4909/5617

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 8, 1995

Mark Fitzgibbons, Director
Detention Center
County Council of Beaufort County
P. O. Drawer 1228
Beaufort, South Carolina 29902-1228

Re: Informal Opinion

Dear Mr. Fitzgibbons:

Your recent letter to Attorney General Condon has been referred to me for reply. You reference the practice of a Family Court judge who "has started to sentence inmates who are [in] arrears in child support to periods of time in local detention facilities, i.e. from 6 pm until 4 or 7 am, when they are to be released to go to work." Your fear is that the "potential of introduction of contraband into the facility and the potential safety of the inmate if he is placed in General Population." Reference is made by you to S.C. Code Ann. Section 24-13-910 which provides that local governing bodies "may" set up a work/punishment program. Specifically, you ask our advice as to the following:

1. Does a judge have the authority to sentence an individual to a program which a local detention facility does not have?

2. Is a jail administrator or sheriff required to operate a program which is not consistent with good security practices?

3. Can a judge mandate to a local government entity that it must establish a program which is not specifically required by state statute?

It is well-settled that the imposition of sentence for contempt is a matter largely within the discretion of the trial judge. Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983) [Lewis, C.J., dissenting]. In addition, as has been stated elsewhere,

> [i]n the absence of legal restrictions, the nature or character of the punishment for contempt is within the discretion of the court, and the court may imprison or fine, or do both, or impose some other penalty, or may discharge the offender absolutely or conditionally.

17 C.J.S., Contempt, § 92. While, on occasion, our Supreme Court has determined that a trial judge's sentence is unreasonable or inconsistent with public policy, see e.g. Beckner v. State, 296 S.C. 365, 373 S.E.2d 469 (1988), State v. Wickenhauser, _____ S.C. _____, 423 S.E.2d 344 (1992), generally speaking, a sentence -- including one for contempt -- is considered discretionary with the sentencing judge.

Furthermore, the authority of the Family Court to sentence for contempt for failure to comply with its child support orders or other orders issued for the well-being of a child is beyond cavil. For instance, in Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982), the Supreme Court commented upon the Family Court's authority to hold an individual in contempt for disobedience of its order regarding the promotion of the best interest of a child. There, the Court put it succinctly:

> [t]he power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.

277 S.C. at 382.

Thus, the question is not so much the authority of the Family Court to issue its Order, punishing for contempt. Instead, what is pertinent is the implementation of the Order or its ability to be carried out. The real question, in other words, is what are the obligations to obey an order of the Court until subsequently modified or vacated, and what are the implications where there is disobedience?

It has generally been held that "[w]here a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." Pratt v. S.C. Dept. of Social Services, 283 S.C. 550, 324 S.E.2d 97 (1984). See also, McCall v. McCall, 303 S.C. 452, 401 S.E.2d 193 (1991); Hicks v. Hicks, 280 S.C. 378, 312 S.E.2d 598 (Ct. App. 1984). In Pratt, the Court of Appeals upheld the Family Court's refusal to hold DSS in

contempt for failure to pay the fees of a guardian ad litem or counsel. Noting that the Legislature had not appropriated funds to DSS for that purpose, and thus it was impossible to carry the Order out, the Court held that contempt would be inappropriate in those circumstances.

But at the same time, the courts often apply the following principle:

> [s]ince an order, judgment, or decree of a court having jurisdiction of the parties and the subject matter cannot be collaterally attacked in the contempt proceedings, but must be obeyed by the parties until it is reversed, modified, or vacated by direct, orderly and proper proceedings, disobedience of an order made by a court within its jurisdiction and power is contempt, although the order may be clearly erroneous, or defendant may sincerely believe that the order is ineffective and will finally be vacated, and even though the act on which the order is based is void.

17 C.J.S., Contempt, § 14. And even though there is authority that a change in conditions subsequent to the Order's issuance may be a defense to contempt, there is also case law to the effect that "facts arising subsequent to a judgment rendering its modification proper cannot be interposed as a defense in contempt proceedings, since the remedy is by motion in the original action." 17 C.J.S., Contempt, § 40.

Thus, one who disobeys any court order, does so at his peril. An Order of the Family Court sentencing an individual for contempt for failure to pay child support -- be that sentence one for work release or otherwise -- must be obeyed, unless or until it is set aside on appeal. This legal principle is particularly applicable to jailers and custodians of prisoners, whose principal duty is to hold a prisoner committed to his custody until either completion of the sentence or a subsequent superseding order is presented. Only recently, we set forth in considerable detail the duty of jailers and corrections officials with respect to orders sentencing individuals to their facilities. This opinion comments at length upon the questions you have raised here, noting as follows:

The law recognizes as a fundamental tenet the idea that:

> [t]he duty of an officer in executing the mandate of a judicial order in the nature of a commitment is purely ministerial and his power with respect thereto is limited and restricted to compliance with its terms.

Firmly established also is the following principle:

> [t]he custodian of a prison on receiving a commitment can do only what the commitment orders him to do, that is, receive and safely keep the prisoner, so that the prisoner may then be discharged in due course of law.

60 Am.Jur.2d, Penal and Correctional Institutions, § 22. Similarly, it is helpful to note that Section 24-5-10 requires a sheriff or jailer to "receive and safely keep in prison any person delivered or committed." (emphasis added). A jailer owes a duty to the public at large. [citations omitted]. As was stated by the Court in Whalew v. Christell, 161 Kan. 747, 173 P.2d 252 (1946),

> ... in carrying out the mandate of a commitment or judicial order the duty of an officer is purely ministerial ... Upon receiving such commitment he can only comply with its terms .... Referencing the foregoing ..., [i]f a mistake or error of law has been made in sentencing an individual, redress would lie with the courts.

Op. Atty. Gen., March 27, 1995.

Thus, the order of the Family Court sentencing an individual must be carried out by the jailer or custodian regardless of any disagreement he might have with it or any belief he might hold that it is invalid. Unless it is reversed or modified in the Courts, it will be deemed to be binding upon the custodian. Regardless of whether a particular order sentencing an individual is within the Court's discretion, the law takes the view that it is, until altered by a higher court. In short, I advise that you must do everything possible to carry out the Court's order unless and until that Order is reversed or modified.

Turning now to your specific questions, I would advise as follows. A Family Court Judge does have "authority" to issue an order of contempt if he or she has jurisdiction of the person and subject matter. The Family Court would have jurisdiction to sentence a contemnor to jail, including work release, for failure to pay child support. If a sentence is "invalid" because a work release program is no longer in existence or is beyond the discretion of the Court, such should be raised by the party adversely affected (here, the father) on appeal. If the Order cannot be carried out by the custodian or jailer because of impossibility or change in conditions (if the program becomes non-existent), such could

be raised as a defense to any contempt citation, but depending upon the facts and circumstances, that defense may or may not be successful. See, authorities cited above. In short, a custodian ordered to carry out a sentence, must do everything in his power to implement the Order of the Court.

As to your second question, again, a jail administrator is deemed by the law as a ministerial officer required to carry out the orders of the Court unless or until such Order is reversed or modified. In addition, the jail administrator is deemed to owe a duty to the public and accordingly, must insure that security and safety are maintained notwithstanding security problems which may be created by virtue of a sentence committing a particular individual to his jail.

As to your third question, any argument that the Court cannot order an act within the discretion of a public body can and should be asserted on appeal. However, such argument cannot justify disregarding the Court's order. Such Order, even though it might require a public body to do a discretionary act, and thus beyond the Court's discretion would still be deemed by the law to be valid, and thus should be obeyed, until vacated or superseded by a higher court.

I am not unsympathetic to your situation by any means. However, the legal consequences of contempt can be severe. Accordingly, your best avenue may be a legislative solution.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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