

OP. NO. 04-005

**PRISONS AND OTHER METHODS OF CORRECTION: LOCAL
CORRECTIONAL FACILITIES—DUTIES OF SHERIFFS.**

**COURTS NOT OF RECORD: JUVENILE AND DOMESTIC
RELATIONS DISTRICT COURTS – DISPOSITION.**

**DOMESTIC RELATIONS: DIVORCE, AFFIRMATION AND
ANNULMENT.**

CRIMES AND OFFENSES GENERALLY: IN GENERAL.

**Jail inmate serving contempt sentence for failure to pay
spousal or child support is entitled to sentence credits where
confinement is imposed as punishment rather than in effort to
coerce compliance with support order.**

The Honorable E. Stuart Kitchen, Jr.
Sheriff for Sussex County
March 3, 2004

Issue Presented

You inquire regarding the application of § 53.1-116 to contempt proceedings, and ask whether good conduct credits may be awarded to persons confined in the local jail for contempt of court for failure to make court-ordered support payments.

Response

Section 53.1-116(A) embodies the legislative intent that prisoners sentenced to 12 months or less in jail for misdemeanors shall earn good conduct credits to reduce the length of their imprisonment. Section 53.1-116 applies solely to prisoners serving criminal sentences. Therefore, it is my opinion that the sheriff or jail superintendent responsible for determining the length of a jail inmate's term of confinement must ascertain whether the individual is being detained pursuant to a civil or a criminal contempt finding and award only those prisoners serving criminal contempt sentences the good conduct credits prescribed in § 53.1-116(A).

Background

You state that the sheriff's office in your locality is concerned about calculating the credit of a person serving a contempt sentence in jail for failure to pay child or spousal support. Virginia's juvenile and domestic relations district courts and circuit courts have civil and criminal options available in proceedings against individuals who fail to make court-ordered support payments. When confronted with an individual who has not complied with a support order, the court may determine that incarceration in jail is an appropriate way to address the individual's failure to make support payments. Where the court determines that the individual may have the ability to comply with the support order, the court may find the individual in civil contempt and impose a term of incarceration in an effort to coerce the individual to make payments. Where the court intends to punish a person convicted of failure to comply with the support order, the court may proceed criminally and impose on the individual a term of incarceration for contempt of the court's support order.

Applicable Law and Discussion

Section 53.1-116(A) provides:

Each prisoner sentenced to 12 months or less for a misdemeanor or any combination of misdemeanors shall earn good conduct credit at the rate of one day for each one day served, including all days served while confined in jail prior to conviction and sentencing, in which the prisoner has not violated the written rules and regulations of the jail unless a mandatory minimum sentence is imposed by law.

Misdemeanors are criminal offenses that are punishable by confinement in jail and/or fines.¹ By its own terms, § 53.1-116(A) applies to a sentence imposed for criminal contempt.

A court, in determining whether an individual is in violation of a support order, clearly has civil contempt as an available option.² A civil contempt finding may be appropriate where the court determines that the individual is capable of purging himself of contempt.

It is axiomatic that, in a civil contempt proceeding, the contemnor must be in a position to purge himself of contempt.

"If it is for civil contempt the punishment is remedial [I]mprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do."^[3]

The court imposing a civil contempt sentence for failure to comply with a support order may not require the individual's confinement for more than twelve months.⁴ In order for a court to hold a person in civil contempt, the person confined must have the ability to effect his sooner release by purging himself of the contempt.

Conversely, a court may impose a punishment on an individual for failure to comply with the support order. This is the only option available to the court for confinement where the person in violation of the order is not able to purge himself of contempt. Where the sentence the court imposes is intended to punish for past conduct, and an individual has no ability to purge himself of the contempt and thereby obtain immediate release from confinement, the court must apply § 53.1-116. The conviction in this situation is in the nature of a misdemeanor conviction,⁵ and the good conduct credits available under § 53.1-116(A)—that a prisoner receive a credit of one day for every day he has served without violating the written rules and regulations of the jail—clearly would apply.

The question of whether a prisoner confined in jail receives good conduct credits to reduce the time he must serve to satisfy a contempt sentence turns on whether the sentence is civil or criminal. If the court has given the person an opportunity to effect his early release by purging himself of the contempt, the sentence is civil, and the prisoner would not receive credits. If, however, the court punishes a person who is unable to purge himself of contempt, then the sentence is criminal, and the prisoner is eligible to receive credits.

Conclusion

Accordingly, § 53.1-116(A) embodies the legislative intent that prisoners sentenced to 12 months or less in jail for misdemeanors shall earn good conduct credits to reduce the length of their imprisonment. Section 53.1-116 applies solely to prisoners serving criminal sentences. Therefore, it is my opinion that the sheriff or jail

superintendent responsible for determining the length of a jail inmate's term of confinement must ascertain whether the individual is being detained pursuant to a civil or a criminal contempt finding and award only those prisoners serving criminal contempt sentences the good conduct credits prescribed in § 53.1-116(A).

¹See Va. Code Ann. § 18.2-8 (Michie Repl. Vol. 1996) (defining, among other criminal offenses, "misdemeanors"); § 18.2-11 (LexisNexis Supp. 2003) (setting forth punishment for misdemeanor convictions).

²See *Thompson v. Commonwealth ex rel. Hornes*, No. 0390-01-2, 2003 Va. App. LEXIS 42, at *6-7 (Feb. 4, 2003) (affirming juvenile court's decision holding Thompson in civil contempt and affirming his sentence for indeterminate term, not to exceed twelve months, or until such time that he purges his contempt).

³*Id.* at *4 (quoting *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441-42 (1911)).

⁴See Va. Code Ann. § 20-115 (Michie Repl. Vol. 2000) ("[I]n no event shall commitment ... be for more than twelve months."); see *also* Va. Code Ann. § 16.1-278.16 (LexisNexis Repl. Vol. 2003) (providing that in cases where respondent has failed to comply with support obligation, court may order commitment as provided in § 20-115 or impose sentence of up to twelve months in jail); *Thompson*, 2003 Va. App. LEXIS 42, at *5-6 (quoting §§ 16.1-278.16, 20-115).

⁵See 1987-1988 Op. Va. Att'y Gen. 288 (concluding that criminal contempt is misdemeanor).

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