

FILED
Court of Appeals
Division II
State of Washington
4/9/2018 12:07 PM

NO. 51707-8

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

STATE OF WASHINGTON,

v.

DAMION LAMAR DIAZ

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Appellant.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

In this case, the trial court unlawfully imposed punitive contempt sanctions against the Department of Social and Health Services (DSHS) after delays in providing competency services to Mr. Diaz. Part of the contempt order contained remedial sanctions. DSHS does not challenge these remedial sanctions. However, at least a portion of the sanctions imposed in this case were punitive. DSHS does challenge these sanctions. As explained in *State v. Sims*, sanctions are punitive when the trial court sanctions DSHS for past contempt because DSHS has no opportunity to purge the contempt. *State v. Sims*, 1 Wn. App. 2d 472, 480, 406 P.3d 649 (2017), *petition for review filed on other grounds*, Supreme Court No. 95479-8 (Feb. 7, 2018).¹ The court imposed these sanctions contrary to the strict requirements of the punitive contempt statute, RCW 7.21.040. This statute requires that punitive sanctions be imposed only in a separate action initiated by a prosecutor.

This Court should hold that the trial court erred by imposing contempt sanctions for the period that preceded the April 6, 2016 contempt order. As a result, this Court should partially vacate the April 6, 2016 contempt order and subsequent judgment. The Court should further remand

¹ Appellant filed petition for review to address post-judgment interest and the issues surrounding oral and written findings of contempt.

with instructions that contempt sanctions may be imposed only for the period following the finding of contempt.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred by imposing contempt sanctions for a period of time that preceded the trial court's finding of contempt.
- B. The trial court erred by entering judgment against DSHS in an amount that included impermissible punitive sanctions."

III. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

- A. Sanctions are punitive if a party does not have the opportunity to avoid the contempt. A court must comply with RCW 7.21.040 when imposing punitive sanctions. Did the trial court err when it imposed punitive sanctions against DSHS without adhering to RCW 7.21.040?

IV. STATEMENT OF THE CASE

On March 9, 2016, the Pierce County Superior Court ordered DSHS to admit Damion Diaz for competency restoration services in his then-pending criminal proceeding. CP at 1-3. The Court ordered that DSHS admit Mr. Diaz by March 16, 2016. After a delay in admission, Mr. Diaz's defense counsel obtained an order to show cause on March 24, 2016. CP at 6. The order to show cause required Western State Hospital, a mental health facility operated by DSHS, to show cause why it had not admitted Mr. Diaz for services. CP at 6. It further required DSHS to explain why it should not incur contempt sanctions for the delay. CP at 6.

A show cause hearing in Mr. Diaz’s criminal proceeding occurred on April 6, 2016. CP at 273. DSHS opposed contempt. CP at 75-82. Defense counsel asked that remedial contempt sanctions be imposed against DSHS for the delay. CP at 7. Relevant to this appeal, DSHS argued that pursuant to RCW 7.21.040, the court could not impose punitive sanctions against DSHS at that time. CP at 78. At the hearing, DSHS twice reiterated that because the Court had not made the contempt finding until April 6, 2016, backdating sanctions to March 16, 2016 would be punitive and, the court could not impose punitive sanctions pursuant RCW 7.21.040 without following the requirements for imposing punitive sanctions. VRP at 5:2-7; 6:8-13, April 6, 2016.

The trial court found DSHS in contempt of the court’s competency restoration order and stated that it would “impose sanctions of \$500 a day since the day [Mr. Diaz] was supposed to be transported out there” VRP at 6:17-19. The written order, which was entered on April 6, 2016, imposed sanctions “starting March 16, 2016.” CP at 274. DSHS admitted Mr. Diaz for competency restoration at Western State Hospital on April 26, 2016. CP at 278.

The trial court later entered a \$20,500 judgment that named DSHS as the judgment debtor and summarized the basis for the judgment. CP at 278. DSHS timely appealed from the judgment.

V. ARGUMENT

Contempt of court occurs where there has been an intentional disobedience of a court order. RCW 7.21.010(1)(b). Once contempt has been found, a court may impose remedial or punitive sanctions pursuant to RCW 7.21 so long as the statute's required procedures are followed. A sanction is punitive when a party has no opportunity to avoid incurring the sanction. Here, the trial court's contempt order imposed monetary punitive contempt sanctions against DSHS. These punitive sanctions must be vacated because they were imposed without adherence to the required statutory procedures and exceeded the trial court's statutory authority under RCW 7.21.040. In a case with nearly identical facts, Division Three of this Court affirmed that DSHS may only be held in contempt for days following a finding of contempt. *Sims*, 1 Wn. App. 2d at 480. This Court should follow Division Three's correct acknowledgment of the distinction between punitive and remedial contempt sanctions.

A. Punitive Sanctions Were Imposed Against DSHS

The contempt statute, RCW 7.21, distinguishes between remedial and punitive contempt sanctions and includes specific provisions for how each type of sanction may be imposed. Remedial sanctions, also known as civil sanctions, are sanctions "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.” RCW 7.21.010(3). Remedial sanctions must “permit[] the contemnor to avoid the sanction by doing something to purge the contempt.” *In re Det. of Young*, 163 Wn.2d 684, 693 n.2, 185 P.3d 1180 (2008); *see also King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988) (concluding that a “sanction is civil if it is conditional and indeterminate, *i.e.*, where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order.”).

Conversely, punitive sanctions are imposed to “punish a past contempt of court,” RCW 7.21.010(2), and do not afford the contemnor an opportunity to avoid incurring the sanctions. A contempt sanction is punitive, and thus criminal rather than civil, if it “is imposed to punish a past contempt of court, results in a determinate sentence, and does not afford the defendant an opportunity to purge the contempt by performing the acts required in the original order.” *State v. Buckley*, 83 Wn. App. 707, 711, 924 P.2d 40 (1996).

The contempt order on appeal in this case imposed punitive sanctions against DSHS. The sanctions were punitive because DSHS had no opportunity to avoid part of the contempt sanctions imposed. DSHS was not found in contempt until April 6, 2016, but the court's order from April 6 states that sanctions would accrue from “March 16, 2016 and continue until

the contempt is purged by admitting Damion Lamar Diaz . . . for restoration treatment.” CP at 274. Per the terms of the order, even if DSHS had admitted Mr. Diaz on April 6, 2016, the day of the contempt finding, DSHS still would have had to pay \$10,500 in sanctions. Because the order imposed 21 days of sanctions without any opportunity for DSHS to avoid those sanctions, this portion of the contempt sanctions is punitive.

Division III of this Court addressed the nearly identical issue in *Sims*. There, the trial court found DSHS in contempt for failing to conduct a competency evaluation. *Sims*, 1 Wn. App. 2d at 478. The trial court found DSHS in contempt on December 12, 2014, but imposed monetary sanctions beginning December 2. *Id.* Division III determined that the sanctions prior to December 12 were punitive because when DSHS was found in contempt on December 12, “DSHS could not perform Mr. Sims’s competency evaluation any earlier than that date.” *Sims*, 1 Wn. App. 2d at 480. Therefore, because DSHS could not purge that portion of contempt sanctions, they were punitive. *Id.*

The same analysis applies here. DSHS had no opportunity to purge any of the contempt sanctions prior to the trial court’s April 6, 2016 finding of contempt. Therefore, any sanctions prior to April 6, 2016 are punitive rather than remedial.

B. The Court Erred By Imposing Punitive Sanctions In Disregard of The Punitive Contempt Statute

“Washington’s criminal contempt statute, RCW 7.21.040, provides that a punitive sanction for contempt of court may be imposed only in a separate action initiated by a public prosecutor.”² *In re Mowery*, 141 Wn. App. 263, 276, 169 P.3d 835 (2007), *as amended* (Nov. 8, 2007). The information or complaint that commences the action must charge contempt and must recite the punitive sanction sought to be imposed. RCW 7.21.040(2)(a), (b). A judge presiding in an action to which the contempt relates may request a public prosecutor to act, or may appoint a special counsel to prosecute the action “if required for the administration of justice.” RCW 7.21.040(2)(c). A judge who requests prosecution is disqualified from presiding at the trial. *Id.*

Here, contrary to the express requirements of RCW 7.21.040, punitive sanctions were imposed against DSHS in the midst of an unrelated criminal proceeding, not after the filing of a separate criminal complaint against DSHS by a prosecutor. There has been no criminal complaint regarding contempt filed in relation to this proceeding, making the imposition of punitive contempt sanctions unlawful.

² The single exception is for contempt committed in the courtroom in the presence of the judge. RCW 7.21.040(1), referring to the summary imposition procedures provided in RCW 7.21.050. This exception has no applicability here.

The trial court provided no explanation of the basis of its authority to impose contempt sanctions. The trial court made no mention of its inherent authority; however, its inherent authority likewise would not allow the court to impose the punitive sanctions at issue. As a prerequisite to the exercise of a court’s inherent contempt power to impose “punitive or remedial sanctions for contempt of court,” it must “ ‘specifically find’ all statutory contempt procedures and remedies are inadequate.” *State v. Salazar*, 170 Wn. App. 486, 492-93, 291 P.3d 255 (2012) (quoting *In re Dependency of A.K.*, 162 Wn.2d 632, 652, 174 P.3d 11 (2007)). As the trial court made no finding that its statutory contempt authority was inadequate, the trial court’s unutilized, inherent sanctioning authority cannot save the deficient sanctions order.

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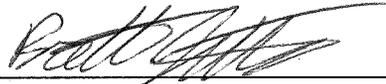
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VI. CONCLUSION

This Court should partially vacate the contempt order and judgment and remand with instructions that sanctions may only be imposed for the period following the court's finding of contempt. It should do so because the punitive sanctions imposed prior to that point exceeded the trial court's authority to sanction under RCW 7.21.040.

RESPECTFULLY SUBMITTED this 9th day of April 2018.

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PROOF OF SERVICE

I, *Beverly Cox*, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on April 9, 2018, I caused to be served a true and correct copy of this **APPELLANTS' OPENING BRIEF** and this **PROOF OF SERVICE** on the following individuals, in the manner indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of April 2018, at Tumwater, Washington.



BEVERLY COX
Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

April 09, 2018 - 12:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: DSHS, Appellant v. State of Washington & Damion Diaz, Respondents
Superior Court Case Number: 16-1-00782-3

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