

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50715

JOHN ERVA JOHNSON,

Plaintiff,

versus

SHIRLEY S. CHATER, Secretary of
Health and Human Services,

Defendant-Appellee,

versus

JOHN R. HEARD,

Movant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA 94 CA 323)

(August 22, 1995)

Before JOLLY, DAVIS, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

This case presents the question whether the district court erred by accepting, without a hearing, the magistrate judge's recommendation of contempt and \$500 in sanctions against Attorney

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

John R. Heard. In July 1994, the magistrate judge ordered Heard to file a brief in the captioned case. When Heard missed the August 15 deadline, the judge, without a brief from Heard, filed a memorandum and recommendation with the district court taking note of Heard's failure. The magistrate judge recommended that Heard be held in contempt and fined \$500.

On September 6, Heard filed a response to the magistrate judge's memorandum and requested a hearing by the district court. Without a hearing, the district court adopted the magistrate judge's report on September 28 and ordered Heard to pay the \$500. On October 5, Heard moved for reconsideration, arguing that the Federal Magistrates Act, 28 U.S.C. § 631, et seq., requires the district court to hold a hearing on a magistrate judge's recommendation of contempt sanctions. Heard noticed an appeal of the contempt order on October 25, and the district court denied the motion for reconsideration on November 8, noting that under 28 U.S.C. § 636(e) a hearing by the district court is optional.

"A contempt order is characterized as either civil or criminal depending on its primary purpose." FDIC v. LeGrand, 43 F.3d 163, 168 (5th Cir. 1995). "If the primary purpose is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal." Id. "If the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation, the order is considered purely civil." Lamar Fin. Corp., 918 F.2d at 566.

"A key determinant is whether the penalty is absolute or conditional on the contemnor's conduct." LeGrand, 43 F.3d at 168. By the time that the instant contempt order issued, Heard could no longer comply with the court's order to submit a brief, the violation of which prompted the sanction. The sanction could not bring him into compliance with the briefing order. Given the fact that this contempt penalty was criminal in nature, the judgment of the district court is VACATED and REVERSED, and the case is REMANDED for an appropriate hearing. See 28 U.S.C. § 636(e) and Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 903-04 (3d Cir. 1992).

REVERSED, VACATED, and REMANDED.