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Defending Criminal Contempt Cases in Tennessee[1]

Under Tennessee law, courts may punish a person's contempt of a court order as a criminal offense. Courts' criminal contempt authority "is designed to preserve the power and vindicate the dignity and authority of the law and the court as an organ of society."[2] Unlike civil contempt claims—which are designed "to force compliance with [an] order and thereby secure private rights established by the order"—"[s]anctions for criminal contempt" are "punitive[.]" Thus, they are "designed to punish past behavior, not to coerce directly compliance with a court order or influence future behavior."[3]

Despite being criminal offenses, people who are charged with criminal contempt in Tennessee do not enjoy the full scope of rights afforded to traditional criminal defendants. For instance, accused "[c]ontemnors are not entitled to a jury trial if the criminal contempt is not 'serious' enough to require the protection of the constitutional right to a jury trial"—a term that is generally regarded as punishment "by confinement of six months or less."[4] Most importantly, "unlike criminal prosecutions, general [criminal] contempt proceedings do not require an

[1] By Daniel A. Horwitz, Horwitz Law, PLLC. This is a draft whitepaper current through November 14, 2024. It is not intended to be legal advice, and it should not be relied on for that purpose.
[2] *Baker v. State*, 417 S.W.3d 428, 436 (Tenn. 2013) (cleaned up).
[3] *Id.*
[4] *Id.* at 437 (citing *Bloom v. Illinois*, 391 U.S. 194, 198, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968)).

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indictment and subsequent prosecution by the State."[5] That means that criminal contempt charges are usually brought by opposing litigants, rather than state prosecutors. And although private attorneys for opposing litigants often have financial or other incentives to pursue criminal contempt charges against their opponents, the Tennessee Supreme Court has ruled (dubiously) that "allowing an attorney for the beneficiary of a court order to prosecute a contempt proceeding alleging a violation of that order does not involve an inherent or potential conflict of interest sufficient to warrant adoption of an automatic rule of disqualification."[6]

The ultimate effect of this framework is that criminal contempt charges are routinely initiated by private attorneys who stand to gain—including financially—from seeking an opposing litigant's conviction. Thus, despite being flimsy, many criminal contempt charges are pursued anyway. Criminal contempt charges also are frequently adjudicated in civil—rather than criminal—courts that do not typically preside over criminal proceedings. The reason is that, under Tennessee law, "the power to punish for contempt is reserved to the court against which the contempt is committed, i.e. the court whose order is disobeyed."[7]

There is another side to this coin, though. In particular, because private litigants' attorneys—rather than state criminal prosecutors—are typically the people behind criminal contempt charges, they commonly lack familiarity with essential components of criminal proceedings. Further, although defendants in criminal contempt cases are not afforded *all* of the procedural rights that traditional criminal defendants enjoy, criminal contempt defendants are still entitled to *many* of those protections. Thus, because the private litigants who pursue contempt charges and the courts that adjudicate them frequently lack necessary experience with the criminal process, criminal contempt charges are often easily defended, and criminal contempt convictions are uniquely vulnerable to reversal on appeal.

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[5] *Id.*

[6] *Wilson v. Wilson*, 984 S.W.2d 898, 905 (Tenn. 1998)

[7] *State v. Gray*, 46 S.W.3d 749, 750 (Tenn. Ct. App. 2000).

A. ELEMENTS OF A CRIMINAL CONTEMPT CHARGE.

"There are three essential elements to criminal contempt: '(1) a court order, (2) the defendant's violation of that order, and (3) proof that the defendant willfully violated that order.'"[8] "In addition, the party moving for contempt must show the following four elements: (1) the order allegedly violated was lawful; (2) the order was clear and unambiguous; (3) the individual charged did in fact violate the order; and (4) the individual acted willfully in so violating the order."[9]

All of these elements—many of which are overlooked by private attorneys in criminal contempt cases—can provide a basis for a judgment of acquittal at trial or reversal of a contempt conviction on appeal.

B. CONTEMPT DEFENSES

"[A]ppellate courts are charged with a special responsibility to see that the contempt power is not abused." *See State v. Wood*, 91 S.W.3d 769, 776 (Tenn. Ct. App. 2002). Thus, even if defendant in a criminal contempt case is convicted in the trial court, alleged criminal contemnors have a host of ways to beat criminal contempt charges on appeal, including based on the insufficiency of the evidence introduced at trial. Some of the most common successful criminal contempt defenses are detailed below.

1. Failure to prove that an order was clear, specific, and unambiguous.

To sustain a conviction for criminal contempt, the order that a defendant is accused of violating must be "clear, specific, and unambiguous."[10] Thus, "[v]ague or ambiguous orders that are

[8] *Pruitt v. Pruitt*, 293 S.W.3d 537, 545 (Tenn. Ct. App. 2008) (quoting *Foster v. Foster*, No. M2006-01277-COA-R3-CV, 2007 WL 4530813, at *5 (Tenn. Ct. App. Dec. 20, 2007)).
[9] *Boren v. Wade*, No. W2022-00194-COA-R3-CV, 2023 WL 3000881, at *2 (Tenn. Ct. App. Apr. 19, 2023) (cleaned up).
[10] *Konvalinka*, 249 S.W.3d at 355.

susceptible to more than one reasonable interpretation cannot support a finding of civil [or criminal] contempt."[11]

Given this standard, a defendant may not be convicted of criminal contempt unless an order's terms "leave no reasonable basis for doubt regarding their meaning."[12] This standard is an "objective" one "that takes into account both the language of the order and the circumstances surrounding the issuance of the order, including the audience to whom the order is addressed."[13] Under this standard, "[o]rders which form the basis for a contempt charge must 'expressly and precisely' spell out the details of compliance in a way that 'reasonable persons' will know exactly what actions are required or forbidden."[14] Further, "[a]mbiguities in an order alleged to have been violated should be interpreted in favor of the person facing the contempt charge."[15]

These rules provide fertile ground for successful appeals of criminal contempt convictions. One reason is that—in addition to the favorable trial-level standards identified above—the standard of appellate review remains favorable even after a defendant has been convicted. As the Tennessee Court of Appeals has explained: "Determining whether an order is sufficiently free from ambiguity to be enforced in a contempt proceeding is a legal inquiry that is subject to de novo review."[16] Thus, the matter is treated as a question of law, so the trial court's determination enjoys no deference on appeal.

A recent criminal contempt case successfully handled by our firm illustrates the point. In *Lehmann v. Wilson*, No. M2023-00232-COA-R3-CV, 2024 WL 901426 (Tenn. Ct. App. Mar. 4, 2024), the Court of Appeals considered an appeal of two criminal contempt convictions.

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[11] *Beyer v. Beyer*, 428 S.W.3d 59, 78 (Tenn. Ct. App. 2013).
[12] *Id.* at 78.
[13] *Id.*
[14] *Lehmann v. Wilson*, No. M2023-00232-COA-R3-CV, 2024 WL 901426, at *3 (Tenn. Ct. App. Mar. 4, 2024).
[15] *Beyer*, 428 S.W.3d at 79 (collecting cases).
[16] *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 356 (Tenn. 2008).

The case arose out of a trial court order that initially forbade any contact between parents—a Father and a Mother—who shared a child. To enable court-ordered visitation exchanges to occur, though, the trial court's original order was modified by agreement to *require* contact between the parties. After the child's Father spoke to his child's Mother about their shared Xfinity account, the Mother petitioned for criminal contempt based on Father's asserted violations of the original non-contact order.

Father was then convicted of criminal contempt on both charged counts, in part because his trial counsel conceded during closing argument that Father had committed "a technical violation." That statement notwithstanding, after Father switched counsel and retained Horwitz Law, PLLC to handle his appeal, his appellate attorneys—Daniel A. Horwitz, Lindsay E. Smith, and Melissa K. Dix—successfully argued that the two conflicting orders created a material ambiguity and, therefore, could not give rise to lawful contempt convictions. The Tennessee Court of Appeals unanimously agreed and reversed Father's convictions to acquittals. The Court explained:

> On appeal, Ms. Lehmann argues that the August 1 order only modifies the April 19 order to allow for the exchange of the child without modifying the no contact provision at all. Ms. Lehmann appears to understand the two orders as meaning no verbal communication between the two parties, regardless of other mandated events like exchanging their child. However, the April 19 order does not make this subtle distinction. The April 19 order specifically orders Mr. Wilson not to "contact [Ms. Lehmann or her minor children] either directly or indirectly, by phone, email, messages, mail or any other type of communication or contact." The order not only proscribed verbal communication with Ms. Lehmann, but also proscribed any contact at all with Ms. Lehmann. The order itself makes a distinction between communication and contact through the use of a disjunctive list ("communication or contact"). The subsequent order mandating Dr. Wilson to meet with Ms. Lehmann regularly creates an ambiguity regarding how Dr.

> Wilson is to both not contact Ms. Lehmann and meet with her regularly.
>
> The August 1 order does not provide sufficient clarity as to what conduct Dr. Wilson was prevented from doing to support a finding of contempt. Orders underlying a finding of contempt must "leave no reasonable basis for doubt regarding their meaning." *Id.* at 356. Ms. Lehmann's interpretation of the orders does not resolve the ambiguity regarding what contact was allowed under the August 1 order. Courts are not to "go beyond the four corners of the order in contempt cases to clarify an ambiguity." *Scobey v. Scobey*, No. M2016-00963-COA-R3-CV, 2017 WL 4051085, at *5 (Tenn. Ct. App. Sept. 13, 2017). We are limited to the plain meaning as understood from the orders themselves.
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> In concluding that the orders at issue were not sufficiently clear to support a finding of contempt, we have considered not only the circumstances of the alleged violations, but also the circumstances surrounding the issuance of the orders and their audience. *See Furlong*, 370 S.W.3d at 339 (citing *Konvalinka*, 249 S.W.3d at 356) (requiring the application of this standard when evaluating whether an order is ambiguous). Indeed, some of the conduct complained of occurred at a mandated meeting between the two parties. It appears that the parties did not have a clear idea of what the orders required of them. This confusion was even shared by Ms. Lehmann and her counsel at trial.
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> Construing the ambiguity in favor of Dr. Wilson, we find that the ambiguities are such that the orders cannot support a conviction of contempt. The determination that the order which was allegedly violated lacked specificity and was ambiguous requires a reversal of the convictions of contempt. *See Ross*, 2008 WL 5191329, at *6.

Id. at *4.

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Thus, as in Dr. Wilson's case, an arguably ambiguous order may provide a successful basis for defending against a criminal contempt charge, whether at trial or on appeal.

2. Insufficiency of the convicting evidence.

"A defendant accused of criminal contempt is presumed to be innocent."[17] As in all criminal cases, "[t]he prosecution bears the burden of proving guilt beyond a reasonable doubt." *Id.* That requirement—a constitutional one—also applies to "each element" of the charged offense.[18] These standards are non-waivable; as the Tennessee Court of Criminal Appeals has explained, a defendant "cannot waive plenary review of any issue for which the remedy is dismissal of the charge,"[19] and insufficient convicting evidence qualifies.

Based on this standard, those pursuing criminal contempt charges have the burden of proving each and every element of their case beyond a reasonable doubt, while those who are charged with criminal contempt do not have to prove anything. That means that a private prosecutor's failure to introduce sufficient evidence of an essential element of a criminal contempt charge necessarily requires that a defendant charged with contempt be acquitted.

When it comes to defenses based on the insufficiency of the convicting evidence, though, the standard of review is less favorable on appeal. In particular: "When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[20] Even so, due to

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[17] *Cottingham v. Cottingham*, 193 S.W.3d 531, 538 (Tenn. 2006) (citing *Shiflet v. State*, 217 Tenn. 690, 400 S.W.2d 542, 544 (1966)).

[18] *Hobbs v. State*, 73 S.W.3d 155, 158 (Tenn. Crim. App. 2001) ("it is true that, constitutionally, a defendant's conviction must be based upon proof beyond a reasonable doubt of each element of the offense").

[19] *State v. Lee*, No. M2021-01084-CCA-R3-CD, 2022 WL 16843485, at *10 (Tenn. Crim. App. Nov. 10, 2022)

[20] *State v. Jones*, No. W2018-01421-CCA-R3-CD, 2020 WL 974197, at *9 (Tenn.

private prosecutors' comparative unfamiliarity with the criminal process generally and with criminal contempt specifically, many essential elements of a criminal contempt charge often go overlooked.

a. Failure to introduce the order allegedly violated.

The first element of a criminal contempt charge is "a court order."[21] Thus, the order allegedly violated must be introduced into evidence at trial to sustain a criminal contempt conviction.

The obviousness of this requirement notwithstanding, those pursuing contempt charges often overlook the requirement. A shockingly large number of criminal contempt appeals arise from trials in which the underlying order allegedly violated was never introduced into evidence.[22] That failure also cannot be remedied retrospectively on appeal for sevearl reasons. One of them is that, as the Tennessee Court

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Crim. App. Feb. 27, 2020) (cleaned up).

[21] *Pruitt*, 293 S.W.3d at 545 ("There are three essential elements to criminal contempt: '(1) a court order . . . .").

[22] *See, e.g., City of Cleveland v. Patterson*, 8th Dist. Cuyahoga No. 109274, 2020 WL 1951545, at *10, ¶ 10 (Apr. 23, 2020) ("Because the city failed to introduce a court order into evidence and the court did not take judicial notice of a court order, that element of criminal contempt was not supported by sufficient evidence."); *State v. Majerus*, 909 N.W.2d 228 (Iowa Ct. App. 2017) ("The district court dismissed the application because the prosecutor failed to offer into evidence the no-contact order. Specifically, the district court stated, '[T]he Court finds that there has not been evidence established beyond a reasonable doubt that the defendant violated the No-Contact Order, as alleged in the affidavit, because the Court has no idea what's in the No-Contact Order.'"); *United States v. Peguero*, 34 F.4th 143, 165 (2d Cir. 2022) ("at the October 8, 2020 revocation hearing, the district court orally announced its finding 'that the government failed to demonstrate by a preponderance of the evidence that Carlos Peguero committed [Specification 9]' as the government had 'fail[ed] to introduce the order of protection ... or present evidence that there was in fact an order of protection in effect on the date of the incident.'"). *Cf. In re Joshua M.,* No. E2021-01527-COA-R3-PT, 2022 WL 4666232, at *9 (Tenn. Ct. App. Oct. 3, 2022) ("the order was not introduced into evidence. . . . Although the record indicates that the children were removed from Mother's custody by a court order, we cannot, without evidence indicating when that order was entered, conclude that Petitioners proved by clear and convincing evidence that the children had been removed from Mother's custody by a court order 'for a period of six (6) months.'").

of Appeals has explained: "Pursuant to Tenn. R. App. P. 13(c), this Court may only consider evidence that is considered by the trial court and set forth in the record, or evidence that was erroneously excluded at trial."[23]

b. Failure to prove an actual violation.

To sustain a conviction for criminal contempt, a prosecutor must prove that a defendant "actually violated the order" underlying a contempt charge.[24] This inquiry is a factual one. Thus, on appeal, the question is whether the evidentiary record can support a factual finding of guilt beyond a reasonable doubt.[25]

This requirement, too, may give rise to a successful contempt defense. Parties often have disagreements about underlying events. When such disagreements spill over into criminal contempt charges, testifying witnesses also must have personal knowledge of what they claim occurred; otherwise, their testimony is inadmissible. As the Tennessee Court of Criminal Appeals has explained: Personal knowledge is an indispensable requirement of "competent" witness testimony, and thus, the party "'offering the testimony must introduce evidence sufficient to support a jury finding that the witness had personal knowledge of the matter.'"[26]

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[23] *See Bryant v. Bryant*, No. M2007-02386-COA-R3-CV, 2008 WL 4254364, at *3 (Tenn. Ct. App. Sept. 16, 2008) ("Pursuant to Tenn. R. App. P. 13(c), this Court may only consider evidence that is considered by the trial court and set forth in the record, or evidence that was erroneously excluded at trial.").

[24] *See Konvalinka*, 249 S.W.3d at 356; *see also Pruitt*, 293 S.W.3d at 545 ("There are three essential elements to criminal contempt: '(1) a court order, **(2) the defendant's violation of that order**, and (3) proof that the defendant willfully violated that order.'") (emphasis added).

[25] *See id.* ("When the sufficiency of the evidence in a criminal contempt case is raised in an appeal, this court must review the record to determine if the evidence in the record supports the finding of fact of guilt beyond a reasonable doubt, and 'if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt' we are to set aside the finding of guilt.") (quoting Tenn. R. App. P. 13(e)).

[26] *See State v. McKenzie*, No. E2018-02226-CCA-R3-CD, 2020 WL 3251173, at *3 (Tenn. Crim. App. June 16, 2020) (quoting *State v. Land*, 34 S.W.3d 516, 529 (Tenn.

This requirement is often missing in criminal contempt cases. The reason is that criminal contempt charges are frequently based on opposing parties' *belief* about what occurred during events for which they were not present. Thus, failing to introduce adequate evidence—from a witness who has personal knowledge—of what actually transpired will enable a successful defense or appeal based on a claim that there is insufficient evidence that a defendant actually violated an order.

c. Failure to prove a "willful" violation.

A criminal contempt conviction cannot be sustained absent "proof that the defendant willfully violated [an] order."'[27] In the criminal contempt context, "[w]illfulness has two elements: (1) intentional conduct; and (2) a culpable state of mind."[28] Thus, sufficient proof that an act was undertaken both intentionally *and* "for a bad purpose" is essential to sustain a conviction.[29] Put another way: those pursuing criminal contempt charges must prove that a defendant acted "voluntarily and intentionally and with the specific intent to do something the law forbids."[30]

These are onerous standards that are difficult to meet for several reasons. Among them: criminal contempt violations are frequently based on claims of omission—that someone *failed to do* something that

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Crim. App. 2000)); *see also* Tenn. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *cf. In Re Jackson*, 2021 WL 3748076, at *11 (Tenn. Ct. App. 2021) (Stafford, J., dissenting) ("absolutely nothing in the record indicates that Ms. Boshers had personal knowledge of the facts alleged in the petition. . . .Without personal knowledge, I must conclude that Ms. Boshers' testimony does not provide competent evidence that Father committed the act alleged in the dependency and neglect petition.").

[27] *Pruitt*, 293 S.W.3d at 545.
[28] *See Saleh v. Pratt*, No. E2021-00965-COA-R3-CV, 2022 WL 1564170, at *4 (Tenn. Ct. App. May 17, 2022) (citing *State v. Beeler*, 387 S.W.3d 511, 523 (Tenn. 2012)).
[29] *See Konvalinka*, 249 S.W.3d at 357
[30] *State v. Braden*, 867 S.W.2d 750, 761 (Tenn. Crim. App. 1993).

was a court order required, rather than having done some act that was forbidden. As many courts have observed, though, proving that an omission was intentional—rather than a product of some less culpable state of mind—is an extraordinarily difficult undertaking.[31] Intentionality also is "the heart of" a criminal contempt charge,[32] so insufficient evidence of intent will doom a conviction.

Establishing that a defendant acted "for a bad purpose" is similarly difficult to prove in many cases. "[I]n its most recent pronouncement on this issue, the Tennessee Supreme Court has indicated that criminal contempt requires 'an *intentional* violation of a **known** duty.'"[33] There also is conflicting Tennessee Court of Appeals jurisprudence as to the underlying standard. Thus, whether liability attaches when a litigant has violated a court order with pure or good-faith motives is not entirely settled in Tennessee.[34]

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[31] *See, e.g., Mott v. Stewart*, No. 98-CV-239, 2002 WL 31017646, at *4 (D. Ariz. Aug. 30, 2002) ("Specific intent crimes of omission are both more difficult to prove and more difficult to disprove."); *United States v. Arispe,* No. DR-07-CR-381(1)-AML, 2007 WL 9723486, at *4 (W.D. Tex. Nov. 2, 2007), *aff'd*, 328 F. App'x 905 (5th Cir. 2009) ("It is often difficult to prove that omissions were made intentionally or with reckless disregard").

[32] *See In re Ct. Ord. Dated Oct. 22, 2003*, 886 A.2d 342, 348 (R.I. 2005).

[33] *Mawn v. Tarquinio*, No. M2019-00933-COA-R3-CV, 2020 WL 1491368, at *7 (Tenn. Ct. App. Mar. 27, 2020) (cleaned up).

[34] *Compare Mobley v. Mobley*, No. E2012-00390-COA-R3-CV, 2013 WL 1804189, at *18 (Tenn. Ct. App. Apr. 30, 2013) (stating that willful in the criminal context can mean "undertaken with a bad purpose," but it can also mean " 'a thing done without ground for believing it is lawful; or conduct marked by careless disregard whether or not one has the right so to act....' " (quoting *Casper*, 297 S.W.3d 687–88)), *with Miller v. Miller*, No. M2014-00281-COA-R3-CV, 2015 WL 113338, at *10 (Tenn. Ct. App. Jan. 7, 2015) ("In this case, there is no dispute that Mother violated the order of the Davidson County Circuit Court. She did not bring the children to visit Father during their spring break, and she failed to transport the children to Nashville for Father's summer visitation. The evidence adduced at trial, however, does not support the conclusion that Mother acted with a bad purpose. . . . Mother's testimony indicates that she did not intend to flaunt the orders of the Davidson County court. Rather, it merely reflects that she had concerns about sending the children to be with Father in light of the recommendations made by the Winnebago DHS. Although in the future we would certainly direct Mother to secure relief from the courts before unilaterally deviating from the mandated parenting schedule, the

3. Notice defects.

Except in cases of summary disposition, Tenn. R. Crim. P. 42(b) instructs that "[a] criminal contempt shall be initiated on notice[.]" *Id.* The contents of the required notice are specified by Tenn. R. Crim. P. 42(b).

Because adequate notice is a due process requirement, material notice defects—particularly those that "confuse civil and criminal contempt"—require that a criminal contempt conviction be vacated. *See McClain*, 539 S.W.3d at 221. As the Tennessee Court of Appeals has explained:

> Sufficient notice meeting the requirements of due process must be given as a prerequisite to a court's authority to punish a party for criminal contempt committed outside the presence of the court. *Storey v. Storey*, 835 S.W.2d 593, 599–600 (Tenn.Ct.App.1992). Under Tenn. R.Crim. P. 42(b), a person facing a criminal contempt charge must "be given explicit notice that they are charged with criminal contempt and must also be informed of the facts giving rise to the charge." *Long v. McAllister–Long*, 221 S.W.3d 1, 13 (Tenn.Ct.App.2006) (citation omitted). "Essential facts are those which, at a minimum, (1) allow the accused to glean that he or she is being charged with a crime, rather than being sued by an individual, (2) enable the accused to understand that the object of the charge is punishment—not merely to secure compliance with a previously existing order, and (3) sufficiently aid the accused to determine the nature of the accusation, which encompasses the requirement that the underlying court order allegedly violated by the accused is itself clear and unambiguous." *Id.* at 13–14.[35]

This requirement, too, often provides grounds for a successful

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evidence in this case is not indicative of a bad purpose.").

[35] *McLean v. McLean*, No. E2008-02796-COA-R3-CV, 2010 WL 2160752, at *5 (Tenn. Ct. App. May 28, 2010).

appeal. One reason is that many litigants who file contempt petitions file their contempt notices with outdated language that purports to require defendants to "show cause" why they should *not* be held in contempt. Such "show cause" orders misallocate the burden of proof based on outdated language from Tenn. R. Crim. P. 42 that was deleted back in 2014, though.[36] Thus, as long as notice objections are not waived, notice defects may provide a basis for appellate reversal as well. On appeal, "[a]n issue regarding the sufficiency of notice provided regarding criminal contempt allegations presents a question of law, which we review de novo."[37]

There also is a case to be made that notice defects should never be waivable. "Waiver is a voluntary relinquishment or abandonment of a *known* right or privilege."[38] "Thus, when an individual does not know of his rights or when he fails to fully understand them"—precisely what pretrial notice is supposed to provide—"there can be no effective waiver of those rights."[39] To date, though, the Tennessee Court of Appeals has not accepted this reasoning, and it has held contrarily that claims about notice defects are waived if they are not raised in the trial court.[40]

4. Failure to make required factual findings.

"Rule 52.01 of the Tennessee Rules of Civil Procedure requires that trial courts make findings of fact and conclusions of law to support their rulings following bench trials."[41] Construing this rule, this Court

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[36] *See* Tenn. R. Crim. P. 42, ADVISORY COMMISSION COMMENT [2014].
[37] *McClain v. McClain*, 539 S.W.3d 170, 187 (Tenn. Ct. App. 2017).
[38] *Faught v. Est. of Faught*, 730 S.W.2d 323, 325 (Tenn. 1987) (emphasis added).
[39] *Id.* at 326.
[40] *Hughes v. Hughes*, No. E2023-00952-COA-R3-CV, 2024 WL 1697782, at *4 (Tenn. Ct. App. Apr. 19, 2024) ("both this Court and the Court of Criminal Appeals have held, under analogous circumstances, that issues regarding inadequate notice of criminal contempt may be waived on appeal when not properly preserved in the lower court.").
[41] *Mawn v. Tarquinio*, No. M2019-00933-COA-R3-CV, 2020 WL 1491368, at *2 (Tenn. Ct. App. Mar. 27, 2020) (citing Tenn. R. Civ. P. 52.01 ("In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions or law and direct the entry of the appropriate judgment.")).

has explained that:

> [T]he requirement of making findings of fact and conclusions of law is "not a mere technicality." *Paul v. Watson*, No. W2011-00687-COA-R3-CV, 2012 WL 344705, at *5 (Tenn. Ct. App. Feb. 2, 2012) (quoting *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009)). In addition, "[s]imply stating the trial court's decision, without more, does not fulfill this mandate." *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8 (Tenn. Ct. App. Oct. 24, 2012). If a trial court fails to make findings of fact and conclusions of law, this Court is "left to wonder on what basis the court reached its ultimate decision." *Paul*, 2012 WL 344705, at *5 (quoting *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009)).[42]

The three purposes underlying Rule 52.01—facilitating appellate review, defining precisely what is being decided, and evoking careful consideration of a trial judge—are well established.[43] While "[n]o bright-line test exists to determine whether factual findings are sufficient," "the findings of fact must include as many facts as necessary to express how the trial court reached its ultimate conclusion on each factual issue."[44]

Rule 52.01's requirements apply to criminal contempt cases.[45] In

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[42] *Hall v. Humphrey*, No. E2022-00405-COA-R3-CV, 2023 WL 2657542, at *10 (Tenn. Ct. App. Mar. 28, 2023).

[43] *See Lovlace v. Copley*, 418 S.W.3d 1, 34–35 (Tenn. 2013).

[44] *Mawn*, 2020 WL 1491368, at *2 (citing *Lovlace*, 418 S.W.3d at 35; 9C Charles A. Wright et al., *Federal Practice and Procedure* § 2571, at 328 (3d ed. 2005)).

[45] *See id.* at *13 (holding, in criminal contempt case, that, "[a]ny new order issued by the trial court shall fully comply with Rule 52.01 of the Tennessee Rules of Civil Procedure."); *see also Eleiwa v. Abutaa*, No. W2019-00954-COA-R3-CV, 2020 WL 882141, at *3 (Tenn. Ct. App. Feb. 24, 2020) (holding, in criminal contempt case, that "[b]ecause the trial court failed to comply with Rule 52.01, we vacate the trial court's order and remand the matter for the trial court to establish findings of fact and conclusions of law in compliance with Tennessee Rule of Civil Procedure 52.01.").

many cases, though, trial court criminal contempt orders do not comply with them. Instead trial courts often just check a box finding a defendant guilty or include cursory factual findings to support a conviction. Absent factual findings as to each essential element of criminal contempt, credibility determinations, and an indication of what evidence, if any, supports its judgment, though, trial court contempt orders are vulnerable to reversal on appeal based on a claim that they do not complete with Tennessee Rule of Civil Procedure 52.01.

5. Sentencing errors.

Criminal contempt convictions are not exempt from Tennessee's standard criminal sentencing guidelines.[46] Thus, in criminal contempt cases, "there is a presumption in favor of concurrent sentencing as distinguished from consecutive sentencing."[47] In determining whether to sentence a defendant consecutively or concurrently, a court also must consider the eight factors enumerated in Tenn. Code Ann. § 40–35–115(b). Additionally, "in order to safeguard constitutional procedures courts should employ 'the least possible power adequate to the end proposed.'"[48]

Although a presumption of reasonableness ordinarily attaches to a trial court's sentencing determinations, appellate courts only afford deference to trial court orders that impose a consecutive sentence "if [the trial court] has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40–35–115(b)[.]"[49] By contrast, when a trial court fails to state its

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[46] *See Sneed*, 302 S.W.3d at 828.

[47] *Simpkins v. Simpkins*, 374 S.W.3d 413, 424 (Tenn. Ct. App. 2012) (citing *State v. Taylor*, 739 S.W.2d 227, 230 (Tenn. 1987)); *see also Trezevant v. Trezevant*, 568 S.W.3d 595, 640 (Tenn. Ct. App. 2018) ("We acknowledge that there is a presumption in favor of concurrent sentencing for convictions of criminal contempt. This Court has the ability to modify a sentence that it considers to be excessive.") (citing *Thigpen v. Thigpen*, 874 S.W.2d 51, 54 (Tenn. Ct. App. 1993)).

[48] *Wood*, 91 S.W.3d at 776 (quoting *In Re Michael,* 326 U.S. 224 at 227, 66 S.Ct. 78, 90 L.Ed. 30 (1945) (internal quotations omitted))).

[49] *See State v. Pollard*, 432 S.W.3d 851, 861 (Tenn. 2013); *see also In re Anna L.J.*, 2014 WL 1168914, at *6 ("In the absence of an explanation from the court of why it

reasons for a sentence on the record, appellate review "'is simply de novo.'"[50] Thus, a favorable standard of review applies in the many cases in which trial courts fail to state their statutory reasoning.

a. Inadequately justified consecutive sentences.

The standards that apply to contempt sentencing are violated almost routinely, especially in cases involving consecutive sentencing. Thus, despite firm requirements, trial court sentencing rulings in criminal contempt cases often are "surprisingly sparse."[51] As one recent Tennessee Court of Appeals decision explains:

> For an order sentencing Mother to more than one year in jail in multiple ten-day increments, however, the trial court's order is surprisingly sparse. First, we note that nothing in the trial court's order indicates that it considered whether Mother's sentence should be served consecutively or concurrently, as required by *Sneed*. Further, the trial court completely omits any discussion of the factors contained in Sections 40–35–103 and 40–35–115(a). Moreover, the trial court's order here does not contain any factual findings underlying its contempt finding from which this Court could make an independent review of those factors. As noted by Mother, the trial court's order fails to even indicate the statutory provision it is relying upon in finding Mother in contempt and imposing the sentence of incarceration.[52]

A trial court's failure to conduct the proper—and mandatory—analysis when sentencing a defendant requires that its sentencing determinations be vacated.[53] Further, although Tenn. Code Ann. § 40–35–115(b)(7) allows courts to impose consecutive sentences when a case

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imposed the maximum sentence for each count and for the sentences to be served consecutively, in our review we cannot afford the sentencing decision a presumption of reasonableness or conclude that the court did not abuse its discretion.").

[50] *Reynolds*, 2014 WL 7151596, at *5 (quoting *Carter*, 254 S.W.3d at 345).

[51] *Burris v. Burris*, 512 S.W.3d 239, 257 (Tenn. Ct. App. 2016).

[52] *Id.*

[53] *See, e.g., In re Anna L.J.*, 2014 WL 1168914, at *6.

involves criminal contempt, the Tennessee Court of Appeals has held that that factor alone does not justify imposing the maximum sentence.[54] Thus, consecutive sentences in contempt cases are commonly overturned as excessive when only that factor is present.[55] Generally speaking, lengthy consecutive sentences only appear to have been upheld as reasonable in situations where violence was threatened or the infractions were "flagrant[.]"[56]

b. Inadequately justified sentences of incarceration.

Any sentence of incarceration is similarly vulnerable on appeal absent serious misconduct. When sentencing a criminal defendant, "the overall length of the sentence must be 'justly deserved in relation to the seriousness of the offense[s],' and 'no greater than that deserved' under the circumstances[.]"[57] Put another way: "The sentence should . . . be 'no greater than that deserved for the offense committed.'"[58] Thus, even

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[54] *See Simpkins*, 374 S.W.3d at 425.

[55] *See, e.g., Simpkins*, 374 S.W.3d at 425 ("[h]aving considered the facts of this case, we find the imposition of an effective sentence of 140 days is excessive, especially because only one of the factors in Tennessee Code Annotated § 40–35–115(b) applies."); *Burris*, 512 S.W.3d at 257 (remanding a 403-day consecutive contempt sentence "with instructions to consider whether Mother's sentence was excessive under the circumstances."); *Baker v. Baker*, No. M2010-01806-COA-R3-CV, 2012 WL 764918, at *12 (Tenn. Ct. App. Mar. 9, 2012) ("Mother's acts and omissions while on probation do not justify a 180–day sentence. Considering the unique facts of this case, we find an effective sentence of 180 days is clearly excessive in relation to Mother's acts and omissions.").

[56] *See Worley v. Whitaker*, No. E2010-00153-COA-R3-CV, 2011 WL 1202060, at *7 (Tenn. Ct. App. Mar. 31, 2011); *Sliger v. Sliger*, 181 S.W.3d 684, 692 (Tenn. Ct. App. 2005) (citing *State v. Wood*, 91 S.W.3d 769, 776 (Tenn. Ct. App. 2002)); *Sneed*, 302 S.W.3d at 829.

[57] *In re Sneed*, 302 S.W.3d at 828–29 (quoting Tenn. Code Ann. § 40–35–102(1); Id. at § 40–35–103(2)); *see also Simpkins*, 374 S.W.3d at 425–26 (determining that the imposition of the maximum sentence possible was excessive and modifying the sentence for contempt from 140 days to 49 days in jail); *Burris*, 512 S.W.3d at 258 (vacating sentence because the trial court failed to consider whether the sentence was excessive in light of *Simpkins*).

[58] *See In re A.J.*, No. M2014-02287-COA-R3-JV, 2015 WL 6438671, at *4 (Tenn. Ct. App. Oct. 22, 2015) (quoting Tenn. Code Ann. § 40–35–103(2)).

when an underlying conviction is sustained, many criminal contempt sentences are vacated or modified on appeal because they are excessively harsh and do not satisfy this standard.

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These are just some of the many ways that criminal contempt charges may successfully be defended, either at trial or after conviction on appeal. They are not exhaustive; for example, in rare cases involving lengthy sentences, defendants charged with criminal contempt may be entitled to a jury, and in cases where a defendant is charged with contempt under Tennessee Code Annotated section 36-5-104 for alleged non-payment of child support, a defendant "is entitled to grand jury action."[59] Criminal contempt charges also involve other specialized considerations during and after appeal, including a right to release on bail and a right to expungement in the event of acquittal. Horwitz Law, PLLC's attorneys have successfully navigated these complex issues, too, prevailing in contested appeals resulting from a trial court's denial of bail pending appeal and winning contested post-appeal expungement orders. Thus, if you have been charged with or convicted of criminal contempt in Tennessee, there is no substitute for consulting with competent counsel about your case.

If you would like to consult with a Horwitz Law, PLLC attorney about your Tennessee criminal contempt case, you may do so by purchasing a consultation at: https://horwitz.law/consultation/

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[59] *State v. Hill*, No. M2011-02233-CCA-R3CD, 2012 WL 3834066, at *4 (Tenn. Crim. App. Sept. 5, 2012).