

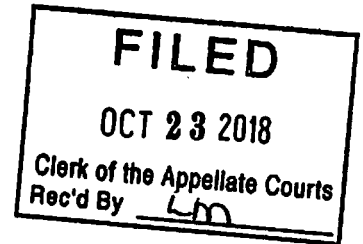
IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**IN RE: ANDY LAMAR ALLMAN, BPR #17857**  
An Attorney Licensed to Practice Law in Tennessee  
(Sumner County)

---

No. M2017-01476-SC-BAR-BP  
BOPR No. 2017-2748-6-AW

---



**ORDER**

By order entered September 9, 2016, Andy Lamar Allman was temporarily suspended from the practice of law. Mr. Allman has not sought nor been granted reinstatement since that time. On July 17, 2017,<sup>1</sup> the Board of Professional Responsibility (“Board”) filed a Petition for Contempt, alleging that Mr. Allman engaged in the unauthorized practice of law and failed to comply with the Order of Temporary Suspension entered by this Court on September 9, 2016, and Tennessee Supreme Court Rule 9.

By Order entered August 10, 2017, this Court appointed Matt Sweeney to serve as Special Master; directed the Special Master to serve Mr. Allman, pursuant to Tennessee Rule of Criminal Procedure 42, with a notice of criminal-contempt hearing; instructed the Special Master to conduct an evidentiary hearing on the Petition; and directed the Special Master, upon completion of the hearing, to transmit the record of the proceedings and a report of his findings of fact and conclusions of law to this Court. The hearing before the Special Master occurred on January 22, 2018, and on February 26, 2018, the Special Master filed the record of the proceedings and a report of his findings of fact and conclusions of law with this Court.

On March 9, 2018, Mr. Allman filed a “Motion to Set Aside Special Master’s Report of Findings of Fact and Conclusions of Law,” arguing that the hearing that occurred on January 22, 2018, was conducted in violation of his right to be present at trial, right to counsel, right to confront witnesses, and right to a jury trial. In an order filed on April 19, 2018, this Court granted Mr. Allman’s motion to set aside the Special Master’s Report and remanded the case to the Special Master for a new evidentiary hearing.

---

<sup>1</sup> The BPR filed an amended petition for criminal contempt on October 4, 2017.

On May 10, 2018, the BPR filed its Second Amended Petition for Criminal Contempt. On August 30, 2018, the parties entered into a plea agreement,<sup>2</sup> in which Mr. Allman agreed to plead nolo contendere to two separate counts of criminal contempt in exchange for dismissal of twenty-three<sup>3</sup> other counts of criminal contempt. Pursuant to the plea agreement, the sentence to be imposed would be determined by the Special Master and this Court.

The hearing on the plea agreement and sentencing occurred before the Special Master on August 30, 2018. At the hearing, the BPR provided the following proffer of proof:

If called to testify in this matter, Ms. Lisa Smelser, would talk about Counts 15 through 18. And she would establish that on November 9th, 2016, Ms. Smelser was terminated from her employment and called Mr. Allman on his cell phone to seek legal advice and retain him as her attorney.

During the November 9th, 2016, conversation, Ms. Smelser asked Mr. Allman to provide legal representation to her, and Mr. Allman agreed. Mr. Allman quoted a fee of \$4,500 to represent Ms. Smelser.

On November 10th, 2016, Ms. Smelser presented a letter to Mr. Allman that he had requested she draft for his review before sending to her employer. Mr. Allman provided legal advice to Ms. Smelser regarding the letter and advised her not to let the employer know she had retained an attorney.

On November 22nd, 2016, Ms. Smelser met with Mr. Allman to deliver a \$4,500 cashier's check she obtained from Wilson Bank and Trust on November 22nd, 2016. The cashier's check, payable to Mr. Allman, represented the retainer fee requested by Mr. Allman and was delivered to Mr. Allman on November 22nd, 2016. At no time prior to accepting the \$4,500 cashier's check did Mr. Allman disclose his suspension from the practice of law to Ms. Smelser.

Shortly after delivery of the \$4,500 retainer fee, Ms. Smelser discovered Mr. Allman was suspended from the practice of law. Ms.

---

<sup>2</sup> The parties originally executed a plea agreement on August 21, 2018, but signed a corrected copy of the plea agreement on August 30, 2018, the day of the hearing before the Special Master.

<sup>3</sup> The Board's second amended petition for criminal contempt alleged sixty separate counts of criminal contempt. The Special Master subsequently determined that the petition alleged the essential facts of twenty-five separate charges.

Smelser contacted Mr. Allman to inquire about the suspension, and Mr. Allman informed her that he was suspended for three forms he had been late filing. Mr. Allman made it sound like it was just paperwork that had not been timely filed. Based upon Mr. Allman's explanation, Ms. Smelser continued with Mr. Allman as her attorney until she discovered he had been arrested. Mr. Allman never returned any of the \$4,500 retainer to Ms. Smelser.

If called to testify on Counts 21 through 25, Ms. Wanda Kelley would establish that shortly before November 7th, 2016, Ms. Kelley contacted Mr. Allman and made him aware she wanted to hire him as her attorney to represent her in an EEOC action.

Mr. Allman agreed to meet Ms. Kelley on November 7, 2016, at Mr. Allman's law office on Saundersville Road in Hendersonville, Tennessee. At the November 7, 2016, meeting, Ms. Kelley discussed her EEOC complaint and her discrimination claims. At the conclusion of this one-hour meeting, Mr. Allman stated to Ms. Kelley he would take her case and would need a \$4,500 retainer fee in cash.

Ms. Kelley left Mr. Allman's office and traveled to her bank in Pegram, Tennessee, and withdrew \$4,500 in cash. Ms. Kelley then traveled from Pegram back to Hendersonville and delivered the \$4,500 cash retainer to Mr. Allman. Mr. Allman proceeded to count the money and provided Ms. Kelley with a receipt in the amount of \$4,500.

At this second meeting, Mr. Allman discussed the legal services he would provide to Ms. Kelley. Mr. Allman presented Ms. Kelley with an Attorney-Client Litigation Agreement, and Ms. Kelley signed the agreement as requested and dated it November 7, 2016. Ms. Kelley asked Mr. Allman if he needed to sign the Attorney-Client Litigation Agreement, and Mr. Allman replied, "No."

At no time did Mr. Allman inform Ms. Kelley of his suspension from the practice of law. Ms. Kelley would not have retained Mr. Allman had he disclosed his suspension from the practice of law.

The week following November 7, 2016, Ms. Kelley met Mr. Allman at his office to review documents related to her case. The meeting lasted approximately one hour, during which Mr. Allman stated he would contact the EEOC about her claim.

Subsequent to this third meeting, Ms. Kelley exchanged numerous texts, e-mails, and phone calls regarding another meeting to discuss her case. At no time did Mr. Allman inform Ms. Kelley of his suspension of the practice of law. Ms. Kelley discovered Mr. Allman was suspended from the media reports of his arrest. Mr. Allman never refunded any of the \$4,500 retainer fee to Ms. Kelley.

When counsel for Mr. Allman had the chance to respond, he stated in pertinent part,

So first I just want to note, because this is a nolo plea, Mr. Allman is not accepting certain factual allocutions as presented. I think the pieces that are particularly relevant for the sentencing phase, to the extent that the Court gets there and to the acceptance of the plea, is that at all times Mr. Allman had a good faith belief that he would be returning to the practice of law; and he had a good faith belief that to the extent there was a suspension, it was for technical reasons that were resolved quickly related to trust accounting and other issues.

Later the Special Master had the following discussion with counsel for Mr. Allman:

Special Master: As to the allocution, your client hasn't requested to make an allocution. But again, the Court would have to find that there's a factual foundation –

Counsel: I understand.

Special Master: -- for the charges for a plea.

Counsel: And we accept –

Special Master: And so it's appropriate for the Board counsel to say what they believe the evidence would show if this matter went forward to trial.

Counsel: We agree fully. I just want to make clear on the record that that's -- what we're doing under the nolo plea is accepting that there are sufficient facts to meet the elements.

On September 6, 2018, the Special Master entered his report, accepting the plea agreement and determining that the maximum sentence of ten days and fine of \$50 for each count of criminal contempt was appropriate in this case. Moreover, the Special Master determined that, pursuant to the applicable sentencing considerations, the

sentences should be run consecutively for a total effective sentence of 20 days and a total fine of \$100.

This Court filed an order on September 13, 2018, requiring Mr. Allman to respond to the Special Master's report and show cause why this Court should not enter judgment holding him in contempt of this Court's September 9, 2016 Order and impose the sentence determined by the Special Master. The Court also allowed the BPR to respond to the Special Master's report.

Upon our review of the transcript of the hearing and the report filed by the Special Master in this matter, as well as the responses to the Special Master's report filed by Mr. Allman and the BPR, we agree that there are adequate factual bases to support the two charges of contempt to which Mr. Allman entered pleas of nolo contendere. Therefore, Mr. Allman is adjudged to be guilty of two counts of criminal contempt. Accordingly, we must determine the appropriate punishment.

Tennessee Code Annotated section 29-9-102 (2012) provides the authority for this Court to punish criminal contempt: "The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases: . . . (3) The willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts . . ." Tenn. Code Ann. § 29-9-102. "This provision enables the courts to maintain the integrity of their orders." Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth., 249 S.W.3d 346, 354 (Tenn. 2008). "Criminal contempt . . . is designed 'to preserve the power and vindicate the dignity and authority of the law and the court as an organ of society.'" Baker v. State, 417 S.W.3d 428, 436 (Tenn. 2013) (quoting State v. Beeler, 387 S.W.3d 511, 520 (Tenn. 2012)). "Sanctions for criminal contempt are generally both punitive and unconditional in nature, designed to punish past behavior, not to coerce direct[] compliance with a court order or influence future behavior." Id.

Section 29-9-103 (2012) outlines the range of punishments for criminal contempt. It states:

- (a) The punishment for contempt may be by fine or by imprisonment, or both.
- (b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars (\$50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars (\$10.00).

Tenn. Code Ann. § 29-9-103.

Thus, section 29-9-103(b) authorizes up to ten days incarceration, as well as a fifty dollar (\$50.00) fine, for each of Mr. Allman's contempt convictions. The Special Master determined that the maximum sentence for each count of criminal contempt was appropriate in this case.

As stated by this Court in In re Sneed,

This Court has previously observed that "criminal contempt is generally regarded as a crime." Black, 938 S.W.2d at 402. Because it is punishable by confinement of less than one year, we consider it a misdemeanor for sentencing purposes. See Tenn. Code Ann. § 39-11-110 (2006); but see State v. Wood, 91 S.W.3d 769, 776 (Tenn. Ct. App. 2002) (holding inapplicable to a criminal contempt conviction arising from a civil matter that portion of the misdemeanor sentencing provision requiring the trial court to fix a percentage of the sentence to serve, and that statutory provision allowing a misdemeanant to earn good time credits). We therefore look to the Tennessee Criminal Sentencing Reform Act of 1989, Tenn. Code Ann. §§ 40-35-101 through -505 (2006), for guidance.

302 S.W.3d 825, 828 (Tenn. 2010). Thus, this Court shall consider whether the following principles apply to determine whether a sentence of confinement is necessary:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant;

Tenn. Code Ann. 40-35-103(1). In this case, the Court finds that confinement is necessary to avoid depreciating the seriousness of the offense—that is, blatant disregard of this Court's order of temporary suspension. Rule of Professional Conduct 8.4(g) states that an attorney must comply with orders entered in proceedings in which the lawyer is a party. Tenn. Sup. Ct. R. 8, RPC 8.4(g) ("It is professional misconduct for a lawyer to: . . . (g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party . . ."). There are two exceptions to this rule, but neither is applicable. Id. Additionally, this Court has outlined the duty to follow orders, even though they are perceived to be erroneous, or even those held to be erroneous: "[E]ven though the trial judge's order is erroneous and is reversed on appeal, an adjudication of contempt for failure to obey that order will be sustained." State v.

Jones, 726 S.W.2d 515, 517 (Tenn. 1987) (citing Vanvabry v. Staton, 88 Tenn. 334, 12 S.W. 786 (1890)).

In this case, Mr. Allman was temporarily suspended from the practice of law on September 9, 2016. Almost two months later, he agreed to represent two different clients. He did not disclose his suspension until one of the clients questioned him, and even then he minimized the seriousness of it and implied it was based on his failure to file documents timely. He accepted two retainer fees of \$4,500 and has not repaid these fees. At the hearing, Mr. Allman's attorney argued that "Mr. Allman had a good faith belief that he would be returning to the practice of law" and that the suspension "was for technical reasons." Regardless, even accepting Mr. Allman's contention as true, the fact remains that he accepted new clients almost two months after he had been temporarily suspended by this Court. Thus, in order to avoid depreciating the seriousness of these offenses, we find that a ten-day maximum sentence, as well as a fifty-dollar fine, for each of Mr. Allman's contempt convictions is appropriate.

Finally, we must determine the manner in which Mr. Allman shall serve his sentences. Tennessee Code Annotated section 40-35-115 outlines the applicable criteria for when "a defendant is convicted of more than one (1) criminal offense" and states that the Court "shall order sentences to run consecutively or concurrently as provided by the criteria in this section." Tenn. Code Ann. § 40-35-115 (2014). The decision regarding whether sentences are to be served concurrently or consecutively is left to the sound discretion of the sentencing court. See State v. Nelson, 275 S.W.3d 851, 870 (Tenn. Crim. App. 2008). The pertinent criteria for this case in section 40-35-115 states that a defendant can be sentenced consecutively if "[t]he defendant is sentenced for criminal contempt." Tenn. Code Ann. § 40-35-115(b)(7). Any single ground is a sufficient basis for the imposition of consecutive sentences. State v. Pollard, 432 S.W.3d 851, 862 (Tenn. 2013). As Mr. Allman has been found guilty of criminal contempt, we find by a preponderance of the evidence that the criteria is satisfied to impose consecutive service for the two counts of criminal contempt. See In re Sneed, 302 S.W.3d 825, 828 (Tenn. 2010) (ordering a partially consecutive sentence in an attorney criminal contempt case). Moreover, we find that a total effective sentence of twenty days' incarceration is "a sentence justly deserved in relation to the seriousness of the offense[s]," Tenn. Code Ann. § 40-35-102(1), and "no greater than that deserved for the offense[s] committed." Id. § 40-35-103(2).

Accordingly, pursuant to Tennessee Code Annotated section 29-9-103, we hereby sentence Mr. Allman to ten days' incarceration in Sumner County Jail for each count, to be served consecutively, for a total effective sentence of twenty days' incarceration. Mr. Allman shall surrender himself to the Sumner County Sheriff's Department within fifteen days of the filing date of this Order. If Mr. Allman fails to report to the Sumner County Sheriff's Department within fifteen days of the filing date of this Order, any law enforcement officer in this State is authorized to arrest Mr. Allman and transport him to

the Sumner County Sheriff's Department to serve his sentence. Furthermore, Mr. Allman shall pay a fine of fifty dollars (\$50.00) for each of the two counts, for a total fine of one hundred dollars (\$100.00). The Clerk of this Court is directed to forward a copy of this order to Mr. Allman and the Sheriff of Sumner County. The Clerk also shall forward a copy of this order to the Board of Professional Responsibility.

On October 5, 2018, Mr. Allman filed a "Motion for Leave to File Document Under Seal." Upon review, we hereby grant Mr. Allman's motion to file the lodged document under seal.

Upon the filing of the Special Master's declaration of costs in this matter, both sides shall respond within ten days as to the assessment of costs.

PER CURIAM