DATE FILED: July 11, 2016 2:35 PM
FILING ID: 1E7B68123966A
CASE NUMBER: 2015CV31960

DISTRICT COURT IN AND FOR THE FIRST JUDICIAL DISTRICT, JEFFERSON COUNTY 100 Jefferson County Parkway, Golden, CO 80401	
On appeal from the Wheat Ridge Municipal Court, Hon. Christopher D. Randall, No. GA14-34553	
Plaintiff-Appellee: CITY OF WHEAT RIDGE by and on behalf of THE STATE OF COLORADO v. **Defendant-Appellant:** WILBURN TAYLOR	▲COURT USE ONLY▲ Case No. 15CV31960 Div. 4
Ty Gee, #19772 HADDON, MORGAN AND FOREMAN, P.C. 150 East 10th Avenue Denver, CO 80203 Tel 303.831.7364 tgee@hmflaw.com Mark Silverstein, #25979 Rebecca T. Wallace, #39606 AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO 303 East Seventeenth Avenue, #350 Denver, CO 80203 Tel 303.777.5482 msilverstein@aclu-co.org; rtwallace@aclu-co.org *Attorneys for Defendant-Appellant Wilburn Taylor*	

Mr. Taylor's Reply Brief

Table of Contents

Table of Contents i

Table of Authorities ii

Introduction 1

Argument 4

I. Mr. Taylor's conviction was obtained in violation of section 18-1.3-702. 4

A. The municipal court failed to give mandated notice to Mr. Taylor. 4

Violation of section 18-1.3-702(2)(a). 4

Violation of section 18-1.3-702(2)(b). 5

B. The municipal court violated section 18-1.3-702(3)(a) and (c). 6

C. The municipal court failed to comply with the requirement of section 18-1.3-702(3)(b) and C.R.C.P. 107 that it notify Mr. Taylor of his rights in a contempt proceeding. 8

II. The court violated Mr. Taylor's constitutional rights by finding him in contempt for failure to pay the court costs. 9

A. Mr. Taylor's guilty plea to the contempt charge was not voluntary, knowing and intelligent. 9

B. The municipal court violated Mr. Taylor's rights to equal protection and due process by convicting and punishing him for contempt because of his inability to pay the court costs. 10

III. The municipal court violated the Colorado Constitution's prohibition against imprisoning debtors. 10

IV. The municipal court violated Mr. Taylor's right to counsel. 10

V. The municipal court engaged in plea bargaining with Mr. Taylor, in violation of his right to fundamental fairness and Colorado law. 11

Conclusion 13

Certificate of Service 14

Table of Authorities

Cases

Bearden v. Georgia,
461 U.S. 660 (1983) 10

Crumb v. People,
230 P.3d 726 (Colo. 2010) 12

In re Marriage of Nussbeck,
974 P.2d 493 (Colo.1999) 9

Lacy v. People,
775 P.2d 1 (Colo. 1989) 9

People v. Galang,
2016 COA 68 7

Tate v. Short,
401 U.S. 395 (1971) 10

Statutes

C.R.S. § 16-7-302(1) 12

C.R.S. § 18-1.3-702 4

C.R.S. § 18-1.3-702(2)(a) 4

C.R.S. § 18-1.3-702(2)(b) 5, 6

C.R.S. § 18-1.3-702(3) 6

C.R.S. § 18-1.3-702(3)(a) 6, 7

C.R.S. § 18-1.3-702(3)(b) 8

C.R.S. § 18-1.3-702(3)(c) 6, 7

Rules

C.R.C.P. 107 8

C.R.C.P. 107(d) 8

Crim. P. 11(f)(4) 12

Other Authorities

Colo. Const. art. II, § 12 10

Colo. Const. art. II, § 25 ..... 10, 12

Defendant-appellant Wilburn Taylor, through his attorneys Haddon, Morgan and Foreman, P.C., in cooperation with the ACLU Foundation of Colorado, respectfully submits this Reply Brief.

Introduction

While abandoning virtually all the municipal court's rationale in its order denying Mr. Taylor's C.M.C.R. 235(c) motion, the government advances arguments that do not improve on the municipal court's rationale. Like the municipal court, the government fails to identify how that court complied with the procedural and substantive protections guaranteed to Mr. Taylor under the United States and Colorado constitutions and the laws of the state of Colorado. The record establishes that the municipal court convicted and imprisoned a homeless and unemployed man for contempt of court because of his financial inability to pay court costs, in violation of his fundamental rights.

Facts

The government does not dispute any of the facts set forth in Mr. Taylor's Opening Brief. We dispute some of the government's facts because they are unsupported by the record.

On page 2 of its Answer Brief, the government makes various "factual" statements relating to the procedures and practices of the Jefferson County Detention Center and the municipal court. The record on appeal provides no support for these statements. Accordingly, they should be stricken. For example, the government states: "Absent a specific request from the defendant to appear in person, the [detention center] does not

transport in-custody defendants to the Wheat Ridge Municipal Court." Ans. Br. 2. As support for this "fact," the government cites to Exhibit 2, page 2, lines 3-6. The cited document says nothing about the detention center's rules or practices. As another example, the government states that "Municipal Court clerks prepare … court documents for the defendants and send them to the [detention center]." Ans. Br. 2. Nothing in the record says anything about the practice of the municipal court's clerks vis-à-vis court documents.

On pages 3 and 6, the government asserts as a fact that before he was released from the detention center, Mr. Taylor entered into two "agreements" with the municipal court. *See* Ans. Br. 3-4. This is a misstatement of fact. The alleged "agreements" are two "Request[s] for Stay of Execution/Promise to Pay" signed by Mr. Taylor and filed with the court. In these pre-printed, form motions, Mr. Taylor asks the municipal court for an order staying execution on its order requiring immediate payment of court costs. The form motion confirms that unless the request for stay is granted, "Fines and costs are due at the time they are imposed by the court" (capitalization altered). Op. Br., Ex. 6, at [1]. It states that a stay of execution is "not guaranteed." *Id.* These motions are hardly "agreements."

On page 8, the government—citing to page 3 of Exhibit 11 of the Opening Brief—states that Mr. Taylor "knowingly and voluntarily pleaded guilty to not paying his court costs, even though he had the ability to do so." This is pure argument. It also is seriously misleading. Page 3 of Exhibit 11 does not state that Mr. Taylor "knowingly and

voluntarily" pleaded guilty. Indeed, nowhere on page 3 did the municipal court expressly *ask* Mr. Taylor whether he wanted to plead guilty to criminal contempt, and nowhere on page 3 did Mr. Taylor expressly plead guilty to criminal contempt, let alone "knowingly and voluntarily." On page 3, the municipal judge makes these statements seeking a response from Mr. Taylor:

> THE COURT: …. So here's how it works, Mr. Taylor. I give you the chance, if you want to do a little bit of jail, to do a little bit of jail and take care of the fine [sic]. So if you admit you didn't pay your fine [sic], yet had the ability to pay the fine [sic], I would give you three days in jail. Or the other thing you can do is have a hearing on this issue, and the hearing would be set out about 60 days, and between then and now, I'd put you on a payment plan. But I will tell you, a lot of guys, when it's only three days, a lot of guys are just doin' it. And I'd give you credit from yesterday [when Mr. Taylor was in jail]. So you got two more days to do. So any questions you have?
>
> MR. TAYLOR: No, sir.
>
> THE COURT: *What do you want to do?*
>
> MR. TAYLOR: I'll, I'll *do the three days*.

Op. Br., Ex. 6, at 3:10-23 (emphasis supplied). Mr. Taylor's statement that he will accept a municipal court's offer that he "do three days" of jail to "take care of the fine"—when no "fine" ever was imposed upon him—hardly is an admission that he knowingly and voluntarily was pleading guilty to criminal contempt.[1] Nor does the statement—"I'll do

[1]On page 3, the municipal court twice referenced Mr. Taylor's entry of a guilty plea, but these references concerned the *underlying offense* for which court costs were

(footnote cont'd on next page)

the three days"—admit that he failed to pay the "fine" despite having "the ability to pay the fine." It is highly misleading to state otherwise.

Argument

I. Mr. Taylor's conviction was obtained in violation of section 18-1.3-702.

A. The municipal court failed to give mandated notice to Mr. Taylor.

Violation of section 18-1.3-702(2)(a). The government argues that the requests for stay of execution on payment of the court costs constituted "agreements" that satisfied section 18-1.3-702(2)(a)'s requirements. This argument is factually misleading and substantially groundless.

To begin with, the requests for stays of execution are not "agreements." They are requests that the municipal court stay execution on the order requiring immediate payment of court costs.

Regardless, subparagraph (2)(a) of the statute provides that when a court imposes a sentence which includes payment of any monetary amount, "the court *shall instruct the defendant as follows*: … If at any time the defendant is unable to pay the monetary amount due, the defendant must contact the court's designated official or appear before the court to explain why he or she is unable to pay the monetary amount …." (Emphasis supplied.)

---

imposed in the first instance. The references did not concern the new charge of criminal contempt.

There is a reason the government fails to quote from either subparagraph (2)(a) or the request for stay of execution to support its argument that the request provides the notice mandated by subparagraph (2)(a). The reason is that the request for stay says *nothing* about the situation where a defendant is unable to pay court costs. To the contrary, the request for stay—which is a municipal court-published form containing blanks for defendants to fill in—*presupposes* that every person requesting a stay *can pay*. *See, e.g.*, Op. Br., Ex. 6, at [1] ("If you are unable to pay in full by the due date noted below, you must pay at least 10% of the balance, complete a payment plan application, and provide supporting documentation ….") (capitalization altered; emphasis omitted).

The advisal on the request for stay also says nothing to assure a penniless defendant that he cannot be jailed for inability to pay. If anything, it suggests there is strict liability for failing to pay, as it advises that if a defendant fails to pay and fails to show up, a warrant will issue. Nor is there anything in the request for stay's advisal that explains the *purpose* of a court appearance in the case of a missed payment. Without that information, an impecunious defendant could easily (and reasonably) conclude that the purpose of coming to court is to get arrested and save the court the trouble of issuing a bench warrant.

Violation of section 18-1.3-702(2)(b). The government argues that the requests for stays of execution satisfied subparagraph (2)(b) as well. This argument fares no better than the one directed at subparagraph (2)(a).

Subparagraph (2)(b) provides that when a court imposes a sentence which includes payment of any monetary amount, "the court *shall instruct the defendant as follows*: If the defendant has the ability to pay the monetary amount as directed by the court … but willfully fails to pay, the defendant may be imprisoned for failure to comply with the court's lawful order …." (Emphasis supplied.)

There is a reason the government in its argument fails to quote from either subparagraph (2)(b) or the request for stay of execution to establish that the request provides the notice mandated by subparagraph (2)(b). The reason is that the request says *nothing* about a defendant's inability to pay court costs or his "willful[] fail[ure] to pay." To the contrary, as noted above, the request for stay presupposes that every person requesting a stay can pay. It does nothing to advise defendants that they can be jailed for failure to pay only if their failure is willful. In short, the written advisal on a pre-printed form motion used by some indigent defendants to request a stay of execution cannot and did not serve as the notice that the statute requires the court to provide.

The municipal court violated subparagraphs (2)(a) & (b) of section 18-1.3-702.

B. The municipal court violated section 18-1.3-702(3)(a) and (c).

Subsection (3) provides that "[i]ncarceration for failure to pay is prohibited" unless certain procedural and substantive protections are afforded to the defendant. Subparagraph (3)(a) provides: "When a defendant is unable to pay a monetary amount due without undue hardship …, the court *shall not imprison the defendant* for his or her failure to pay …." (Emphasis supplied.) Subparagraph (3)(c) provides that "[t]he court

shall not find the defendant in contempt of court … nor order the defendant to jail for failure to pay" unless the court has:

> made findings on the record, after providing notice to the defendant and a hearing, that the defendant has the ability to comply with the court's order to pay a monetary amount due without undue hardship to the defendant … and that the defendant has not made a good-faith effort to comply with the order.

The government argues that neither protection is available unless "the defendant requests and receives a hearing." Ans. Br. 13. This is an all but frivolous "interpretation" of subparagraphs (3)(a) and (c) that leads to "absurd" results, *People v. Galang*, 2016 COA 68 ¶ 34; *see id.* (in interpreting statute, courts "will not construe a statute either to defeat the legislative intent or to lead to an absurd or illogical result") (internal quotations omitted).

The plain-meaning reading of the statute is that a court is prohibited from imprisoning a defendant for failure to comply with an order to pay a monetary amount unless it has made "findings on the record" that the defendant has the ability to pay the monetary amount and has not in good faith tried to comply with the order.

Under the government's remarkable—outlandish—reading of section 18-1.3-702(3)(a) & (c), the procedural and substantive protections against imprisonment for indigency are available to the defendant only if he asks for and is granted a hearing. If he fails to ask for a hearing or if he is not granted a hearing, the government's argument continues, then the municipal court is free to imprison the defendant regardless of his indigency. The government's argument entirely defeats the obvious legislative intent of

ensuring that courts may imprison only defendants who can pay monetary amounts but in bad faith refuse to pay them. It leads to the absurd and illogical result that courts may imprison indigent defendants notwithstanding their inability to pay fines or costs so long as the defendants fail to request a hearing.

The municipal court violated section 18-1.3-702(3)(a) and (c). It made no finding that Mr. Taylor could pay the court costs, yet found him in criminal contempt for failure to pay, and it imprisoned him.

C. The municipal court failed to comply with the requirement of section 18-1.3-702(3)(b) and C.R.C.P. 107 that it notify Mr. Taylor of his rights in a contempt proceeding.

Under section 18-1.3-702(3)(b), the municipal court was required to afford to Mr. Taylor the procedural protections listed in C.R.C.P. 107. Among the protections mandated by C.R.C.P. 107 is notice to the defendant that he has "the right to have the action heard by another judge" and "the right to testify at trial." C.R.C.P. 107(d). The court did not notify Mr. Taylor of these rights.

The government argues the municipal court "satisfied" subparagraph (3)(b) and C.R.C.P. 107(d) by serving Mr. Taylor with a notice to show cause and "accepting his knowing and voluntary plea" to criminal contempt. Ans. Br. 15. Nowhere, however, does the government identify any place in the record where the municipal court gave notice to Mr. Taylor of his right to have the action heard by another judge or to testify at a trial on the contempt charge. This silence is an implicit admission that the municipal court violated section 18-1.3-702(3)(b) and C.R.C.P. 107.

II. The court violated Mr. Taylor's constitutional rights by finding him in contempt for failure to pay the court costs.

A. Mr. Taylor's guilty plea to the contempt charge was not voluntary, knowing and intelligent.

The government concedes that a guilty plea is not knowing, voluntary and intelligent unless "the record … show[s] affirmatively that the defendant understood the *critical elements of the crime* to which [the] plea [was] tendered." Ans. Br. 9 (emphasis supplied); *accord Lacy v. People*, 775 P.2d 1, 5 (Colo. 1989). Then the government pivots. Instead of trying to establish that the municipal court advised Mr. Taylor of, and that he understood, the "critical elements of the crime" to which he pleaded guilty—i.e., criminal contempt—the government instead argues that the municipal court "properly advised [him] of the *true nature of the charge* against him." Ans. Br. 10 (emphasis supplied).

Nowhere does the government identify any place in the record where the municipal court advised Mr. Taylor of the "critical elements" of criminal contempt, i.e., (1) the existence of a lawful order of the court; (2) contemnor's knowledge of the order; (3) contemnor's ability to comply with the order; and (4) contemnor's willful refusal to comply with the order. *See In re Marriage of Nussbeck*, 974 P.2d 493, 497 (Colo. 1999). The failure to identify such an advisement in the record is fatal to the government's argument. Mr. Taylor testified that before pleading guilty to punitive contempt, he did not know these were the elements of the offense. Op. Br., Ex. 8 ¶ 8. Had he known this, he would not have pleaded guilty to contempt. *Id*.

Mr. Taylor's guilty plea was not voluntary, knowing and intelligent. Accordingly, the plea was invalid.

B. The municipal court violated Mr. Taylor's rights to equal protection and due process by convicting and punishing him for contempt because of his inability to pay the court costs.

On pages 20-23 of our Opening Brief, we argued that the municipal court violated Mr. Taylor's rights to equal protection and due process by imprisoning him because of his inability to pay the court costs. In support, we relied principally on *Tate v. Short,* 401 U.S. 395 (1971), and *Bearden v. Georgia*, 461 U.S. 660 (1983). The government does not contest this point and, we submit, has conceded it.

III. The municipal court violated the Colorado Constitution's prohibition against imprisoning debtors.

Article II, Section 12, of the Colorado Constitution prohibits imprisonment of a person for debt. The government argues the municipal court did not violate this prohibition because it imprisoned Mr. Taylor for "a willful refusal to obey a court's order to pay." The argument is a *non sequitur*. There never has been a finding that Mr. Taylor's failure to pay was a "willful refusal." Indeed, the evidence is otherwise: there was abundant evidence Mr. Taylor, an unemployed homeless man with a significant mental-health disability, had no ability to pay the court costs. The court violated Article II, Section 12, by imprisoning him for a debt.

IV. The municipal court violated Mr. Taylor's right to counsel.

Mr. Taylor argued in the Opening Brief that the municipal court violated his right to counsel by failing to advise him properly of his right to counsel. Specifically, we

argued, the municipal court failed to notify Mr. Taylor that he was entitled to an attorney to represent him in pretrial proceedings, including in any proceeding in which he was offered a plea bargain. Op. Br. 25. The court also failed to inquire whether he understood his right to counsel, and failed to determine whether he was waiving his right to counsel. *Id.*

While the government argues the municipal court "properly advised" Mr. Taylor of his right to counsel, Ans. Br. 16, it fails to identify any place in the record where the court advised him of his right to counsel in pretrial proceedings, inquired whether he understood his right to counsel, or determined whether he was waiving his right to counsel. This failure, we respectfully submit, is an implicit concession that the municipal court violated Mr. Taylor's right to counsel.

V. The municipal court engaged in plea bargaining with Mr. Taylor, in violation of his right to fundamental fairness and Colorado law.

The government concedes that the municipal court was prohibited from plea bargaining with Mr. Taylor. It argues, however, that the court did not engage in plea bargaining. Instead, the government says, the municipal court "simply advised Mr. Taylor of the maximum period of incarceration," "indicated that a guilty plea would result in a sentence of three days in jail," and "shar[ed] … its likely sentence." Ans. Br. 18. This is a misleading presentation of what happened.

Like the municipal court in its order denying 235(c) relief, the government avoids discussing what constitutes plea bargaining by a judge. In general, a judge may not "directly or indirectly" communicate to the defendant that a plea agreement should be

accepted or a guilty plea should be entered. *Crumb v. People*, 230 P.3d 726, 731 (Colo. 2010). Plea bargaining by a judge includes threatening a defendant with a more severe sentence if he declines to plead guilty, "mak[ing] a tacit offer of leniency," comparing the potential consequences of pleading guilty versus going to trial, or acting as a legal advisor to the defendant. *Id*.

The record—ignored by the government—overwhelmingly establishes that the municipal court engaged in plea bargaining. After telling Mr. Taylor that it "appear[s] … [he] failed to pay … costs as previously ordered," the court said:

> *So here's how it works, Mr. Taylor. I give you the chance, if you want to do a little bit of jail, to do a little bit of jail and take care of the fine. So if you admit you didn't pay your fine, yet had the ability to pay the fine, I would give you three days in jail.* Or the other thing you can do is have a hearing on this issue, and the hearing would be set out about 60 days, and between then and now, I'd put you on a payment plan. But *I will tell you, a lot of guys, when it's only three days, a lot of guys are just doin' it.* And I'd give you credit from yesterday. *So you got two more days to do* ….

EXHIBIT 11, at 3 (emphasis supplied).

While one-sided, with the municipal court holding all the cards, there is no doubt this was plea bargaining. It was obvious the court was trying to entice Mr. Taylor to plead guilty by offering the carrot of "a little bit of jail" and noting that "a lot of guys" like Mr. Taylor "are just doin'" the time instead of contesting the contempt charge. The municipal court violated Mr. Taylor's right to due process, section 16-7-302(1), C.R.S. (2016), and Colorado Rule of Criminal Procedure 11(f)(4). *See generally* Op. Br. 27-30.

Conclusion

The court should reverse the judgment of the municipal court, and vacate Mr. Taylor's conviction for contempt.

July 11, 2016

Respectfully submitted,

s/ Ty Gee
Ty Gee, #19772
HADDON MORGAN AND FOREMAN, P.C.
150 E. 10th Avenue
Denver, CO 80203
Tel 303.831.7364
tgee@hmflaw.com
In cooperation with the American Civil Liberties Union Foundation of Colorado

Mark Silverstein
Rebecca T. Wallace
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
303 East Seventeenth Avenue, #350
Denver, CO 80203
Tel 303.777.5482
msilverstein@aclu-co.org;
rtwallace@aclu-co.org

Attorneys for Defendant-Appellant Wilburn Taylor

Certificate of Service

I certify that on July 11, 2016, a copy of the foregoing *Reply Brief* was served *via* ICCES upon the following:

Donna L. Schneider
Assistant City Attorney
City of Wheat Ridge
7500 W. 29th Avenue
Wheat Ridge, CO 80033

Gerald E. Dahl
Joseph Rivera
Murray Dahl Kuechenmeister & Renaud LLP
710 Kipling Street, Suite 300
Lakewood, CO 80215

s/ Stephanie Klipp