SMU | Dedman School of Law

SMU Law Review

Volume 20 | Issue 2 Article 9

1966

Interpretation of Rule 42 of the Federal Rules of Criminal Procedure - A Further Restriction on the Use of Summary Proceedings

Joseph J. McCain Jr.

Interpretation of Rule 42 of the Federal Rules of Criminal Procedure — A Further Restriction on the Use of Summary Proceedings

I. Proper Procedure for Punishing Contempts—Summary Proceeding or a Hearing?

Courts are universally acknowledged as being vested with the power to punish for contempt,[1] but there has been disagreement concerning the procedure that should be followed. Must there be a hearing with notice, submission of arguments, and perhaps a jury, or can the judge convict the defendant of contempt by the use of a "summary proceeding"—a procedure which dispenses with the formality and delay of a conventional court trial (*e.g.*, issuance of process, service of complaint and answer, holding of hearings, taking evidence, listening to arguments, awaiting briefs, and submission of findings).[2] It is the use of this summary proceeding, with its lack of notice and a hearing, that has prompted criticism.[3]

II. Historical Perspective

The Judiciary Act of 1789[4] provided that courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." The statute placed no restrictions upon the use of the contempt power, and several instances[5] of abuse occurred. A succession of grievances against the arbitrary exercise of the judicial power culminated in impeachment proceedings[6] against Federal District Judge James H. Peck.[7] In 1826, Judge Peck

---

[1] The power to punish for contempts 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. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Ex parte Robinson, 86 U.S. 505, 510 (1873). See also Anderson v. Dunn, 5 U.S. 61, 67 (1821). For a complete list of cases to the same effect, see *Ex parte* Terry, 128 U.S. 289, 303-04 (1888).

[2] Sacher v. United States, 343 U.S. 1, 9 (1951). See also: Annot., 96 L. Ed. 762 (1951) and Annot., 3 L. Ed. 2d 1855 (1958).

[3] See Mr. Justice Black's dissent in Green v. United States, 356 U.S. 165, 194 (1957).

[4] 1 Stat. 73, 83.

[5] Nelles & King, *Contempt by Publication in the United States*, 28 Col. L. Rev. 401, 422-23 (1928).

[6] For a complete record of the impeachment proceedings, see Stansbury, Report of the Trial of James H. Peck (1833).

[7] Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1024 (1923). See also Nye v. United States, 313 U.S. 33 (1940).

had rendered an opinion which was fatal to the claim of a client of Luke Lawless, an attorney. A few days later Lawless published in a newspaper a detailed criticism of Peck's opinion. Peck found the attorney guilty of contempt, sentenced him to one day in jail, and suspended him from practice for eighteen months. Lawless petitioned Congress for Peck's impeachment. The House of Representatives brought impeachment proceedings against Peck, but the Senate acquitted him by one vote. The House, fearing that the acquittal might be construed as favoring Peck's use of the summary power,[8] instructed its Judiciary Committee "to inquire into the expediency of defining, by statute, all offenses which may be punished as contempts of the courts of the United States, and also to limit the punishment for the same."[9] Nine days later a bill was introduced which became the Act of March 2, 1831.[10]

The Act of 1831 seemingly restricted the use of summary proceedings to (1) cases of misbehavior in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) misbehavior by court officers in their official transactions; and (3) disobedience to orders or writs of the courts.[11] For many years the decisions of the Supreme Court recognized that the act imposed these limitations on the court's power to punish summarily for contempt.[12] However, in the 1918 case of *Toledo Newspaper Co. v. United States*,[13] the Supreme Court adopted an entirely differest interpretation of the 1831 statute. A district judge had summarily convicted for contempt a newspaper that had published, during a

[8] Nelles & King, *supra* note 5, at 430.

[9] 7 CONG. DEB., 21st Cong., 2d Sess., Feb. 1, 1831, Cols. 560-61.

[10] Act of March 2, 1831, ch. 99, 4 Stat. 487.

[11] The Act of March 2, 1831, provided:

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistence of any officer of the said courts, party, juror, witness ,or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.
>
> Sec. 2. And be it further enacted, that if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense.

[12] *Ex parte* Robinson, 86 U.S. 505, 511 (1873); *Ex parte* Savin, 131 U.S. 267, 276 (1888); *Ex parte* Cuddy, 131 U.S. 280, 285 (1888).

[13] 247 U.S. 402 (1917).

trial, statements concerning the judge's integrity and fairness. The Supreme Court affirmed the conviction and stated that "there can be no doubt that the [Act of 1831] . . . conferred no power not already granted and imposed no limitations not already existing."[14]

The effect of the *Toledo* decision was to remove "in the presence" of the court as a limitation on the use of the summary power. Possible abuse of the summary proceeding again seemed imminent. However, seven years later, in *Cooke v. United States*[15] the Supreme Court changed its position and returned to the interpretation of the act that had prevailed prior to *Toledo*. In *Cooke*, an attorney, after receiving an adverse judgment in the first of several bankruptcy suits against his client, wrote the court a critical letter, accusing the judge of being personally prejudiced against the client and asking him to refrain from hearing the remaining suits. The judge summarily convicted the attorney for contempt. In reversing the conviction, the Supreme Court declared that summary punishment can only be used when the contempt occurs in "open court."[16] When it occurs elsewhere, due process of law requires that the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.[17]

The holding in the *Cooke* case that a contempt can only be punished summarily when committed in open court was eventually enacted into Rule 42 of the Federal Rules of Criminal Procedure in 1946.[18] Section (a) of that rule restates, in effect, the *Cooke* rule as to summary disposition, providing that: "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the *actual presence* of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."[19]

It can be seen that two requirements must be met before summary punishment can be issued under rule 42(a). First, the contempt must be committed in the "actual presence" of the court, and second, the

---

[14] *Id.* at 418.

[15] 267 U.S. 517 (1924). It is interesting to note that *Cooke* failed to overrule the *Toledo* holding. In fact, *Toledo* was not expressly overruled until 1940 with the Supreme Court's decision in Nye v. United States, 313 U.S. 33 (1940).

[16] *Id.* at 534.

[17] *Id.* at 537.

[18] The Federal Rules of Criminal Procedure, including rule 42, became effective on March 21, 1946. 327 U.S. 821 (1945).

[19] The Advisory Committee on the rules stated that rule 42(a) "is substantially a restatement of existing law, *Ex parte* Terry, 128 U.S. 289 (1888); Cooke v. United States, 267 U.S. 517 (1924)." Notes of Advisory Comm. on Rules, Fed. R. Crim. P. 42(a). (Emphasis added.)

judge must see or hear the conduct constituting the contempt. If both requirements are met, the party committing the contempt can be convicted immediately without being provided the safeguards of notice and a hearing. Summary punishment for such contempts does not deprive the defendant of due process because the judge saw the offense and no amount of explanation could disprove the fact that the contempt was committed. The policy reason behind allowing summary punishment in such situations is the necessity of preserving order in the court room for the proper conduct of business.[20] The court must be able to act instantly to suppress disturbance or violence or physical obstruction or disrespect to the judge which occurs in open court.[21]

Rule 42(b), on the other hand, requires that all contempts not committed in the presence of the court or observed by the judge shall be prosecuted only upon notice and after a hearing.[22] In such an instance the judge does not have personal knowledge of all the facts constituting the contempt, and he must be informed of them by the testimony of others.[23] Due process, therefore, requires that the defendant be given a reasonable opportunity to obtain counsel and prepare a defense.[24]

III. Summary Proceedings Under Brown v. United States

The enactment of rule 42 was looked upon as the final victory in the battle against the abusive use of the summary proceeding. The two requirements of section (a) appeared sufficient to prevent the arbitrary exercise of the summary contempt power. In 1959, however, the Supreme Court's decision in the case of *Brown v. United States*[25] cast doubt upon the application of the rule. A grand jury

---

[20] Cooke v. United States, 267 U.S. 517, 534 (1924).

[21] *Id.*

[22] Rule 42(b) deals with disposition upon notice and hearing:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

[23] Annot., 96 L. Ed. 762, 765 (1951).

[24] *Id.*

[25] 359 U.S. 41 (1959). See also Note, 13 Vand. L. Rev. 400 (1959).

investigating possible violations of the Interstate Commerce Act[26] subpoenaed Brown to testify. He appeared but refused to answer the questions upon the ground of possible self-incrimination. He was taken before a district judge, who told him that he was immune from prosecution and ordered him to return to the grand jury room and to answer the questions. Brown returned to the grand jury but refused to answer the questions. He was again taken before the district court. This time the judge himself repeated the questions to Brown, and when he refused to answer, he was summarily convicted of contempt under rule 42(a) and sentenced to fifteen months imprisonment. Brown contended that rule 42(b) should have been applied; that by depriving him of the safeguards in that rule, he was denied due process of law. The Supreme Court affirmed the conviction, stating that the contempt occurred in the "presence" of the court as required by rule 42(a). The Court reasoned that since a grand jury is merely an appendage of a court and lacks the power to compel a witness to testify, Brown was not guilty of contempt when he first refused to answer the grand jury's questions.[27] When Brown returned to the grand jury room and again refused to answer the questions, in direct disobedience of the court's order, he was for the first time guilty of contempt.[28] Since the disobedience of the court's order did not take place in the actual presence of the court, a contempt proceeding would have been proper at this stage only under rule 42(b). But when Brown refused to answer the questions as propounded by the judge, the Supreme Court concluded that the contempt was then in the court's presence and that it was clearly proper to proceed under rule 42(a).[29]

In a strong dissent Mr. Chief Justice Warren, joined by Justices Black, Douglas, and Brennan, urged that rule 42(a) was not intended to apply in this situation. The Chief Justice stated that in view of the concern long demonstrated by both Congress and the Court over the possible abuse of the summary contempt power, it is obvious that rule 42(a) is reserved for exceptional circumstances.[30]

The Brown decision was reaffirmed one year later in *Levine v. United States*.[31] The court interpreted the procedure authorized by *Brown* as consisting of three steps.[32] First, it is proper for the district

[26] 49 Stat. 543 (1935), 49 U.S.C. §§ 301-27 (1964).
[27] 359 U.S. 41, 49 (1959).
[28] *Id.* at 50.
[29] *Id.* at 51.
[30] *Id.* at 54.
[31] 362 U.S. 610 (1959). See also Rogers v. United States, 340 U.S. 367 (1950); United States v. Curcio, 234 F.2d 470 (2d Cir. 1956), *rev'd on other grounds*, 354 U.S. 118 (1956).
[32] *Id.* at 614.

court to disregard any contempt committed outside its presence. Second, the judge can then ask the questions directly to the witness in the court's presence. Finally, the refusal of the witness to answer can be punished summarily by the judge under rule 42(a) as a contempt committed in the actual presence of the court.

IV. HARRIS V. UNITED STATES

Six years after *Brown* was decided, an identical fact situation reappeared before the court in the case of *Harris v. United States*.[33] Apparently, as a result of a change in the composition of the Court,[34] *Brown* was expressly overruled and the use of summary power authorized by rule 42(a) was restricted. Mr. Justice Douglas, speaking for the majority, interpreted rule 42(a) as being reserved for exceptional circumstances, such as acts threatening the judge or disrupting a hearing or obstructing court proceedings.[35] The situation in *Harris* was not one falling within the ambit of rule 42(a) because the refusal of Harris to answer was not an open, serious threat to orderly procedure requiring instant and summary punishment.[36] Moreover, Mr. Justice Douglas expressly stated that section (a) of the rule can only be used when the contempt occurs in the "actual presence of the court."[37] In *Harris*, no contempt was even committed in the presence of the court. The real contempt, if any, occurred before the grand jury—the refusal to answer to it when ordered by the court.[38]

The court concluded that the *Harris* situation falls properly within the scope of rule 42(b). Mr. Justice Douglas stated that "Rule 42(b) prescribes the 'procedural' regularity for all contempts in the federal regime except those unusual situations envisioned by

[33] 382 U.S. 162 (1965). Like Brown, Harris was a witness before a grand jury and he refused, on the ground of self-incrimination, to answer certain questions asked him. He was taken before the district judge, who granted Harris immunity from prosecution and ordered him to return to the grand jury room and answer the questions. Harris returned to the grand jury but refused to answer any questions. He was taken again before the district judge who repeated the questions and directed him to answer. When Harris refused, he was adjudged guilty of criminal contempt under rule 42(a) and was sentenced to one year's imprisonment.

[34] *Brown* was decided on March 9, 1959. The majority consisted of Justices Stewart, Clark, Harlan, Frankfurter, and Whittaker. Chief Justice Warren and Justices Black, Douglas, and Brennan dissented. Subsequently, Justices Frankfurter and Whittaker, both of the majority, retired. They were replaced by Justices Fortas and White.

Harris was decided on December 6, 1965. Justice White joined with the three remaining Justices who had constituted the majority in *Brown*, but Justice Fortas joined the four *Brown* dissenters. Thus, the dissenters in *Brown*, with the addition of Justice Fortas, became the majority in *Harris*. A change in the Court's composition apparently resulted in the overruling of the summary contempt procedure of *Brown*.

[35] 382 U.S. 162, 164 (1965).

[36] *Id.* at 165.

[37] *Id.* at 164.

[38] *Id.* at 164.

Rule 42(a) where instant action is necessary to protect the judicial institution itself."[39]

V. CONCLUSION

The *Harris* decision is in line with the historical attempt to curb the use of the summary power. It would seem that the two restrictions of rule 42(a)—that the contempt must occur in the actual presence of the court and be observed by the judge—would be sufficient to prevent abuse of the summary power. However, the Supreme Court in *Brown,* under the guise of a constructive "presence of the court," attempted to extend the summary power to grand jury investigations. *Harris* stops this attempted extension by adding, in effect, a third limitation—the summary power cannot be used unless the contempt is of a type that disrupts the orderly court procedure, making instant action necessary.

The *Harris* decision abolished a fiction which might have caused rule 42(b) to become a dead letter. In *Brown* the contempt was interpreted as occurring in the presence of the judge when the witness refused to answer the judge's repetition of the grand jury's questions. As pointed out in *Harris,* the actual contempt was before the grand jury. A subsequent repetition of the questions by the judge added nothing since the contempt had already been completed in the grand jury room.

The holding in *Harris* is also consistent with the wording of the rule. Rule 42(b) prescribes that criminal contempts, except as provided in subdivision (a), "shall" be prosecuted on notice. On the other hand, rule 42(a) provides that contempts committed in the actual presence of the court "may" be punished summarily. Thus, the wording of the rule demonstrates that the general mode of procedure was intended to be that prescribed by rule 42(b), whereas rule 42(a) was to be restricted in its usage.[40]

After the *Harris* decision, summary power is only available to a judge when the contempt is observed by the judge, occurs in the actual presence of the court, and disrupts the orderly court procedure so that instant action is necessary. In all other situations the witness is entitled to the protection and benefits of rule 42(b) such as notice, a hearing, bail, and possibly a jury trial.[41]

Joseph J. McCain, Jr.

---

[39] *Id.* at 167.

[40] Brown v. United States, 359 U.S. 41, 53 (1958) (Chief Justice Warren dissenting in separate opinion).

[41] See note 22 *supra.*