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COURT OF APPEALS  
DIVISION II  
2018 JUL 25 AM 11:42  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

No. 49392-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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RICHARD KING and RICHARD JACKSON, individually and  
representing a class of similarly situated individuals,

Plaintiffs,

DEREK GRONQUIST,

Appellant-Intervenor-Plaintiff,

v.

CHASE RIVELAND and JANNET BARBOUR in their official  
capacities; the DEPARTMENT OF CORRECTIONS OF THE  
STATE OF WASHINGTON; the INDETERMINATE SENTENCING  
REVIEW BOARD; and KEN EIKENBERRY in his official  
capacity as Attorney General of the State of  
Washington,

Respondents-Defendants,

KING COUNTY PROSECUTOR DANIEL T. SATTERBERG,

Respondent-Intervenor-Defendant.

FILED  
COURT OF APPEALS  
DIVISION II  
2018 JUL 25 PM 3:15  
STATE OF WASHINGTON  
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APPELLANT'S REPLY BRIEF

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Derek E. Gronquist  
#943857 C-616-2  
Monroe Corr. Complex  
Twin Rivers Unit  
P.O. Box 888  
Monroe, WA 98272

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**A. FACTS RELEVANT TO REPLY.**

The issue before the Court is simple: can a contempt action be rendered moot by "prospective" vacation of an injunction? See Appellant's Opening Brief at 23-34. Rather than address that issue, respondent Satterberg filed a brief rife with irrelevant, false, and disparaging comments directed at Mr. Gronquist. See Prosecutor Daniel T. Satterberg's Response Brief (Satterberg Response). Those statements are unsupported by citation to the record, and Mr. Gronquist has moved to strike that brief. See Motion to Strike. The Brief of Respondent Department of Corrections (DOC Response) is more tempered, but likewise includes disparaging remarks and misleading statements concerning the law and proceedings below. See Id.

The respondents statements appear to be interposed to prejudice the Court, and distract from the question at issue. This case is not about whether Mr. Gronquist is a model citizen; it does not seek to determine if Gronquist should be punished for past criminal conduct; and it is not about a special proceeding which Mr. Satterberg has never had the conviction to initiate. The case before the Court concerns government officials

violation of a court order, and whether the judiciary possesses the power to remedy that violation.

**B. ARGUMENT.**

**I. THE STANDARD OF REVIEW IS DE NOVO**

"A court's authority to impose sanctions for contempt is a question of law, which [is] review[ed] de novo." Dependency of A.K., 162 Wn.2d 632, 644 (2007); Interest of Silva, 166 Wn.2d 133, 140 (2008). "Mootness is a question of law that [is] review[ed] de novo." Robbins v. Legacy Health System, Inc., 177 Wn.App. 299, 308 (Div. 2 2013); Bavand v. OneWest Bank, 176 Wn.App. 475, 510 (2013).

Despite the clarity of Washington law on the subject, Respondents contend the standard of review is abuse of discretion. Satterberg Response at 10 (citing Weiss v. Lonquist, 173 Wn.App. 344, 363 (2013) and Chamber of Commerce v. Department of Energy, 627 F.2d 289, 291 (D.C.Cir. 1980)); DOC Response at 4-5 (citing Marriage of Williams, 156 Wn.App. 22, 27 (2010)).

Weiss reviewed the imposition of sanctions for violation of a discovery order. Williams reviewed a trial court decision which found no violation of a court order after a hearing on the merits. Chamber

of Commerce held that "no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief.").

DOC attempts to buttress its contention by claiming it "did not move to dismiss Gronquist's contempt motion under CR 12." DOC Response at 5. That motion, however, requested dismissal "as a matter of law." CP 600 & 604. Only CR 12(b) and CR 56(c) authorize dismissal "as a matter of law," which are reviewed de novo. Washington Trucking Association v. Employment Security Department, 188 Wn.2d 198, 207 (2017)(CR 12(b)); Sprague v. Spokane Valley Fire Department, 189 Wn.2d 858, 871 (2017) (CR 56(c)). Consistent with CR 12(b), Judge Hirsch reviewed only the pleadings when dismissing this action. CP 723-724. The standard of review applicable to "matters of law" should apply here. Hilltop Terrace Homewowner's Association v. Island County, 126 Wn.2d 22, 29 (1995)(issues of law are reviewed de novo).

Regardless of how Respondents attempt to frame this controversy, the question being reviewed is whether this action is moot because the trial court lacked legal authority to remedy contemptuous conduct. That question is reviewed de novo. A.K.,

Silva, Robbins, Bavand, and Hilltop Terrace, supra.

## II. JUDICIAL ESTOPPEL BARS THE RESPONDENTS INCONSISTENT POSITIONS

Respondents confine their opposition to judicial estoppel to its first element: inconsistent positions. Satterberg Response at 15-16; DOC Response at 6-9. To support that argument, Respondents point to statements made in briefing filed before Mr. Gronquist asserted the collateral bar rule<sup>1</sup> and before the hearing on their motions. Ids.

Judge Price made an express factual finding that Respondents "conced[e] . . . their motion does not directly affect the current contempt action." CP 595. Based upon that finding, Judge Price held: "the Court's order [vacating the injunction] is prospective only, and does not resolve allegations of contempt in the past." Id. Respondents have neither appealed nor assigned error to those findings and conclusions, and they are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808 (1992).

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<sup>1</sup>The collateral bar rule "prohibits a party from challenging the validity of a court order in a proceeding for violation of that order." City of Seattle v. May, 171 Wn.2d 847, 857 (2010).

Despite Judge Price's express finding and conclusion, Respondents took a contrary position as soon as the case was transferred to Judge Hirsch - arguing the case was "moot and no longer viable as a matter of law as a result of th[e] court's January 14, 2016 ruling." CP 599-605 & 708-714. Judicial estoppel prohibits such disingenuous and inconsistent positions. Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538 (2007).

### III. THIS ACTION IS NOT MOOT

a. The superior court possesses the statutory authority to impose remedial sanctions for Respondents violation of the King injunction.

Contempt is "intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b) (emphasis added). RCW 7.21.030(2) authorizes remedial sanctions for contempt if "the court finds that the person has failed or refused to perform an act that is yet with the persons power to perform. . ." Those sanctions include:

(a) "Imprisonment" commensurate with a "coercive purpose."

(b) "forfeiture not to exceed two thousand dollars for each day the contempt of court continues";

(c) an "order designed to ensure compliance with a prior order of the court"; and

(d) "any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds

that those sanctions would be ineffectual to terminate a continuing contempt of court."

RCW 7.21.030(2).

Mr. Satterberg contends that "because the 1993 Injunction was vacated as to Gronquist and the SOTP documents are in [his] proper possession . . . , there is no conceivable remedy available to Gronquist through the Court's civil contempt powers." Satterberg Response at 11. DOC contends "[t]he trial court's vacation of the permanent injunction as to Gronquist on January 14, 2016 and DOC's subsequent lawful provision to the King County Prosecutor of all of Gronquist's SOTP records rendered Gronquist's contempt motion seeking only remedial relief moot as such relief was unavailable as a matter of law." DOC Response at 14.

RCW 7.21.010(1)(b) and .030(2) expressly authorize remedial sanctions for "any" intentional violation of a court order. Of the sanctions authorized by RCW 7.21.030(2), only subsection (d) is limited to "continuing contempt[s] of court." Subsection (c) is particularly applicable to the facts of this case, as it authorizes the Court to fashion a remedy "designed to ensure compliance

with a prior order of the court." RCW

7.21.030(2)(c).

The statutory language defining contempt as "any" intentional violation of a court order, and authorizing a remedial sanction "to ensure compliance with a prior order" cannot be interpreted to mean only a current order, as that would render the statutory language "any. . . prior order" meaningless. Citizens Alliance v. San Juan County, 184 Wn.2d 428, 440 (2015)("statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

While any sanction imposed under RCW 7.21.030(2) must contain a "purge" condition tied to an "act that is yet within the persons power to perform," that condition does not need to be linked to the order violated. In re Structured Settlement Payment Rights of Rapid Settlements, 189 Wn.App. 584, 614 (2015). Even if it did, neither Respondent contends that it is not "within their power" to purge themselves of Mr. Gronquist's SOTP records. To the contrary, Respondents merely decry that they don't want to because they have formed the belief that they are entitled to the records and view them

as instrumental to keeping Mr. Gronquist confined. Satterberg Response at 5-6; DOC Response at 27. But the question is not whether the Respondents want to perform an act to purge themselves of contempt, or even if Mr. Gronquist will derive some benefit from it; the question is whether Respondents possess the "power to perform" such and act. RCW 7.21.030(2). They clearly do.

Respondents also conveniently forget that Mr. Gronquist's contempt action embraced not only records that were unlawfully disclosed to Mr. Satterberg, but to DOC Classification Counselors, Community Corrections Officers, and members of the End of Sentence Review Board. See CP 11-20. Judge Price's order was based upon RCW 71.09.025. CP 593-598. That statute is limited to prosecutors. It does not authorize disclosures to DOC officials. Neither Respondent disputes that those officials cannot be purged of unlawfully disclosed records, or that they could be compelled to reevaluate decisions based upon those records. Cf. Satterberg Response & DOC Response, passim.

Respondents also overlook the fact that Judge Price expressly held that his decision to vacate was "prospective only" and "did not resolve issues

of contempt in the past." CP 595. That order is binding, keeps the injunction in full force and effect for purposes of this action, and protects all SOTP records created prior to January 14, 2016. See Appellant's Opening Brief at 24-27.

While DOC agrees that "Judge Price indeed indicated that his vacation of the injunction . . . was "prospective only,"" it claims that "means only that the injunction no longer applied to Gronquist after January 14, 2016" or Mr. Gronquist's attorney waived rights secured by the injunction through an out-of-court email. DOC Response at 19-20.

DOC's position ignores, in the absence of any reasoned argument or citation to authority, the legal effect of "prospective" judicial decisions. Such decisions "affect[] only those cases arising after the announcement of the new rule." Lunsford v. Saberhagen Holdings, 166 Wn.2d 264, 270-71 (2009); Cascade Security Bank v. Butler, 88 Wn.2d 777, 785-86 (1977)(prospective application protects "rights and liabilities" of the party). It is also far too much to read a passing comment made by counsel in an email as Mr. Gronquist's waiver of rights secured by the injunction. Mr. Gronquist has certainly not waived those rights, and only he

possesses the power to do so. RCW 5.60.060(4)&(9); RCW 70.02.020(1).

Because the trial court possesses the authority to find Respondents in contempt and impose remedial sanctions under RCW 7.21.030(2), whether the injunction was subsequently vacated or not, this case is not moot.

b. The superior court possessed the authority to require the Defendants to compensate Mr. Gronquist for his injuries, costs, and attorney fees. RCW 7.21.030(3) authorizes the Court to award costs, attorney fees, and "any losses suffered by the party as a result of the contempt."

Satterberg contends that Mr. Gronquist made "no argument below" for such relief. Satterberg Response at 16. DOC contends that the statute's use of "in addition to" means that such relief can be "awarded only if remedial sanctions under subsection (2) have been imposed"; and Mr. Gronquist cites no authority which authorizes such an award "when coercive relief is unavailable." DOC Response at 21-23.

Mr. Gronquist raised the issue below. His initial pleading requested "at least \$500 per contemnor for each day the contempt of court

continues" and "attorneys' fees and costs under RCW 7.21.030(3) for bringing this contempt motion"; his motion to show cause sought an order requiring the Respondents to "show cause why they, as a categorical matter, should not be subject to this Court's contempt powers"; his response to DOC's motion argued that the case was not moot because the court could order Respondents to pay "for any losses suffered . . . as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney fees. RCW 7.21.030(3)." CP 29, 72 & 700-701.

DOC failed to raise its "in addition to" argument below, and cannot do so now. RAP 2.5(a); Kave v. McIntosh Ridge Primary Rd. Ass'n, 198 Wn.App. 812, 823 (2017)(courts generally do not consider arguments raised for the first time on appeal). DOC also misreads the statute. RCW 7.21.030(3)'s use of the phrase "in addition to" merely means that the court may grant such an award "in addition to" the remedial sanctions listed in RCW 7.21.030(2). Rapid Settlements, 189 Wn.App. at 601 (RCW 7.21.030(3) authorizes damages, costs, and fees "without regard to whether it is possible to craft a coercive sanction" under RCW 7.21.030(2)).

The statute does not say that such relief can be awarded "only when a remedial sanction under subsection (2) has been imposed."

Concerning DOC's final argument, Mr. Gronquist cited RCW 7.21.030(3) and case law which authorize the award damages, costs, and fees even if "coercive relief is unavailable." See Appellant's Opening Brief at 27-29.

Because the trial court possesses the authority to award damages, costs, and attorney fees "suffered by the party as a result of the contempt," RCW 7.21.030(3), "without regard to whether it is possible to craft a coercive sanction," Rapid Settlements, 189 Wn.App. at 601, this case is not moot.

c. The trial court possessed authority to request a prosecutor to initiate a criminal contempt proceeding or appoint a special counsel to prosecute a criminal contempt proceeding. The trial court possessed statutory authority to request a prosecuting attorney to commence, or "appoint a special counsel to prosecute an action to impose a punitive sanction for contempt." RCW 7.21.040(2)(c).

Mr. Satterberg contends that under "RCW 7.21.040, a punitive sanction can only be sought by the local prosecutor"; and he cannot be subject to the statute because the limitations period for misdemeanors has elapsed. Satterberg Response at 14-15. DOC contends that Mr. Gronquist did not raise the issue below, and the court "did not err in not referring this matter for criminal prosecution under RCW 7.21.040." DOC Response at 24. Neither Respondent disputes that effective relief could be provided under RCW 7.21.040.

Mr. Satterberg's first contention is contrary to the plain language of RCW 7.21.040, which authorizes local prosecutors and court-appointed special counsels to prosecute such actions. See also Interest of Mowery, 141 Wn.App. 263, 278-79 (2007)(court possesses authority to impose punitive contempt sanction without a prosecutor, so long as criminal due process protections are afforded).

Mr. Satterberg also confuses the punitive sanctions authorized by RCW 7.21.040 with a crime to which the statute of limitations under RCW 9A.04.080 is applicable. He claims: "Criminal contempt . . . is a gross misdemeanor," but fails to identify any statute showing that it is. See

Satterg Response at 15. Chapter 7.21 RCW does not define crimes; it establishes a "special proceeding" for contempt of court. Just because due process requires the same level of safeguards provided to criminal defendants before a punitive contempt sanction may be imposed, A.K., 162 Wn.2d at 646, does not change RCW 7.21.040 into a criminal offense to which RCW 9A.04.080 is applicable.

Concerning DOC's argument, resort to the Court's punitive contempt powers was raised below. See CP 118 (Satterberg asserting that "Gronquist appears to be seeking remedies that are available only under the criminal contempt statute, RCW 7.21.040."); CP 711 (Satterberg contending that "Gronquist is left to seek a punitive sanction to punish DOC and Prosecutor Satterberg for the alleged violations"); CP 73 (Gronquist arguing the case is not moot because "[n]othing under the Court's inherent authority or by statute prevents it from hearing the merits . . . and . . . sanctioning DOC and the Prosecutor . . . [through] punitive or remedial sanctions for contempt of court"). As for the second contention, the question of mootness turns upon whether a court "can provide

any effective relief," not whether it should or would grant such relief. City of Sequim v. Malkasian, 157 Wn.2d 251, 259 (2005).

Because the trial court could have provided effective relief under RCW 7.21.040, this case is not moot.

**d. The trial court possesses inherent authority to fashion a remedy for the Respondents contemptuous conduct.** "The inherent power of the court to hold a person in contempt can be used to enforce orders or judgments in aid of the court's jurisdiction and to punish violation of orders or judgments." State v. Boatman, 104 Wn.2d 44, 48 (1985). The measure of a court's inherent authority "is determined by the requirements of full remedial relief." McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949).

Mr. Satterberg does not dispute that the trial court could have provided a remedy under its inherent authority. Satterberg Response at 10-17. Instead, he contends the remedies authorized by Chapter 7.21 RCW are not available, and the case is moot because he possesses Gronquist's SOTP records. *Id.*, at 12-13. DOC makes a similar mootness argument; contends "[t]he trial court did not find

its statutory contempt authority to be inadequate"; and asserts that "[e]ven if the trial court could have exercised its inherent contempt powers" the relief Mr. Gronquist requests "is beyond the scope of relief the trial court could grant." DOC Response at 26.

Respondents contentions about mootness are foreclosed by binding precedent. In Mead School District No. 354 v. Mead Education Association, 85 Wn.2d 278 (1975), a superior court issued a preliminary injunction that was subsequently vacated upon appeal. Prior to the injunction being vacated, several officials violated the court's order and were found in contempt. The officials appealed the contempt citation, arguing that vacation of the injunction "vitiates" the court's contempt authority. Mead, 85 Wn.2d at 279. The precise question the Supreme Court was asked to resolve was

whether the fact that the injunction was later adjudicated to be invalid excuses the appellant's allegedly contemptuous conduct.

Mead, 85 Wn.2d at 280.

The Supreme Court held that "the impropriety of the injunction does not vitiate these contempt convictions":

flaws which do not go to the heart of the judicial power are insufficient to justify the flouting of an otherwise lawful order.

Mead, 85 Wn.2d at 279 & 284.

DOC does not address Mead. Instead, it argues that State v. Breazeale, 144 Wn.2d 829 (2001) "supports the dismissal of Gronquist's civil contempt motion." DOC Response at 15. DOC is wrong. In Breazeale, "there was no order with which the [state agency] failed to comply. . ." 144 Wn.2d at 843. Here, there was a valid injunction in effect at the time Respondents violated it, when Mr. Gronquist sought enforcement, and to the present day (as a result of Judge Price's "prospective only" ruling). Under Mead, the trial court possesses inherent authority to sanction Respondents contemptuous conduct.

Contrary to DOC's second contention, Judge Hirsch's dismissal of this action necessarily implies that she found the statutory remedies inadequate or unavailable. CP 723-724. At that point, the court should have recognized that it could provide effective relief through its inherent authority, and proceed to a hearing on the merits.

The trial court possessed not only the inherent authority but the duty to provide "full remedial relief." McComb, 336 U.S. at 193. That

relief could have been in the nature of a fine or remittance to jail. Mead, 85 Wn.2d at 286; Bresolin v. Morris, 86 Wn.2d 241, 249-50 (1975). The Court could have ordered Mr. Gronquist's transfer to community custody, or release from confinement. Bresolin, 86 Wn.2d at 249-50 (if prison official's violation of a court order was willful "we could release or transfer the prisoner" as a remedy for contempt); Mickens Thomas v. Vaughn, 355 F.3d 294, 310 (3rd Cir. 2004)(ordering the release of a prisoner as a remedy for officials refusal to comply with court order that limited facts that could be used in determining parole eligibility). Finally, the court possesses the authority to enjoin Mr. Satterberg from initiating a prosecution under Chapter 71.09 RCW. Shaw v. Garrison, 328 F.Supp. 390 (E.D.La 1971)(court used inherent equitable power to enjoin criminal prosecution).

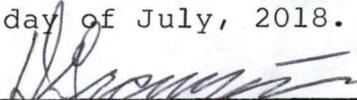
**C. CONCLUSION.**

Whatever remedy the trial court could, or ultimately would impose for the Respondents repeat and flagrant breaches of the King injunction is not before this Court. All that matters is that the court could grant some form of relief. Because the

trial court possesses such authority, this case is not moot.

This Court should reverse and remand for a hearing to determine if the Respondents violated the Court's order, and if so, to fashion an appropriate remedy.

Submitted this 19th day of July, 2018.

  
\_\_\_\_\_  
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DECLARATION OF SERVICE

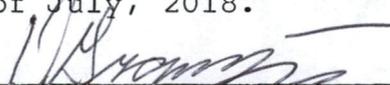
Derek Gronquist declares under penalty of perjury under the laws of the state of Washington that on this day I deposited a properly addressed envelope(s) in the internal legal mail system of the Monroe Correctional Complex, and made arrangements for postage, containing: Appellant's Reply Brief. Said envelope(s) was addressed to:

Derek M. Byrne, Clerk  
Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Douglas Carr  
Assistant Attorney General  
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David Hackett  
King County Prosecuting Attorney's Office  
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Dated this 20th day of July, 2018.

  
\_\_\_\_\_  
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