1981 WL 157803 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 2, 1981

***1** Mr. Louis L. Rosen
Assistant Director
South Carolina Court Administration
South Carolina Supreme Court
Post Office Box 11788
Columbia, South Carolina 29211

Dear Louis:
You have requested the opinion of this office as to the extent of the Probate Court's authority to hold a physician in contempt for refusing to comply with an order to give a mental examination to a person for the purpose of civil commitment. Our conclusion is that the courts do not appear to have such power.

The Probate Courts possess the same broad power to punish contempt of their authority as do the Circuit Courts and the Supreme Court (§ 14-23-310 Code of Laws of South Carolina (1976); see § 14-5-320), but their power extends no farther than the courts' lawful authority to act in given matters. '. . . [D]isobedience of a void Order, Judgment, or Decree, or one issued without jurisdiction of subject matter and parties litigant, is not contempt.' Long v. McMillan, 226 S.C. 598, 86 S.E.2d 477 (1955). See also State v. Holbrook, 274 S.C. 4, 260 S.E.2d 181 (1979). Thus, whether a court could hold a person in contempt for violating one of its orders is dependent upon whether the court had the lawful power to issue the order as to that person.

The statutory provisions pertaining to the examination of persons for purposes of civil commitment do not give the Probate Court the authority to compel a physician to perform a mental examination and to hold him in contempt for his refusal to do so. Under civil commitment procedure, the Court is directed to appoint '. . . two designated examiners [see § 44-23-10(7)], one of whom shall be a licensed physician, to examine the [person in question] and report to the court their findings as to his mental condition and his need for treatment.' § 44-17-530. See also § 44-17-540. Of persons for whom continued hospitalization and a hearing are ordered under § 44-17-410, as amended, the Probate Court is required to 'cause' the examination by two designated examiners one of whom must be a licensed physician. These provisions are directed toward safeguarding the interests of those who might be committed so that a decision on their placement will be based upon a sound medical basis. They impose no duties on physicians in this state in general, and grant the judge no power to compel physicians to examine patients and testify as to their conclusions if they are unwilling to do so.

The Probate Courts also do not have any inherent authority in these matters. Although no South Carolina case appears to have addressed the question presented here, the issue seems to be well-settled elsewhere. Many cases have held that a physician or other expert cannot be compelled to make any examination of an individual or perform any other such service so that he may be able to attend a trial and give his opinion on the matter. 77 A.L.R.2d 1196; 31 Am.Jur.2d Expert and Opinion Evidence § 11; 8 Wigmore, Evidence § 2203(a) (McNaughton rev. 1961); Carter Wallace, Inc. v. Otte, 474 F.2d 529 (2nd Cir. 1972), cert. denied, 412 U.S. 929, 93 S.Ct. 2743, 37 L.Ed.2d 156 (1973); State Highway Commission v. Earl 82 S.D. 139, 143 N.W.2d 88 (1966); Neilson v. Brown, 374 P.2d 896 (Or. 1962); Barnes v. Boatmen's National Bank of St. Louis, 348 Mo. 1032, 156 S.W.2d 597 (1941); Brown County v. Hall, 61 S.D. 568, 249 N.W. 253 (1933); People v. Barnes, 111 Cal. App. 605, 295 P. 1045 (1931); Mount v. Walsh, 118 Or. 568, 247 P. 815 (1926); Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1909); Flinn v. Praire Co. 60 Ark. 204, 29 S.W. 459 (1895). The reasoning behind such a rule was set out as follows, in Burnett v. Freeman, 125 Mo. App. 683, 103 S.W. 121 (1907);

***2** It should be remembered that the duty the expert owes to the state, as a performance of citizenship, rather than a rendering of service to an individual, pertains to an obligation to give the court the benefit of the knowledge he has in store at the time he is called upon. He cannot be required to especially fit himself for lines of inquiry. He should not be expected to make examinations, perform professional service, and the like, for that is not the office of a witness. He could not be compelled to do that any more than an ordinary person, with no knowledge of the facts pertaining to a case, should be required to go and post himself as to become a witness; and so the court said in Ex part Dement, 25 Ala. 397 (25 Am. Rep. 611), that 'nothing we have said is intended to support the proposition that a physician or surgeon could be punished as for a contempt for refusing, unless paid therefor, to make a post mortem examination, or undertake any other operation, requiring skill and special professional training, in order to qualify himself, when desired by a court so to do, to testify in a cause'. 103 S.W. 121 at 123.

Although a few of the above cited cases state that an expert could be paid to perform an examination or experiment before trial, with the possible exception of the Dement case cited in Burnett, none of them provide authority for compelling him to do so under those circumstances.

The opinion of this office is that, the Probate Court does not have the power to compel a physician to perform an examination of a person for purposes of civil commitment, with or without compensation, and thus, it may not hold him or her in contempt for failing to comply with such an order. If we may be of further assistance, please 1et us know.

Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

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