Supreme Court of Texas

No. 23-0253

In re Natin Paul,

Relator

On Petition for Writs of Habeas Corpus and Mandamus

JUSTICE BLAND, joined by Chief Justice Hecht, Justice Devine, and Justice Busby, dissenting from the denial of the petition.

The trial court permitted a judgment creditor to prosecute its debtor for acts of criminal contempt. The creditor sought to criminally penalize the debtor for perjury and for violations of an injunction the creditor obtained to aid in securing its judgment. Employing a financially interested private party to prosecute a defendant for criminal contempt raises due process and separation-of-powers constitutional concerns.

While a court may initiate criminal contempt charges based on a failure to comply with its orders or abuse of process, a court should refer such charges to the local prosecuting authority. In the rare circumstance that such a referral is unworkable, the court should appoint an independent prosecutor—one financially disinterested in the outcome of the contempt proceeding. The trial court did neither in this case. Although the defendant raised this issue in the trial court and in the

court of appeals, the court of appeals did not address it in its opinion denying habeas relief.

Because the trial court did not refer charges of criminal contempt to an authorized local prosecutor and instead permitted a financially interested party to prosecute the defendant, our Court should consider this petition for writ of habeas corpus on its merits. Upon review, we are likely to conclude that the trial court did not accord the defendant due process before finding him guilty of criminal contempt. I respectfully dissent from this Court's denial of review.

A

The underlying case involves the trial court's confirmation of an arbitration award. The judgment confirming the award includes actual and punitive damages in favor of The Roy F. and Joann Cole Mitte Foundation and against Relator Natin Paul. After the trial court confirmed the award, the Foundation sought and obtained injunctive relief preventing Paul from dissipating assets that would satisfy the Foundation's judgment while that judgment was on appeal.

The trial court's injunction requires Paul, among other things, to report each transfer "of assets in excess of $25,000 made over the course of the prior month, or, if applicable, that no such transfers . . . were made." The Foundation alleges that Paul violated this order by failing to appropriately disclose certain transfers, and it initially moved to hold Paul in civil contempt.

Following a show-cause hearing for civil contempt, the Foundation added charges of criminal contempt against Paul, noting in particular his failure to report a $100,000 transfer not made for fair

value. Recognizing that Paul was "entitled to an opportunity to have another day in court . . . and present any defenses he has to that criminal contempt," the Foundation moved for a second show-cause hearing for Paul to defend himself from a finding of criminal contempt. The trial court initiated further contempt proceedings with a second show-cause order "[b]ased on events that occurred during the [first] hearing."

At the second show-cause hearing, the Foundation functioned as a criminal prosecutor, cross-examining Paul and presenting evidence to prove criminal contempt. After the hearing, the trial court found Paul guilty of eight counts of criminal contempt. It sentenced Paul to ten days in jail for each count, to be served concurrently. In objecting to the trial court's procedure, Paul challenged the Foundation's role as prosecutor of the criminal charges.

Paul sought relief in the court of appeals through a petition for a writ of habeas corpus. The court of appeals vacated two counts; it left the remaining findings of contempt undisturbed.[1] The court of appeals did not address Paul's challenges to the contempt process, including the employment of the Foundation's counsel—who also represents the Foundation as the judgment creditor—to prosecute charges of criminal contempt against a judgment debtor.

Following the court of appeals' mandate, the trial court issued an amended order confining Paul to the Travis County Jail for six counts of criminal contempt. Among the counts are several adjudging Paul guilty

[1] No. 03-23-00160-CV, 2023 WL 2718454, at *9 (Tex. App.—Austin, Mar. 31, 2023).

of perjury for filing false sworn reports to the trial court and falsely testifying at the initial show-cause hearing. As part of the criminal contempt order, the trial court also found that the Foundation had incurred nearly $91,000 of attorney's fees "in filing the motions for contempt and sanctions, and prosecuting same through two live hearings and extensive briefing." The prosecutors in this case are to be paid from the defendant's coffers for their service. Paul sought relief in our Court through a petition for writs of habeas corpus and mandamus, and we stayed the trial court's order pending our review.

B

Courts differentiate civil and criminal contempt by their purposes: "civil contempt is 'remedial and coercive in nature'—the contemnor carries the keys to the jail cell in his or her pocket since the confinement is conditioned on obedience with the court's order." [2] Criminal contempt, in contrast, is punitive, and its punishment applies even though a punished party might cure its contempt.[3]

Criminal contempt is a criminal offense that stands separately from the underlying civil case.[4] Our Court has recognized criminal contempt as "quasi-criminal in nature," acknowledging "that

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[2] *In re Reece*, 341 S.W.3d 360, 365 (Tex. 2011) (quoting *Ex parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976)).

[3] *Id.*

[4] *Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976) ("[A] separate and independent proceeding at law for criminal contempt . . . could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation." (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 451 (1911))).

proceedings in contempt cases should conform as nearly as practicable to those in criminal cases."[5] And the Court of Criminal Appeals has directed that courts must require prosecution that has no conflict of interest that "rise[s] to the level of a due process violation."[6] Prosecution by a judgment creditor in a related civil action likely presents such a conflict: "It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters."[7]

C

Private prosecution of criminal contempt by a judgment creditor in a related civil action is likely a constitutional violation worthy of this Court's attention. Most states and the federal courts would invalidate this interested prosecution, and members of the Supreme Court have expressed an interest in deciding whether private prosecution of criminal contempt by an interested party comports with constitutional due process guarantees and separation-of-powers principles.

The United States Supreme Court first discussed private prosecution in *Young v. United States ex rel. Vuitton et Fils S.A.*,[8] decided under the Supreme Court's supervisory power over the federal

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[5] *Ex parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986).

[6] *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994); *see State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990).

[7] *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987).

[8] 481 U.S. at 809.

courts.[9] In *Young*, the Supreme Court held "that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order."[10] Although the Court did not require that all criminal contempt prosecutions employ public authorities, it disallowed a financially interested private prosecution in that case, observing that "the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety."[11]

Under *Young*, a federal district court must "first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied."[12] The Court stressed that criminal proceedings are between the public and the defendant, not two parties to civil litigation.[13] "A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a

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[9] The Supreme Court "has supervisory authority over the federal courts, and [it] may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

[10] *Young*, 481 U.S. at 809.

[11] *Id.* at 806.

[12] *Id.* at 801.

[13] *Id.* at 804; *see Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

prosecution."[14] In a concurring opinion, Justice Scalia observed that a federal district court cannot prosecute a claim of criminal contempt on its own; prosecution is an executive act, not a judicial one.[15]

Recognizing the persuasiveness of *Young*'s reasoning that private prosecution by interested parties presents fundamental concerns, the majority of state high courts to consider the issue have applied the *Young* standard either in their supervisory roles[16] or have concluded that due process requires it.[17] A number of federal circuits, including the Fifth Circuit, apply *Young* as a matter of due process, noting that its constitutional underpinnings go beyond a high court's supervisory

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[14] *Young*, 481 U.S. at 804.

[15] *Id.* at 816–19, 825 (Scalia, J., concurring) (asserting that the judicial power "does not include the power to seek out law violators in order to punish them—which would be quite incompatible with the task of neutral adjudication").

[16] *See, e.g.*, *Rogowicz v. O'Connell*, 786 A.2d 841, 844 (N.H. 2001) (adopting *Young* and rejecting opposing-party criminal contempt prosecution); *DiSabatino v. Salicete*, 671 A.2d 1344, 1352–53 (Del. 1996) (disallowing opposing-party criminal contempt prosecution).

[17] *See, e.g.*, *Commonwealth v. Ellis*, 708 N.E.2d 644, 650–51 (Mass. 1999) (rejecting prosecution by an interested party under state due process protections) ("The standard of disinterestedness that we express may well be the same as that mandated by the Fourteenth Amendment. Our art. 12 based standard is at least to equal that mandate."); *In re Taylor*, 73 A.3d 85, 100 (D.C. 2013) ("Just as the lack of defense counsel or absence of a neutral judge at trial defies a prejudice analysis, so too does the absence of a disinterested prosecuting attorney acting as an agent of the government."); *Trecost v. Trecost*, 502 S.E.2d 445, 449 (W. Va. 1998); *see also State v. Villanueva*, 488 P.3d 680, 690 (N.M. Ct. App. 2021) ("Prosecution by an independent, disinterested prosecutor protects the defendant's right to a fair trial.").

posture.[18] A bare minority of state appellate courts have rejected the due process considerations expressed in *Young*, finding no per se due process violation arising from the private prosecution of criminal contempt by a party's civil opponent.[19]

[18] The Fourth Circuit requires criminal-contempt prosecution "by an independent prosecutor" as a constitutional minimum. *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 379 (4th Cir. 2004). The Fifth Circuit requires independent prosecutions as a matter of due process. *Bhd. of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319–20 (5th Cir. 1969) (barring opposing-party criminal contempt prosecution pre-*Young*); *United States ex rel. S.E.C. v. Carter*, 907 F.2d 484, 486 n.1 (5th Cir. 1990) (reasserting the holding of *Locomotive* post-*Young*). The Ninth Circuit has listed "the right to an independent prosecutor" as a "required commensurate due process protection[]" in the criminal contempt context. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1132 (9th Cir. 2001).

[19] *See Wilson v. Wilson*, 984 S.W.2d 898, 899, 905 n.9 (Tenn. 1998) ("[N]o constitutional principle nor ethical standard automatically disqualifies the private attorney for the beneficiary of the order from prosecuting a contempt action for a violation of the order."); *People v. Vasquez*, 137 P.3d 199, 207–10 (Cal. 2006) (writing outside the contempt context, describing *Young* as supervisory, discussing different courts' approaches to the due process question of independent private prosecutors, ultimately finding no problematic conflict of interest); *see also DeGeorge v. Warheit*, 741 N.W.2d 384, 392 (Mich. Ct. App. 2007) (recognizing criminal contempt as a "quasi-crime" deserving of lesser protections for defendants; refusing to extend *Young* to state law); *Eichorn v. Kelley*, 111 P.3d 544, 548 (Colo. App. 2004) (rejecting a rule against opposing-party criminal-contempt prosecution, noting the "broad consequences" such a rule would practically have); *State v. Long*, 176 N.E.3d 334, 341 (Ohio Ct. App. 2021) (relying on the inherent power of courts to reject the necessity of independent prosecutors).

In recent years, multiple Justices of the Supreme Court have observed that due process[20] and separation-of-powers[21] considerations require protection from court-employed private prosecutions by interested parties. In *Robertson v. United States ex rel. Watson*, four Justices in dissent from the dismissal of the writ of certiorari as improvidently granted objected to a private prosecution of criminal contempt by an interested party, and in noting the due process concerns that such a prosecution raises, stated: "Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another."[22] Last year, two different Justices dissented from the Court's denial of certiorari over a case concerning private criminal contempt prosecution, rejecting the notion that an independent judicial branch has a role in employing a prosecutor.[23]

When prosecutors whose interest is maximizing recovery of their client's judgment serve at the pleasure of a court that has initiated

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[20] The Supreme Court did not decide *Young* based on due process considerations but instead as an exercise of its supervisory power. The Court, however, granted review in a case that presented that question, only later to dismiss the writ of certiorari as improvidently granted, with four Justices dissenting. *Robertson v. United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting, joined by Scalia, Kennedy, & Sotomayor, JJ.) ("The terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government.").

[21] *Donziger v. United States*, 143 S. Ct. 868 (2023) (Gorsuch, J., dissenting, joined by Kavanaugh, J.).

[22] *Robertson*, 560 U.S. at 278 (Roberts, C.J., dissenting).

[23] *See Donziger*, 143 S. Ct. at 870 (Gorsuch, J., dissenting).

criminal contempt proceedings, trust and confidence in an independent judiciary wane.[24] The Court should accept review and consider the view that the Constitution demands more. Because we do not, I respectfully dissent.

Jane N. Bland
Justice

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[24] *See Young*, 481 U.S. at 811 ("[A]ppointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.").