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No. 50077-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of

Ausagetalitama Faga,

Appellant.

Pierce County Superior Court Cause No. 12-2-08307-5

The Honorable Judge Jerry T. Costello

Appellant's Reply Brief

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ARGUMENT

THE COURT SHOULD LIFT THE CONTEMPT SANCTION AND REMAND THE CASE FOR TRIAL

A. The Court of Appeals should review *de novo* this pure question of law, which is based on undisputed facts.

Because this appeal presents an issue of law, the Court of Appeals should review the case *de novo*. See Appellant’s Opening Brief, p. 10; *Tabingo v. Am. Triumph LLC*, 188 Wn.2d 41, 46, 391 P.3d 434 (2017), *as amended* (May 2, 2017), *reconsideration denied* (May 10, 2017).

As Respondent points out, there are no disputed issues of fact. Brief of Respondent, pp. 9-10. The Court of Appeals accepted review of a single legal question based on these undisputed facts: “May a court force a contemnor to waive statutory and constitutional rights at the behest of a non-party as a precondition to purging his or her contempt?” Motion for Discretionary Review, p. 1; *see also* Motion to Modify, p. 7. Because this case presents a pure question of law based on undisputed facts, review is *de novo*. *Id.*

Respondent does not address this argument. Brief of Respondent, pp. 9-10. Instead, Respondent implies that issues relating to contempt are always reviewed for abuse of discretion. Brief of Respondent, pp. 9-10.

This is demonstrably false. *See, e.g., In re Silva*, 166 Wn.2d 133, 140, 206 P.3d 1240 (2009). In *Silva*, the Supreme Court addressed the trial

court's "authority to impose sanctions for contempt." *Id.* The court described this as "a question of law, which we review de novo." *Id.*¹

Here, as in *Silva*, the issues involve the trial court's authority. There are no factual issues or credibility determinations under review. Instead, the Court of Appeals must determine if the trial court has the authority to deny Mr. Faga his release trial because he refuses to comply with the demands of the State's experts.

The two cases relied upon by Respondent do not address legal issues. Brief of Respondent, pp. 9-10 (citing *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) and *In re King*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988)). Both cases involved the trial court's initial discretionary decision to enter an order of contempt. *Moreman*, 126 Wn.2d at 40; *King*, 110 Wn.2d at 798. As the Supreme Court observed, "[w]hether contempt is warranted in a particular case is a matter within the sound discretion of the trial court." *King*, 110 Wn.2d at 798.

Here, Mr. Faga does not contest the trial court's initial contempt finding. Instead, he asks the Court of Appeals to address a pure question of law based on undisputed facts stemming from documentary evidence.

¹ See also *In re Dependency of A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11, 17 (2007) ("A court's authority to impose sanctions for contempt is a question of law, which we review de novo"); *In re M.B.*, 101 Wn. App. 425, 454, 3 P.3d 780 (2000) ("Whether a purge condition exceeded the court's authority or violated a contemnor's due process rights, however, are questions of law, which are reviewed de novo").

No discretionary decision is involved. Accordingly, review is *de novo*. *Tabingo*, 188 Wn.2d at 46; *Ameriquet Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 488, 300 P.3d 799 (2013).

Review is *de novo* for another reason as well. Appellate courts review *de novo* a trial court decision that relies exclusively on documentary evidence. *See* Appellant's Opening Brief, pp. 9-10; *Ameriquet*, 177 Wn.2d at 488.

Where a decision is based on documentary evidence, the appellate court "stands in the same position as the trial court." *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). This is true regardless of the type of case; there is no reason to distinguish contempt cases from other cases involving documentary testimony.

Judge Costello has never heard testimony regarding the contempt issue. CP 477-478, 482-491, 497-498; Clerk's Minutes filed 05/17/12, 05/31/12, 06/11/12, 08/17/12, 06/21/13, 02/07/14, 02/28/14, 03/14/14, 05/08/15, 06/06/15, 07/22/16, Supp. CP. Nor has he had any opportunity to observe Mr. Faga's demeanor since the probable cause hearing: Mr. Faga has either been completely absent or present only by telephone. CP 477-478, 482-491, 497-498; Clerk's Minutes filed 05/17/12, 05/31/12, 06/11/12, 08/17/12, 06/21/13, 02/07/14, 02/28/14, 03/14/14, 05/08/15,

06/06/15, 07/22/16, Supp. CP. There is no indication that Mr. Faga has ever spoken in court. CP 477-478, 482-491, 497-498; Clerk's Minutes filed 05/17/12, 05/31/12, 06/11/12, 08/17/12, 06/21/13, 02/07/14, 02/28/14, 03/14/14, 05/08/15, 06/06/15, 07/22/16, Supp. CP.

Any "credibility" determination made by Judge Costello stems from the documents that are before the Court of Appeals. The appellate court should not "defer to the trial court's determination regarding the credibility, weigh and reliability" of the evidence as Respondent claims,² because the appellate court "stands in the same position" as Judge Costello. *Progressive Animal Welfare Soc.*, 125 Wn.2d at 252.

The case involves a pure issue of law. The arguments rest on undisputed facts. The record consists wholly of documentary evidence. For all these reasons, review is *de novo*. *Id.*; *Tabingo*, 188 Wn.2d at 46; *Ameriquet*, 177 Wn.2d at 488.

B. The trial court did not order Mr. Faga to sign any waivers; his refusal to do so is not a violation of the court's orders and does not provide a basis to maintain the contempt sanction.

The trial judge ordered Mr. Faga to complete a sexual history polygraph and to cooperate with a supplemental evaluation. CP 21-22,

² Brief of Respondent, p. 11.

156-157, 170-176, 182-183. The court did not order him to sign any waivers. CP 21-22, 156-157, 170-176, 182-183.

Mr. Faga has agreed to comply with the court's orders. CP 186, 209. Without any legal justification, third parties—the State's chosen experts— seek to force Mr. Faga to waive important rights before he can purge his contempt. CP 203-206. They also wish him to falsely state that he is voluntarily participating in the court-ordered evaluations. CP 203-206.

Mr. Faga cannot purge his contempt without the State's cooperation. As matters stand, the experts selected by the State refuse to visit him to conduct the court-ordered testing that is the subject of the contempt finding. CP 187, 194, 202, 209, 214. Their reason for doing so is his refusal to sign waivers and consent forms; however, the court has not ordered him sign any waivers or consent forms. Indeed, there is no basis for a court order directing him to waive his rights or to falsely state that his participation in court-ordered testing is voluntary.

Mr. Faga's ability to purge is conditioned upon the actions of third parties who refuse to administer the required tests. Because Mr. Faga cannot purge the contempt on his own, the purpose of the court's contempt order "is defeated." *M.B.*, 101 Wn.App. at 460. Like the juvenile contemnors in *M.B.*, Mr. Faga has no control over the State's experts.

Mr. Faga's case does not present the typical situation where a contemnor claims an inability to comply with a court order. *Cf. Moreman*, 126 Wn.2d at 39 (after initially refusing to deliver cabinets that were in his possession, "Butcher testified that he could not comply with the court's order to deliver the cabinets because he no longer possessed them").

Mr. Faga does not claim he lacks the physical ability to sign the waivers and consent forms presented by the State's experts. *See* Brief of Respondent, pp. 14-15. The question here is whether the trial court can coerce him into doing so by holding him in contempt until he signs.

Mr. Faga's inability to comply rests on the legal consequences that flow from signing. Such impediments qualify as a barrier to compliance.³ *See, e.g., King*, 110 Wn.2d at 804–805 ("[t]hese principles [regarding contemnor's inability to comply] extend also to situations where the failure to comply with an order may be constitutionally protected"); *see also Stone v. State*, 85 Wn.2d 342, 347, 534 P.2d 1022 (1975) (lifting contempt order where compliance would involve self-incrimination); *Dike v. Dike*, 75 Wn.2d 1, 9–10, 448 P.2d 490 (1968) (contempt proceedings

³ Because his inability to comply rests on a question of law, the issue does not involve "persuasive and credible evidence of [Mr. Faga's] inability to comply." Brief of Respondent, p. 13. The issue is not whether he *can* comply; the question is whether the court can exercise its contempt power to force Mr. Faga to sign the waivers and consent forms.

dismissed because compliance required violation of attorney-client privilege).

Without citation to authority, Respondent suggests that the burden is on Mr. Faga to seek intervention from the trial court to relieve him of the requirements imposed by the State's experts. Brief of Respondent, pp. 12, 17-18, 22-23. This court may assume that counsel, after diligent research, has found no authority supporting this argument. *In re Det. of Herrick*, 198 Wn. App. 439, 448 n. 24, 393 P.3d 879 (2017). It is the State that wishes Mr. Faga to submit to testing. The State should bear the burden of removing unnecessary barriers to his compliance.

Furthermore, Mr. Faga asked the court to lift the contempt sanction. This created sufficient opportunity for the court to craft a solution, or for the State to suggest a means for Mr. Faga to comply without waiving his rights or falsely stating that he consented to the court-ordered evaluations.

Respondent also implies that Mr. Faga is insincere in his desire to purge the contempt sanction. Brief of Respondent, pp. 12-13, 15. According to Respondent, Mr. Faga "has engaged in a series of attempts to have the contempt sanction lifted without actually complying with the court's order." Brief of Respondent, p. 12.

This theory is easily tested. The State may select different experts, or it may instruct the current experts to proceed without requiring Mr. Faga to sign.⁴ If the State takes these steps and Mr. Faga still refuses to submit, the contempt sanction need not be lifted.⁵

However, Mr. Faga should not be required to pretend that he is voluntarily submitting to court-ordered testing. Nor should he be required to waive his rights to purge his contempt. CP 187, 194, 202-206, 209, 214. The Court of Appeals must vacate the trial court's order, lift the contempt sanctions, and remand the case for trial. *Id.*

C. The trial court improperly modified Mr. Faga's purge condition to impose additional requirements.

After imposing civil contempt, a court may not modify a purge condition to increase the burden on the contemnor. *M.B.*, 101 Wn. App. at 462. Because the court's original contempt order did not require Mr. Faga to sign any waivers or consent forms, the court cannot now require him to do so to purge his contempt. *Id.*; CP 172.

⁴ Alternatively, the State may seek intervention from the trial court allowing the evaluations to proceed without Mr. Faga's coerced signatures.

⁵ The State appears to suggest that Mr. Faga should never be given another opportunity to comply, because his promise to comply might be insincere. But civil contempt requires the court to provide opportunities to comply. If all barriers are removed, the court need not lift the contempt sanction based on Mr. Faga's promise to comply. Instead, the court can wait until Mr. Faga actually complies. This will necessarily require a visit from Dr. Hoberman and the polygrapher.

Compliance does not merely require Mr. Faga to “acknowledge Informed Consent.” *See* Brief of Respondent, pp. 16-20. The forms proffered by the State’s expert require Mr. Faga to waive his rights and to falsely state that he is voluntarily participating in the court-ordered evaluations. CP 203-206.

Mr. Faga offered to acknowledge that he received notice—that he was “informed,” but did not consent and did not waive his rights.⁶ CP 203-206. This offer was rejected. CP 186-187, 194, 202, 209, 214.

The court has added to Mr. Faga’s burden by refusing to lift the contempt sanction unless he signs the waivers and consent forms proffered by the State’s experts. This is improper because it amounts to “ongoing modification and increasing onerousness” of the purge condition. *Id.* The court’s order must be reversed, the remedial sanctions lifted, and the case remanded for trial.

D. Mr. Faga should not be forced to falsely state that his court-ordered participation is voluntary.

Mr. Faga refuses to falsely state that his participation in court-ordered testing is voluntary. CP 203-206, 209. However, he cannot purge

⁶ The fact that he once signed similar forms does not mean that he should be required to sign the current forms. *See* Brief of Respondent, p. 17. Nothing requires a person to sign all future forms based on a willingness to sign similar forms in the past. This is especially true where the refusal to sign is based on the advice of counsel.

his contempt unless he does so: the trial court won't lift the contempt sanction unless the State's experts conduct their tests, and the State's experts refuse to do so unless Mr. Faga falsely indicates he is acting voluntarily.

By enforcing the requirements imposed by the State's experts, the trial court has violated Mr. Faga's First Amendment right to be free from compelled speech. CP 296-299; *see* Appellant's Opening Brief, pp. 14-15; *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213, 133 S. Ct. 2321, 2327, 186 L. Ed. 2d 398 (2013); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573, 115 S. Ct. 2338, 2347, 132 L. Ed. 2d 487 (1995).

Respondent erroneously suggests that the consent and waiver forms merely require Mr. Faga to acknowledge "the purpose, scope, and potential consequences of an evaluation, both the benefits and risks." Brief of Respondent, p. 18. This is not true.

Dr. Hoberman's forms require Mr. Faga to "agree to participate in [the] evaluation," and to "agree to all terms and conditions." CP 203, 205. CP 203. The polygrapher's form requires him to state that he participated

in the polygraph “freely, voluntarily and without threats or promises of any kind.” CP 206.

Mr. Faga was willing to acknowledge that he’d received notice and that he was participating under court order. CP 203-206. His offer to do so was rejected. CP 186-187, 194, 202, 209, 214.

The trial court’s order refusing to lift the contempt sanction and schedule the case for trial is unconstitutional. CP 296-299. This is so even if the consent and waiver forms are “reasonable and customary.” Brief of Respondent, p. 19. The First Amendment prohibits compelled speech, even if the speech is reasonable and even if it is consistent with custom. *See Hurley*, 515 U.S. at 573.

The order must be vacated, the contempt sanction lifted, and the case remanded for trial. *See Appellant’s Opening Brief*, pp. 14-15.

E. The trial court should not coerce Mr. Faga into waiving his rights.

By refusing to lift the contempt sanction, the trial court has acted to enforce the demands of the State’s experts. These demands require Mr. Faga to waive important rights, including his right to confidential communication with his attorney,⁷ his right to sue for negligence or

⁷ If Mr. Faga sought or obtained advice from his attorney regarding Dr. Hoberman’s evaluation, he should not be required to disclose that fact, even if Dr. Hoberman makes no further inquiry. *See Appellant’s Opening Brief*, p. 15-16; *see also Zink v. City of Mesa*, 162

intentional misconduct,⁸ his right to discovery of “any written or recorded report of [the] polygraph examination,”⁹ and his right to prevent unlimited dissemination of information pertaining to the polygraph.¹⁰ CP 203-206.

The requirements of the State’s experts are not authorized by statute or any other legal authority. Mr. Faga should not be required to waive important legal rights to contest his civil commitment at trial.

The court should not maintain the contempt sanction to enforce the unwarranted demands of the State’s experts. The court’s order must be vacated, the contempt sanction must be lifted, and the case must be remanded for trial.

Wn.App. 688, 724, 256 P.3d 384 (2011); *State v. Sheppard*, 52 Wn. App. 707, 711, 763 P.2d 1232 (1988). Respondent does not address these authorities. Brief of Respondent, pp. 20-21.

⁸ Respondent claims that Mr. Faga’s argument on this point is “not credible,” but cites no authority and makes no argument explaining its position. Brief of Respondent, p. 22. The Court of Appeals does not consider “conclusory arguments unsupported by citation to authority or rational argument.” *Port of Tacoma v. Save Tacoma Water*, No. 49263-6-II, Slip Op. at *7 n. 2 (Wash. Ct. App. July 25, 2018).

⁹ His right to obtain discovery from the State does not cover materials that the polygrapher withholds. For example, the polygrapher may provide Dr. Hoberman (and the State) a final report without handing over the underlying data, a transcript, or other information from the polygraphy session. Mr. Faga should be able to obtain these materials even if they are not given to Dr. Hoberman or the prosecuting authority.

¹⁰ Respondent does not address this argument. This failure to respond may be treated as a concession. See *In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009).

F. The trial court’s refusal to lift the contempt sanction violates due process.

Because of the contempt sanction, Mr. Faga is subject to indefinite confinement based on the trial court’s probable cause finding. His confinement will continue unless he falsely states that he is voluntarily participating in court-ordered testing and waives important legal rights.

This violates due process because a finding of probable cause is constitutionally insufficient to justify indefinite civil commitment. U.S. Const. Amend. XIV; *Addington v. Texas*, 441 U.S. 418, 433, 99 S. Ct. 1804, 1813, 60 L. Ed. 2d 323 (1979). By refusing to lift the contempt sanction, the trial court has imposed a “massive curtailment of liberty”¹¹ without due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 494-95, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552 (1980).

The court’s order is unconstitutional. *Id.* The Court of Appeals should vacate the trial court’s order, lift the contempt sanction, and remand the case for trial.

CONCLUSION

The trial court should have lifted the contempt sanction instead of indefinitely denying Mr. Faga his right to contest his detention by taking

¹¹ *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012).

his case to trial. The court's refusal to lift the contempt sanction improperly conditions Mr. Faga's ability to purge on the actions of third parties, improperly modifies his purge conditions to make them more onerous, violates his First Amendment protection against compelled speech, improperly requires him to waive important legal rights before he can proceed to trial, and violates his Fourteenth Amendment right to due process.

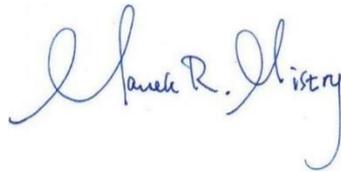
The order must be vacated. The Court of Appeals should lift the contempt sanction and remand the case for trial.

Respectfully submitted on August 9, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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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 Reply 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 9, 2018.



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