

NO. 36027-6-II

COURT OF APPEALS
DIVISION II
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

vs

RYAN MICHAEL JORDAN

In Re: MICHAEL NAGLE, Appellant

BRIEF OF APPELLANT

(Amended)

Michael Nagle, Attorney for Appellant

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ASSIGNMENT OF ERROR:

The lower court erred by holding the undersigned in contempt and imposing sanctions for the alleged contempt.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR:

- (1) Is failure by an attorney to appear for a scheduled hearing a contempt of court as defined by RCW 7.21.010(1)?
- (2) Does a judge have authority to summarily impose a fixed sanction for an alleged past contempt not committed in the presence of the Court?

STATEMENT OF THE CASE:

The attorney for the defendant appeals from three orders in connected cases involving the same defendant finding him in contempt for failing to attend a scheduled hearing. The facts of the underlying cases are not material to the issues

before the Court; the defendant reached a negotiated settlement after the events at issue and is not, for all practical purposes, a party to this appeal.

The defendant had expressed an interest in participating in Drug Court to resolve these charges. I confirmed with the responsible prosecutors that the defendant was eligible for Drug Court and then scheduled the defendant to begin the Drug Court entry process(CP 7).

The Thurston County Drug Court has several steps in its acceptance process. The accused first attends an ""orientation"" at a regular session of Drug Court and witnesses the process in action (RP 12). If his/her interest in participation continues, an intake session and evaluation is scheduled with the Drug Court Coordinator. If that evaluation finds him eligible, the accused signs the Drug Court contract at the next available session of Drug Court and is formally

admitted to the program (RP 12). Part of the contract is a waiver of speedy trial rights for the duration of the Drug Court program, and any remaining hearings on the regular criminal track are stricken(RP 13-14). Responsibility for the defense of the case transfers to the Drug Court staff public defender(RP 12-14).

The defendant in this case attended the first "orientation" session, and I confirmed that he was interested and scheduled for entry of the contract on Friday, January 26, 2007 (CP 7-13). During the week preceding that date, the defendant met with the Drug Court Coordinator for intake. Apparently he was found unsuitable as a candidate due to his history of mental health issues, despite his interest (RP 9). Since I was not notified of the rejection, I assumed that the case had transferred to Drug Court on Friday, January 26, and that the hearing on the morning of Monday, January 29, was stricken (RP 8). Accordingly, I

did not appear for that hearing.

The afternoon of Monday, January 29, the two judges assigned to criminal cases for 2007 appeared at the Office of Assigned Counsel to announce a new policy of imposing progressive fines on attorneys for nonattendance at criminal hearings. They handed out an addition to the ""judge's benchbook"" outlining the policy(CP 7-13). No amendment to the Local Rules or formal announcement of the new policy has ever been made (CP 7-13).

Pursuant to the new policy, I was ordered to appear at a hearing on Thursday, February 1, on pain of an arrest warrant, to show cause why I should not be jailed or fined for missing the Monday hearing(CP 5-6). After hearing an explanation of the above facts, Judge Wickham found me in contempt and imposed a fine of \$150(RP 17).

ARGUMENT:

There was no factual basis for the entry of the order:

RCW 7.21.010(1)¹ defines "contempt of court". Nothing I was alleged to have done-essentially, failing to appear for a hearing- falls within that definition. To the extent that the Court's order purports to constitute findings of fact, they have no basis in the record.

The contempt finding was unauthorized by statute:

¹ "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

RCW 7.21.010² recognizes two possible types of sanctions for contempt: (1) punitive sanctions and (2) Remedial sanctions. As Division 1 has explained:

Washington's general contempt statute provides for either 'punitive' or 'remedial' sanctions. A punitive sanction is imposed to punish a past contempt of court for the purpose of upholding the authority of the court. A remedial sanction is imposed for the purpose of coercing performance when the contempt consists of failure to perform an act that is yet in the person's power to perform. Remedial sanctions are civil rather than criminal and do not require criminal due process protections.

Because most contempt sanctions contain both remedial and punitive elements, however, distinguishing criminal from civil contempt is a notoriously difficult task. In determining whether a particular sanction is civil or criminal, courts look not to 'the

² (2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

subjective intent of a State's laws and its courts,' but examine the 'character of the relief itself.'....

A contempt sanction involving imprisonment remains coercive, and therefore civil, if the contemnor is able to purge the contempt and obtain his release by committing an affirmative act. In other words, the contemnor 'carries the keys of his prison in his own pocket' and can let himself out simply by obeying the court order. As long as there is an opportunity to purge, the fact that the sentence is determinate does not render the contempt punitive. On the other hand, a prison term of a determinate length which does not provide the contemnor an opportunity to purge is generally considered punitive, and thus criminal. Courts may not impose criminal contempt sanctions unless the contemnor has been afforded the same due process rights afforded other criminal defendants. This includes initiation of a criminal action by filing of charges by the prosecutor, assistance of counsel, privilege against self-incrimination, and proof beyond a reasonable doubt.³

While the initial show cause order purported to impose a jail sentence, the final order imposed a fixed monetary penalty. The difference is

³ In re M.B., 101 Wash.App. 425, 3 P.3d 780 (2000)

immaterial. If there is no way to avoid the sanction by complying with the Court's orders, the sanction is punitive and must be sought in a criminal case.

The act I was accused of failing to do- appearing for a hearing on 1-29-07- was impossible of performance after the fact, and the order set no purge condition beyond paying a fixed fine. Thus, the sanction was clearly punitive, and beyond the authority of the Court to impose absent full criminal due process protections.

A summary proceeding for contempt can only be had for disruptive behavior in the courtroom⁴, which is not alleged here. The State Supreme Court has repeatedly held⁵ that an attorney's absence from a scheduled hearing cannot constitute a

⁴ State v. Dugan, 96 Wash.App. 346, 979 P.2d 885 (1999); State v. Berty, 136 Wash.App. 74, 147 P.3d 1004 (2006)

⁵ Washington v. Hatten, 70 Wash.2d 618, 425 P.2d 7 (1967); State v. Winthrop, 148 Wash. 526, 269 P. 793 (1928)

contempt in the court's presence.

Appellant should be awarded his attorney's fees:

The unique procedural posture of this case presents an unusual difficulty under RAP 18.9. "A frivolous appeal is one which, when all doubts are resolved in favor of the appellant, is so devoid of merit that there is no chance of reversal"⁶. Here, the lower court entered an order on its own motion which is plainly invalid. No blame attaches to counsel for the State for this situation, which they did not seek. Even so, this court is presented with an appeal in which there is no basis on which the lower court's order can be *affirmed*. Had the positions been reversed, this court would not hesitate to award attorney's fees under RAP 18.9 for an appeal from a refusal to enter such an order. No less should it hesitate to

⁶ Fidelity Mortgage Corp. v. Seattle Times Co., 131 Wash.App. 462, 128 P.3d 621(2005)

award fees for the appeal from the entry of the order.

CONCLUSION:

I request that the Court reverse the finding of contempt and award my reasonable attorney's fees incurred in this appeal.

Respectfully submitted,

A handwritten signature in cursive script, reading "Michael Nagle", is written over a horizontal line.

Michael Nagle, WSBA #20657

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

CERTIFICATE OF SERVICE

OCT 17 2007
STATE OF CALIFORNIA
BY [Signature]
DEPUTY

I hereby certify that on 10-12-07 I deposited a copy of this document in the US mail, postage paid, addressed to the attorney for the State.

[Signature]

Michael Nagle