann. § 16-10-108, our supreme court has held that the provisions of the statute are not a limitation on the power of the court to inflict punishment for disobedience of process. *Yarbrough v. Yarbrough*, 295 Ark. 211, 213, 748 S.W.2d 123, 124 (1988) (citing *Morrow v. Roberts*, 250 Ark. 822, 467 S.W.2d 393 (1971)). The supreme court, citing article 7, section 26 of the Arkansas Constitution, has held that the legislature "cannot abridge the power of the courts to punish for contempt in disobedience of their process; the Constitution specially reserved this inherent power in the courts, when delegating authority to the Legislature to regulate punishments for contempts." *Id.* (citing *Spight v. State*, 155 Ark. 26, 243 S.W. 860 (1922); *Ford v. State*, 69 Ark. 550, 64 S.W. 879 (1901)).

authorization to exceed that. We would like to ask for a statutory cap that you plan to go for each of these counts.

THE COURT: We'll see how the evidence comes in. I'll let you know.

MS. DAMRON'S COUNSEL: Thank you, Your Honor.

At the conclusion of the hearing, the court found Ms. Damron guilty of five counts of indirect criminal contempt under Ark. Code Ann. § 16-10-108 and imposed a total of sixty days' incarceration in the Benton County jail, with thirty days suspended.[2] The court also ordered payment of restitution and fines. The order was entered December 7, 2017, and Ms. Damron filed a timely notice of appeal on December 21, 2017.

On appeal, Ms. Damron contends that the court erred in failing to grant a jury trial. Specifically, she argues that the court's refusal to grant a jury trial, along with the refusal to cap the statutory amount of days she could serve in jail, indicates that she may have been sentenced to six months or longer in jail, which she contends triggers her right to a jury trial. In addition, Ms. Damron suggests that the court's refusal to indicate how long it intended to sentence her if she were found guilty was in violation of *Etoch v. State*, 343 Ark. 361, 37 S.W.3d 186 (2001). The State responds that Ms. Damron was not entitled to a jury trial and that she is misinterpreting what *Etoch* requires.

In *Etoch*, the appellant was charged with two counts of contempt arising out of two criminal proceedings in which he was a lawyer. He requested notice from the circuit court

[2]Specifically, Ms. Damron was sentenced to thirty days for one count, ten days each for three counts, and thirty days for another count with thirty days suspended for that count.

of the punishment contemplated for the contempt and was informed—prior to trial—that it was considering a sentence of up to one year and a fine of up to $1000, or both. The appellant requested a jury trial, which was denied. On appeal, the supreme court agreed that the circuit court erred in denying his request for a jury trial:

> "Criminal penalties may not be imposed on an alleged contemnor who has not been afforded the protections that the Constitution requires of criminal proceedings." *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988). However, "petty contempt like other petty criminal offenses may be tried without a jury." *Taylor v. Hayes*, 418 U.S. 488 (1974). "Contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute." *Id.*
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> Mr. Etoch was actually sentenced to only one day in jail on each conviction, with the sentences to run concurrently. The State argued that, because the sentence actually imposed upon Mr. Etoch was less than six months, he was not entitled to a jury trial under the reasoning of *Taylor v. Hayes*, *supra*. We adopted the rule set out in *Taylor v. Hayes* in *Edwards v. Jameson*, 283 Ark. 395, 677 S.W.2d 842 (1984). We noted, however, that "the better practice in cases of criminal contempt is for the trial judge to announce at the outset whether punishment in excess of six months may be imposed. If the judge does not contemplate the imposition of a greater sentence, a jury is not necessary; *otherwise one may be demanded*." *Id.* (emphasis added). Stated in other words, under Arkansas law there is no right to a jury trial in a prosecution for criminal contempt unless the sentence actually imposed upon the contemnor is greater than six months, a sentence greater than six months is authorized by statute, or the trial court announces prior to trial that it is contemplating a sentence greater than six months in the particular case. Under any of these circumstances, the offense can no longer be considered "petty" because the contemplated sentence exceeds six months' imprisonment. *See Medlock v. State*, 328 Ark. 229, 942 S.W.2d 861 (1997).

Etoch, 343 Ark. at 365–66, 37 S.W.3d at 189–90. In *Etoch*, the circuit court had clearly announced prior to trial that it was considering a punishment of up to one year.

As stated in *Etoch*, there is no right to a jury trial in a prosecution for criminal contempt under Arkansas law unless (1) the sentence actually imposed on the contemnor is greater than six months, (2) a sentence greater than six months is authorized by statute, or

(3) the circuit court announces prior to trial that it is contemplating a sentence greater than six months; none of these is present in this case. *Id.* There is no dispute that the sentence imposed on Ms. Damron was less than six months and that the statute at issue[3] did not authorize a sentence in excess of six months. The only question is whether the circuit court announced prior to trial that it was contemplating a sentence greater than six months. Based on the colloquy quoted earlier, we cannot say that the court made such a pronouncement.

Ms. Damron's counsel requested a "statutory cap you plan to go for each of these counts," and the court simply responded, "We'll see how the evidence comes in. I'll let you know." There is nothing to indicate from this colloquy that the court contemplated imposing a sentence greater than six months.[4] While *Etoch* recognizes that "the better practice in cases of criminal contempt is for the trial judge to announce at the outset whether punishment in excess of six months may be imposed," such was not done here. *Etoch*, 343 Ark. at 365, 37 S.W.3d at 189. Nor do we agree with Ms. Damron's argument that the circuit court's "refusal to indicate how long it intended to sentence [her] if found guilty" was in violation of *Etoch*. The only question before us is whether the circuit court announced prior to trial that it was contemplating a sentence greater than six months, and based on these facts, we cannot say that there was such a pronouncement. In so holding, we

[3]Ark. Code Ann. § 16-10-108(b)(1) provides that punishment for contempt is a Class C misdemeanor, and Ark. Code Ann. § 5-4-401(b)(3) (Repl. 2013) authorizes up to thirty days' imprisonment for a Class C misdemeanor.

[4]We note that the abstract does not indicate that Ms. Damron's counsel asked the circuit court to again consider the request.

are simply applying the law as set out in *Etoch* to the facts of this case, and we do not in any way abrogate the inherent power of the circuit court to punish for contempt in disobedience of its orders. *See Yarbrough*, *supra*.

Affirmed.

GLOVER, VAUGHT, and BROWN, JJ., agree.

GLADWIN and HIXSON, JJ., dissent.

KENNETH S. HIXSON, Judge, dissenting. Article 2, section 7 of the Arkansas Constitution unambiguously proclaims, "The right of trial by jury shall remain inviolate, and shall extend to all cases at law[.]" Our supreme court recently vigorously upheld this right by holding, "The right to a jury trial is a *fundamental, constitutional* right that is protected by the Constitution of Arkansas, and procedural rules will not be applied to diminish that right." *Tilley v. Malvern Nat'l Bank*, 2017 Ark. 343, at 15, 532 S.W.3d 570, 578 (citing *Walker v. First Commercial Bank, N.A.*, 317 Ark. 617, 622, 880 S.W.2d 316, 319 (1994)) (emphasis added). While this indispensable fundamental right appears to be clear and inviolate, the majority approves of the circuit court's playing word games with appellant's right.

The issue presented in this appeal is under what circumstance is a person charged with criminal contempt entitled to his or her fundamental constitutional right to a trial by jury. The majority correctly cites *Etoch v. State*, 343 Ark. 361, 37 S.W.3d 186 (2001), as controlling precedent. A person charged with criminal contempt is entitled to a jury trial under three independent circumstances—(1) "the sentence actually imposed upon the

contemnor is greater than six months," (2) "a sentence greater than six months is authorized by statute," or (3) "the trial court announces prior to trial that it is contemplating a sentence greater than six months in the particular case." *Id.* at 365–66, 37 S.W.3d at 190.

It is essential to understand a circuit court's authority to impose a sentence for criminal contempt to appreciate the principles set forth in *Etoch*. There are two sources of that authority granted to circuit courts: (1) statutory authority pursuant to article 7, section 26 of the Arkansas Constitution and (2) its inherent authority. In this case, Arkansas Code Annotated section 16-10-108 provides that every court of record shall have power to punish for contempt of court, and the punishment for contempt is a Class C misdemeanor. A defendant's sentence for a Class C misdemeanor shall not exceed thirty days. Ark. Code Ann. § 5-4-401. Hence, the limit of the circuit court's statutory authority for violating this statute is thirty days. However, our supreme court has repeatedly held that a circuit court's inherent authority granted by the constitution to punish for contempt "committed in the presence or hearing of the courts, or in disobedience of process" cannot be limited by the legislature. *See* Ark. Const. art. 7, § 26; *Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993); *Yarbrough v. Yarbrough*, 295 Ark. 211, 748 S.W.2d 123 (1988). Hence, the circuit court in the case at bar clearly had the inherent authority to sentence appellant for a period in excess of six months.

That brings us to the issues herein. Since the circuit court clearly had the authority to sentence appellant for a period in excess of six months, did appellant have a right to a trial by jury? That is where our supreme court's holding in *Etoch* becomes pertinent and

controlling. Recognizing that circuit courts have two sources of authority, our supreme court in *Etoch* illustrated three different and independent circumstances under which a defendant has a constitutional right to a trial by jury.

The second circumstance—a sentence greater than six months is authorized by statute—is clearly fashioned to provide a right to a jury trial when the source of the circuit court's authority is statutory. If the statute provides for a sentence in excess of six months, then the defendant is entitled to a jury trial. I agree with the majority that this subsection does not apply since the applicable statute herein limits appellant to a thirty-day sentence.

The first and third circumstances—the sentence actually imposed on the contemnor is greater than six months and the circuit court announces prior to trial that it is contemplating a sentence greater than six months in the particular case—are fashioned to provide a right to a jury trial when the source of the circuit court's authority is inherent. I agree with the majority that the first *Etoch* circumstance is not applicable because the actual sentence imposed by the circuit court is not in excess of six months. My disagreement is with the majority's failure to recognize the fundamental constitutional right to a jury created under the third circumstance.

One must appreciate that our supreme court in *Etoch* held that a right to a jury trial for criminal contempt under the circuit court's inherent authority may be created prospectively or retroactively. The first *Etoch* circumstance has a *retroactive* perspective. A reviewing court has the opportunity to review the actual sentence imposed and determine whether the actual sentence exceeded six months. If the answer is yes, the defendant had a

right to a jury trial. However, the third *Etoch* circumstance has a *prospective* perspective. The right to a jury trial attaches at the announcement of a risk that the sentence may be in excess of six months. A defendant should not be required to wait until the end of trial to determine whether he or she was not afforded the constitutional right to a jury trial. The question is then, because the circuit court had the inherent authority to sentence the defendant in excess of six months, did the circuit court announce at the commencement of the contempt hearing that it was contemplating a sentence in excess of six months? If the answer is yes, then the right to a jury trial was instantly created.

The simple issue here is whether the circuit court "contemplated" a sentence greater than six months. One only has to look at the colloquy between defense counsel and the circuit court to ascertain the answer. Appellant requested a jury trial on the ground that "under the inherent powers doctrine, you, of course, have the authorization to exceed [the thirty days provided in the statute]. We would like to ask for a statutory cap that you plan to go for each of these counts." The circuit court ruled, "We'll see how the evidence comes in. I'll let you know." Does the circuit court's ruling, "We'll see how the evidence comes in. I'll let you know," constitute contemplating a sentence of greater than six months?

There are no cases in Arkansas that define "contemplating." Further, *Black's Law Dictionary* does not define "contemplating." As such, one can only look to the common definitions of the word. Below are some common definitions:

- to view or consider with continued attention[1]
- to look at or view with continued attention; observe or study thoughtfully[2]
- look thoughtfully for a long time[3]
- spend time considering a possible future action[4]

When appellant asked the circuit court to limit the sentences to the statutory cap of thirty days as a predicate to a right for a jury trial, the circuit court could have ruled, "Yes, I will cap the sentence at thirty days." Clearly, appellant would not have the right to a jury trial. The court could have ruled, "No, I will not cap the sentence at thirty days." Clearly, appellant would have the right to a jury trial. Instead, the court ruled, "We'll see how the evidence comes in. I'll let you know." Substitute the common definitions of "contemplate" to the words used by the circuit court. Did the circuit court consider the sentencing with "continued attention?" Did the circuit court "observe or study the sentencing thoughtfully?" Did the circuit court "look thoughtfully at sentencing for a long time?" Or perhaps did the circuit court "spend time considering the future action" of a sentence greater than six months? If one takes the circuit court at its word, then the answer to each question

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[1]*Merriam-Webster*, s.v. "contemplate (v.)," accessed March 4, 2019, http://www.merriam-webster.com/dictionary/contemplate.

[2]*Dictionary.com*, s.v. "contemplate (v)," accessed March 4, 2019, http://www.dictionary.com/browse/contemplate.

[3]*Oxford Dictionaries. Oxford University Press*, s.v. "contemplate (v)," accessed March 4, 2019, https://premium.oxforddictionaries.com/definition/english/contemplate.

[4]*Cambridge Dictionary. Cambridge University Press*, s.v. "contemplate (v)," accessed March 4, 2019, https://dictionary.cambridge.org/us/dictionary/english/contemplate.

must be a resounding "yes." This is not a matter of semantics. A defendant's fundamental constitutional right to a jury cannot precariously teeter on the outcome of a word game interjected by the circuit court. Whichever definition one chooses, the circuit court was contemplating a sentence greater than six months. Therefore, under the principles illustrated in *Etoch* and article 2, section 7 of the Arkansas Constitution, appellant had the fundamental, inviolate constitutional right to a trial by jury. Thus, I would reverse.

Gladwin, J., joins in this dissent.

Misty Aaron Grady, for appellant.

Leslie Rutledge, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.