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Division II
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Court of Appeals no. 51217-3-II

DIVISION II
COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON

LISA LITTLETON,
Respondent,

V.

TERRY GROVER,
Appellant.

ON APPEAL FROM THE CLARK COUNTY SUPERIOR COURT

REPLY BRIEF OF APPELLANT

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A. ISSUES PERTAINING TO REPLY

1. THIS MATTER IS NOT MOOT.
2. THIS MATTER INVOLVES A CONTINUING AND SUBSTANTIAL PUBLIC INTEREST.

B. INTRODUCTION TO REPLY

Mrs. Lisa Littleton has asserted in her response that this matter is moot, and asked that it be dismissed on those grounds. However, this matter is not moot as the Clark County Sheriff's Office has stated that it intends to arrest Mr. Grover based on an alleged violation of the order in questions. Further, Mr. Grover continues to suffer the public stigma of the unlawfully issued order.

Further, this appeal should not be dismissed, even if moot, due to the continuing and substantial public interest presented by the need for guidance from the lower courts on these issues, which is precisely why this matter was accepted for discretionary review by this Court.

Mrs. Littleton's response brief provides no argument or analysis at all regarding the continuing and substantial public interest presented here. Mrs. Littleton's response brief provides no argument or analysis at all to any of Mr. Grover's assignments of error. Mrs. Littleton's response brief provides a one sentence statement of the case, and but a single paragraph of "argument" on the merits of the unlawfully entered order.

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C. ARGUMENT

1. THIS MATTER IS NOT MOOT.

Until the prior restraint order in question is vacated, this matter is not moot, as Mr. Grover is living under the threat of arrest for violation of the order that placed content based prior restraint on his speech. He is also publicly stigmatized by an antiharassment order issued for nothing but publishing about a business dispute on a business webpage.

In *Hough v. Stockbridge*, mootness of the appeal of an antiharassment order that had already expired was directly at issue. 113 Wash. App. 532, 54 P.3d 192 (2002). Hough argued that his appeal was not moot because “the court can still provide the ‘effective relief’ by cleansing their records and reputations ‘of the stigmatizing, erroneous and void orders.’” *Id.*, at 537. The Court of Appeals held the case was not moot because the Houghs sought “to cleanse their record of the continuing stigma of the antiharassment order.” *Id.*

Likewise, Mr. Grover has been publicly stigmatized and wishes to have his record cleansed. The matter is therefore not moot for this reason alone.

Further, the Clark County Sheriff’s Office has stated unequivocally, and in writing, that it intends to arrest Mr. Grover and book him into jail

for an alleged violation of the order at issue in this case. Decl. D. Angus Lee, Exhibit B.

Deputy Mitchum of the Clark County Sheriff's Office has stated that he intends to arrest Mr. Grover for an alleged violation of the order in this case. *Id.*, ¶ 2. Deputy Mitchum also stated that Mr. Grover could either turn himself into the jail or he would be arrested when contacted by law enforcement. *Id.* Counsel for Mr. Grover sent a letter to Deputy Mitchum asking that he refer the allegation to the Clark County Prosecutor's Office for review, because (1) the order was wrongfully entered, and (2) arrest was not mandatory. *Id.*, Exhibit A. The letter also advised Deputy Mitchum that the order was on appeal, and provided legal authority regarding the basis of the appeal. *Id.*

But in response to that letter, Clark County Sheriff's Deputy Sergeant Duncan Hoss wrote an email making clear the Sheriff's Office is not going to seek legal review and is going to arrest Mr. Grover in front of his family.

... We will not be submitting this case through the "cold intake" process, but will be making a custodial arrest. Your client can choose to meet Detective Mitchum at a predetermined time and location, or I will consider him as not cooperating and will start looking for him and arresting him whether it is at his home in front of his family, his place of business, or wherever he is located.

Id., Exhibit B (emphasis added).

After a public records request was filed for Deputy Mitchum's report, the Clark County Sheriff's Office responded in writing that the case was an "active investigation." Id., Exhibit C.

I confirm that the records you requested are part of an active investigation in which no arrests have been made and which has not yet been referred to the PA's office. The records are exempt from disclosure under RCW 42.56.240(1).

Id.

The matter is certainly not moot, as Mr. Grover is living under fear of arrest and could be arrested at any moment for up to two years from the date of any alleged violation. RCW 9A.04.080(1)(j). That an order expired after an alleged violation of the order occurred does not in any way limit the ability of the police to arrest based on the alleged violation. These records show that Clark County Sheriff's Office seeks to do just that, and they seek to do it "in front of his family." Decl., Exhibit B. They also show that the Clark County Sheriff's Office has stated that the matter is "active." Id., Exhibit C.

That the order has expired does not limit the ability of the prosecutor to prosecute. Stated another way, if an order is in effect at the time of an alleged violation, then the government may enforce the alleged violation anytime within the applicable two-year statute of limitations. That the

order expired after a violation is alleged to have occurred does not impact the government's enforcement authority.

Cases involving domestic violence orders are illustrative of this principle. It is common in cases involving an alleged act of domestic violence assault for a domestic violence no contact order to be entered at arraignment. It is also common for charges alleging a violation of that order to be filed even after the original assault charge, and thereby the accompanying no contact order, have been dismissed.

That an order later expired does not in any way impact the government's ability to arrest or prosecute based on a violation alleged to have occurred during the time the order was in place. Unless, that is, the order is vacated for having been unlawfully issued in the first place. In this case, it is clear from the supplemental records that the Clark County Sheriff's Office, and Mrs. Littleton, allege that Mr. Grover published on his webpage in violation of the order while it was still in place. It is also clear the Clark County Sheriff's Office seeks to arrest Mr. Grover, and can do so for two years from the date of the alleged violation.

This matter is not moot as Mr. Grover still seeks to clear his record and also to remove the fear of arrest based on an alleged violation of the prior restraint order.

2. THIS MATTER INVOLVES A CONTINUING AND SUBSTANTIAL PUBLIC INTEREST.

This matter presents a significant question of law and an issue of public interest as we move into a more digital age with law and technology intersecting on a more regular basis. Court's and citizens should not be left to guess about the authority of the trial court to impose prior restraint or issue orders based only on public speech.

Arguing that this appeal should be dismissed as moot, Mrs. Littleton cites only to *In re Cross*, 99 Wash. 2d 373,376, 662 P.2d 828, 831 (1983). In *Cross*, the court held that the matter "is moot." *Id.* However, in *Cross* the court ruled on the merits of the matter because "even where a case is moot, however, [the appellate court] may nonetheless decide it if it involves 'matters of continuing and substantial public interest.'" *Id.*

The criteria to be considered in determining whether a sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.

Id., at 377. The Washington Supreme Court retained the case because, like here, the central issue was "whether the Commissioner had authority to act in the manner he did." *Id.* "The question of a judicial officer's authority is certainly public in nature." *Id.* "An awareness on the part of such officers of the scope of their authority is crucial." *Id.*

Here, the district court commissioner issued content based prior restraint on public speech about a corporate officer. The order exceeds the authority of the district court. As in *Cross*, the central issue in this matter is the commissioner’s authority (or lack of) to impose prior restraint. Accordingly, this matter is of public interest for the same reason and should be heard even if it were moot, which it is not.

In *Price v. Price*, the threshold issue was the claimed mootness of the appeal of a RCW Section 10.14 antiharassment order that had expired while the appeal was pending. 174 Wash. App. 894, 901, 301 P.3d 486, 490 (2013). “even though the orders have expired, we consider her appeal because it involves a matter of continuing and substantial public interest.” *Id.*, at 902. “The facts here weigh in favor of our review, especially in light of the probability that the issue of a court's authority under the antiharassment statute may arise again in the future and may affect other Washington residents.” *Id.*, at 902-03. *Price* is directly on point. Discretionary review of this matter was accepted because the questions presented need to be answered.

In *Blackmon v. Blackmon*, one side appealed a trial court's domestic violence protection order, but the protection order terminated while the appeal was pending. 155 Wash. App. 715, 719, 230 P.3d 233, 235 (2010). Despite any mootness, the Court of Appeals held that there was

“unquestionably an issue of broad public import that is likely to recur and on which an authoritative determination is desirable to provide guidance to public officers” and retained the case to rule on the merits. *Id.*, at 720.

In *In re Dependency of A.K.*, the matter was “technically moot, [due to] petitioners having each served the sentence imposed for contempt.” 162 Wash. 2d 632, 643, 174 P.3d 11, 16 (2007). However, the Washington Supreme Court retained the matter and ruled on the merits because the “authority of the courts” is a “public matter.” *Id.*, at 644. “A determination of how the courts’ inherent power interacts with the statutory contempt scheme will provide useful guidance to judges.” *Id.*, at 644. “[c]larification of the court's authority to exercise inherent contempt power ... a matter of continuing public interest.” *Id.*

Westerman v. Cary, revolved around the Spokane County District Court’s issuance of a general order providing that domestic violence offenders be detained in custody pending their first appearance in court, but prior to the Washington Supreme Court accepting review, the District Court replaced the general order, which raised the question of mootness on appeal. 125 Wash. 2d 277, 280-81, 892 P.2d 1067, 829 (1994). Despite the order being moot, the Washington Supreme Court retained the issue because the “issues are public in nature” and the “order demonstrates, guidance in this area is both desirable and necessary and

the issue is likely to recur.” *Id.*, at 287.¹

When considering that orders from district court expire in 12 months, it is likely that the vast majority of orders originating in district court will expire while any appeal is traveling the long road to the Court of Appeals, thereby causing those orders to regularly escape appellate review.

A similarly scenario often occurs in cases involving mental health procedures, which frequently present exceptions to the mootness doctrine because the brief time frames involved in bringing a commitment case to trial, and the comparatively short duration of most commitment orders, mean that few cases will not be moot when considered by an appellate court. *In re Det. of C.M.*, 148 Wn. App. 111, 115, 197 P.3d 1233, review denied, 166 Wn.2d 1012 (2009). For this reason, review is often accepted in these cases even though a matter is moot.²

¹ The Court also noted as an indicator in favor of ruling on the merits, that amicus briefs had been filed on the case. *Id.*

² See e.g. *State v. Bigsby*, 196 Wash. App. 803, 808, 384 P.3d 668, 670-71 (2016) (ruling on merits of a moot matter because whether the trial court may sanction an offender on community custody is an issue that “presents an issue of substantial and continuing public interest that warrants review.”); *State v. Beaver*, 184 Wash. App. 235, 242, 336 P.3d 654, 657 (2014) (ruling on merits of a moot matter because “a decision on the trial court’s authority to revoke conditional release in the absence of information regarding the acquittee’s current mental health condition will provide useful guidance to lower courts and public officers.”); *In re Det. of J.S.*, 138 Wn. App. 882, 890, 159 P.3d 435 (2007) (review of moot matter involving trial court’s refusal to allow individual to represent himself at his involuntary civil commitment hearing); *In re Det. of D.F.F.*, 144 Wn. App. 214, 219, 183 P.3d 302 (2008) (mootness was not a bar to detainee’s appeal of trial court’s order committing her to 90 days of psychiatric treatment) *review granted*, 164 Wn.2d 1034, 197 P.3d 1185 (2008).

The United States Supreme Court has also recognized an exception to the general rule against reviewing moot claims where the issues presented therein are “capable of repetition, yet evading review.” *Hart v. Dep't of Soc. & Health Servs.*, 111 Wash. 2d 445, 451, 759 P.2d 1206, 1209 (1988) (citing *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982); *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911)). This exception was recognized by the Washington Supreme Court in *In re Marriage of Horner*, 151 Wash. 2d 884, 893 n.8, 93 P.3d 124, 129 (2004).

The issues presented in this case are public in nature and will become more and more common as we advance into the internet age, making guidance from the court of appeals much needed. Even if this Court finds this matter to be moot, which it is not, it should still be reviewed on the merits and the order should still be vacated.

D. CONCLUSION

The order imposed in this case is an unconstitutional content-based prior restraint. Mrs. Littleton has not responded at all to any of the assignments of error or issues presented.

This matter is not moot due to the stated intent of law enforcement to arrest, and the sill existing public stigma resulting from the unlawfully

issued prior restraint order. Even if moot, the order should be vacated on the merits due to the continuing and substantial public interest presented by this case.

Dated this Friday, March 16, 18.



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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on Friday, March 16, 18 the foregoing was delivered to the following person(s) in manner indicated:

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