

No. 48771-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

Patrick Truxillo,

Appellant.

Grays Harbor County Superior Court Cause No. 14-2-00874-7

The Honorable Judge Mark McCauley

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2

ARGUMENT..... 2

**I. The trial court erred by customizing a remedial
sanction without expressly finding the statutory
sanctions ineffectual..... 2**

**II. If the state substantially prevails, the Court of Appeals
should decline to award any appellate costs requested. 3**

CONCLUSION 4

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

In re Det. of Young, 163 Wn.2d 684, 185 P.3d 1180 (2008) 3

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 3, 4

State v. Sinclair, 192 Wn.App. 380, 367 P.3d 612 (2016) *review denied*,
185 Wn.2d 1034 (2016) 3, 4

WASHINGTON STATE STATUTES

RCW 7.21.030 1, 2, 3

ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by striking the trial date and staying proceedings.
2. The trial court erred by imposing a remedial sanction not specified in RCW 7.21.030(2)(a)-(c) without making the finding required under RCW 7.21.030(2)(d).

ISSUE 1: Before fashioning a remedial sanction that is not listed in RCW 7.21.030(2)(a)-(c), a court must “expressly find[] that those sanctions would be ineffectual to terminate a continuing contempt of court.” Did the trial court violate the statute by customizing a remedial sanction without first expressly finding the available sanctions ineffectual?

3. The Court of Appeals should decline to impose appellate costs, should the state substantially prevail and request such costs.

ISSUE 2: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Truxillo is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state alleges that Patrick Truxillo is a sexually violent predator subject to commitment under RCW 71.09. CP 1. The state sought and obtained an order requiring Mr. Truxillo to submit to a polygraph. CP 253-255. Mr. Truxillo refused. CP 402.

The court found Mr. Truxillo in contempt. CP 402. As a sanction, the court struck Mr. Truxillo's trial date and stayed further proceedings. CP 402-403. The court entered no findings regarding the efficacy of other available sanctions. CP 402-403.

ARGUMENT

I. THE TRIAL COURT ERRED BY CUSTOMIZING A REMEDIAL SANCTION WITHOUT EXPRESSLY FINDING THE STATUTORY SANCTIONS INEFFECTUAL.

RCW 7.21.030 governs remedial sanctions for contempt.

Following a finding of contempt, the court may imprison the contemnor, order a monetary forfeiture, or enter an order "designed to ensure compliance with a prior order." RCW 7.21.030(2)(a)-(c).

Before imposing "[a]ny other remedial sanction," the court must "expressly find[] that [the listed] sanctions would be ineffectual to terminate a continuing contempt of court." RCW 7.21.030(2)(d). The trial

court made no such finding in this case, but stayed the proceedings and struck the trial date.¹

In the absence of an express finding, the contempt order must be vacated and the case remanded to the trial court for a new hearing.

II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, “[t]he

¹ In *dicta*, the Supreme Court has characterized a similar order as “a remedial sanction designed to ensure compliance with the prior order.” *In re Det. of Young*, 163 Wn.2d 684, 694, 185 P.3d 1180 (2008) (citing RCW 7.21.030(2)(c)). But the trial court in *Young* made the required finding, and the appellant in that case raised no challenge relating to the adequacy of that finding. *Id.*, at 688. The *Young* court’s *dicta* rests on a misinterpretation of the statute that would render RCW 7.21.030(2)(d) superfluous. The *Young* court’s *dicta* should not control here.

future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise discretion when properly requested to do so." *Sinclair*, 192 Wn. App. at 388.

Mr. Truxillo has been convicted of a sex offense, and currently resides at the Special Commitment Center. CP 1, 41-42. The trial court determined that he is indigent for purposes of this appeal. CP 406-407. There is no reason to believe that status will change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

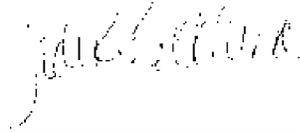
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, the trial court's contempt order must be vacated and the case remanded for a new hearing. If the state substantially prevails on review, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on August 23, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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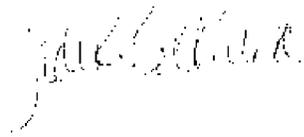
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 23, 2016.



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BACKLUND & MISTRY

August 23, 2016 - 12:15 PM

Transmittal Letter

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