

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37**

LOVE SHAREE S. MONTGOMERY	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
SYIED DRUMMOND	:	
	:	
Appellant	:	No. 388 MDA 2023

Appeal from the Judgment of Sentence Entered January 11, 2023  
In the Court of Common Pleas of York County Domestic Relations at  
No(s): 1927 SA 2006,  
DRO 89487, PACSES No. 345108463

BEFORE: McLAUGHLIN, J., KING, J., and COLINS, J.\*

MEMORANDUM BY McLAUGHLIN, J.:

**FILED JANUARY 23, 2024**

Syied Drummond appeals the order finding him in contempt for failing to comply with non-financial child support obligations. Drummond argues the court violated his due process right to counsel when it found him in contempt and sentenced him to imprisonment following a hearing at which he appeared *pro se*. We vacate and remand.

In December 2022, the York County Domestic Relations Section ("Domestic Relations Section") filed a petition for contempt against Drummond alleging he violated non-financial child support obligations, that is, that he failed to provide information, failed to appear, and failed to comply with job search requirements.

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\* Retired Senior Judge assigned to the Superior Court.

The court scheduled a hearing on the petition. The order scheduling the hearing stated that Drummond had a right to counsel and, if he could not afford counsel, the Lawyer Referral Service of the York County Bar Association “may be able to provide you with information about agencies that may offer legal services to eligible persons at a reduced fee or no fee.” Order, dated Dec. 6, 2022 (capitalization omitted). The order contained the contact information for the Lawyer Referral Service.

In January 2023, Drummond appeared *pro se*, via videoconference, for the hearing. Drummond’s lack of counsel was not discussed at the hearing. An enforcement officer, Cynthia Prowell, testified that Drummond received notice of a phone enforcement meeting for September 9, 2022, and did not attend the meeting. N.T., Jan. 11, 2023, at 10-11. She further testified Drummond had been ordered to enter the PA CareerLink job search program, but he failed to register. ***Id.*** at 11-12. He also had been ordered to submit eight job applications, and failed to do so. ***Id.*** at 13. Drummond alleged he had not received notice of the orders. ***Id.*** at 14.

The trial court found Drummond in contempt for “failure to appear at the September 9th enforcement appointment [and] failure to comply with the job search requirements.” ***Id.*** at 16. The court sentenced Drummond to 30 days’ incarceration, to run concurrent with his incarceration on another matter. It set a cash purge of \$500 and a work purge of 20 days in the outmate program. The court further sentenced Drummond to 12 months’ probation.

On January 19, 2023, the York County Public Defender filed a motion to reconsider, alleging, among other things, that Drummond's right to counsel was violated when he appeared *pro se* at the hearing, without waiving his right to counsel. Motion to Reconsider Contempt Judgment and Sentence, filed Jan. 19, 2023. In an order dated January 20, 2023, the trial court granted the motion and set a hearing date for February 8. On January 31, 2023, Drummond filed a praecipe to withdraw the motion, and the court ordered that the motion be withdrawn and canceled the hearing. On March 2, 2023, Drummond filed a notice of appeal of the January 11 contempt judgment.

Drummond raises the following issues:

[1.] Did the lower court deny Syied Drummond his right to counsel where it proceeded in the absence of counsel, did not seek or secure any waiver of counsel, and went on to find Drummond in contempt and order him incarcerated?

[2.] Does this Court have jurisdiction over this appeal where the lower court granted Drummond's Motion for Reconsideration but never modified the order in question, Drummond withdrew his request for reconsideration, and Drummond then filed a notice of appeal within 30 days of withdrawing his request for reconsideration?

Drummond's Br. at 4.<sup>1</sup>

We will begin with Drummond's second issue, that is, whether the March 2, 2023, notice of appeal of the January 11 order was timely. Following the

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<sup>1</sup> The trial court ordered Drummond to file a statement of matters complained of on appeal by May 4, 2023, and Drummond filed a Rule 1925(b) statement on May 2, 2023. On April 20, 2023, before receipt of the statement, the court issued its Rule 1925(a) opinion. Because it issued its opinion before receipt of the Rule 1925(b) statement, the court did not address Drummond's issue on appeal, that is, whether the court violated his right to counsel.

filing of the notice of appeal, this Court issued a Rule to Show Cause as to why the appeal should not be quashed or dismissed. We noted the trial court granted reconsideration and then Drummond withdrew the request, and stated it was unclear whether the appeal was timely filed, as it was more than 30 days from entry of the order. We further noted that “the notice of appeal from the January 11<sup>th</sup> order may have been rendered inoperative,” due to the grant of reconsideration. Order, dated Apr. 14, 2023. Drummond filed a response, and this Court discharged the Rule to Show Cause and noted the discharge was not a final determination as to the propriety of the appeal. Order, May 1, 2023.

In his brief, Drummond argues that the time for filing the notice of appeal was tolled when the trial court, within 30 days of the entry of the contempt order, entered its order granting the motion for reconsideration. He maintains the tolling of the time to file a notice of appeal continued until he withdrew his motion on January 31, 2023, because the withdraw resolved the matter. He maintains that his withdrawal of the request for reconsideration triggered the 30-day period for the filing of the notice of appeal.

Drummond further contends that Pennsylvania Rule of Appellate Procedure 1701(b)(3)(ii) does not render the notice of appeal inoperative due to the prior grant of reconsideration. He maintains that the grant of reconsideration itself became inoperative when he withdrew his request for reconsideration. He maintains that “[b]y the time Drummond filed his notice

of appeal . . . the matter of reconsideration had been ‘resolved’ and the original order stood.” Drummond’s Br. at 20.

The Domestic Relations Section argues that the order granting reconsideration, “effectively vacated” the January 11, 2023, contempt order and “any appeal thereof is inoperable.” Domestic Relations Section’s Br. at 3. It argues the only appealable order is the January 31, 2023, order granting withdrawal of the motion for reconsideration, which was based on Drummond’s praecipe to withdraw.

Rule 1701(b)(3) provides that after an appeal has been taken, the trial court may grant reconsideration and a timely order granting reconsideration “shall render inoperative any such notice of appeal . . . theretofore or thereafter filed or docketed with respect to the prior order.” Pa.R.A.P. 1701(b)(3). Further, the Rule provides that “[w]here a timely order of reconsideration is entered under this paragraph, the time for filing a notice of appeal . . . begins to run anew after the entry of the decision on reconsideration, whether or not that decision amounts to a reaffirmation of the prior determination of the trial court[.]” *Id.*

Here, the grant of reconsideration within the 30-day appeal period tolled the time for the filing of an appeal. *See PNC Bank, N.A. v. Unknown Heirs*, 929 A.2d 219, 226 (Pa.Super. 2007). The court did not vacate the underlying order for which it had granted reconsideration, and nothing in the appellate rules required it to do so. When Drummond later withdrew the motion for reconsideration, the tolling ended, and the prior order remained in place. In

this unusual situation, we conclude that his time for filing an appeal of the January 11, 2023, order began to run at the time of the withdrawal. **See** Pa.R.A.P. 1701(b)(3); **cf. Estate of Haiko v. McGinley**, 799 A.2d 155, 159 (Pa.Super. 2002) (finding appeal timely where appellant appealed from the order entered after reconsideration had been granted). Because he filed the notice of appeal after the withdrawal, and within 30 days of the withdrawal, the notice of appeal was operable and timely.

In his first issue, Drummond argues that the trial court erred in finding him in contempt and ordering his incarceration “without first appointing counsel to represent him or effectuating a knowing and voluntary waiver of the right to counsel.” Drummond’s Br. at 11. He argues the contempt proceedings were civil in nature, noting the sentence contained purge conditions, and contends he had a due process right to counsel. He points out that in **Commonwealth v. Diaz**, 191 A.3d 851 (Pa.Super. 2018), this Court broadly stated that “an indigent defendant’s right to court-appointed counsel is triggered in any proceeding in which the court finds there is a likelihood of imprisonment.” **Id.** at 14 (quoting **Diaz**, 191 A.3d at 862). He further argues that he did not waive his right to counsel. He observes that the court failed to elicit information regarding the status of counsel, did not remind him of his right to counsel, and made no attempt to determine whether he waived the right. Drummond argues that his presence at the hearing *pro se*, after being provided with a number at which he could request counsel, is not sufficient to

constitute waiver. He further maintains that the violation cannot be deemed harmless.

The Domestic Relations Section argues that under ***Turner v. Rogers***, 564 U.S. 431 (2011), support obligors who are indigent do not automatically have a right to counsel when facing incarceration in civil contempt proceedings. It argues that Drummond had prior notice and an opportunity to be heard on the evidence, which it alleges were sufficient procedural safeguards. It distinguishes ***Diaz***, noting ***Diaz*** was a criminal case where the Commonwealth sought court-ordered fines and costs. The Domestic Relations Section concedes that, if Drummond has a right to counsel, the record is devoid of any waiver of counsel and therefore the contempt order and sentence should be vacated and the matter remanded.

In ***Diaz***, this Court determined that an indigent defendant had a right to counsel in a civil contempt proceeding where he was found in contempt for a failure to pay court-ordered fines and costs. 191 A.3d at 852. Although the case arose from a criminal case, and thus bore a criminal caption, the contempt proceeding at issue was civil. ***Id.*** at 861. The court analyzed the United States Supreme Court's decision in ***Turner***, which held that "the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child

support order, even if that individual faces incarceration (for up to a year).” 564 U.S. at 448 (emphasis removed), and decisions from other jurisdictions.<sup>2</sup>

The ***Diaz*** Court “declined to impose an automatic right to court-appointed counsel in all civil contempt proceedings.” 191 A.3d at 862. Rather, it held that “an indigent defendant’s right to court-appointed counsel is triggered in any proceeding in which the court finds there is a likelihood of imprisonment.” ***Id.*** at 862; ***see also*** Pa.R.Crim.P. 122(A)(1). Therefore, if at a civil contempt hearing the court determines there is a likelihood of incarceration, “the court must appoint counsel and permit counsel to confer with and advocate on behalf of the defendant at a subsequent hearing.” ***Diaz***, 191 A.3d at 862.

Here, Drummond faced a likelihood of incarceration for civil contempt. He therefore had a right to counsel under ***Diaz***, and he did not waive the right. Accordingly, the court erred in failing to appoint counsel. That the civil contempt in ***Diaz*** arose from the failure to pay court fines rather from a child support matter is irrelevant, as both this case and ***Diaz*** involved civil contempt proceedings where incarceration was likely. We vacate the contempt and sentencing order and remand for the appointment of counsel and a new hearing.

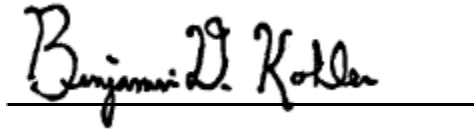
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<sup>2</sup> The ***Turner*** court further concluded that the provision of counsel was not required where “the opposing party or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards,” such as “adequate notice of the importance of the ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings.” ***Turner***, 564 U.S. at 449.



Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.  
Prothonotary

Date: 01/23/2024