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

STATE OF WASHINGTON

v.

STEPHANIE LYNN POND-HILL

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Department of Social and Health Services (DSHS) appeals $291,000 in contempt sanctions imposed against it for delays in providing competency restoration services to a criminal defendant. More specifically, it challenges the trial court's imposition of a $3,000-per-day sanction contrary to the requirements of RCW 7.21.030, the remedial contempt statute.

The remedial contempt statute specifies that the trial court is limited to imposing the sanctions available under RCW 7.21.030(2)(a)-(c) unless it "expressly finds" that those options would be ineffectual to terminate a continuing contempt of court. RCW 7.21.030(2)(d). Daily monetary sanctions of $3,000 are not available under RCW 7.21.030(2)(a)-(c), and the trial court made no express finding that the available sanctions were inadequate. As a result, the trial court exceeded its statutory authority by imposing a $3,000-per-day sanction.

As it has done in analogous situations, this Court should vacate the trial court's contempt order for failing to comply with the requirements of RCW 7.21.030(2)(d). This relief is also appropriate because the record would not support a finding that the contempt remedies available to the trial court were inadequate.

II. ASSIGNMENT OF ERROR

A. The trial court erred by imposing a $3,000-per-day contempt sanction against DSHS under RCW 7.21.030(2)(d) without expressly finding that the sanctions available under RCW 7.21.030(2)(a)-(c) were inadequate.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Whether the trial court erred by imposing a $3,000-per-day sanction against DSHS without expressly finding that the available sanctions would be ineffectual to terminate the contempt as required by RCW 7.21.030(2)(d).

B. Whether vacation of the contempt sanctions is the appropriate remedy on appeal where this Court has vacated contempt sanctions in analogous cases and where the record would not support imposing a sanction under RCW 7.21.030(2)(d).

IV. STATEMENT OF THE CASE

On October 2, 2018, Stephanie Lynn Pond-Hill was arraigned on charges of assault in the third degree, malicious mischief in the third degree, and resisting arrest. Clerks Papers (CP) at 4-6. At the arraignment, the trial court ordered an evaluation of Ms. Pond-Hill's competency to stand trial, CP 8-14, which DSHS completed on October 14, 2018, CP 23-29. Two days later, the trial court found Ms. Pond-Hill not competent and ordered DSHS to provide her with competency restoration services. CP 16-20.

After a delay in admitting Ms. Pond-Hill to a facility for restoration services, the trial court ordered a hearing for November 13, 2018 at which DSHS was required to address whether it should be held in contempt.

CP 31. DSHS submitted briefing opposing the contempt that repeatedly cited to RCW 7.21, the contempt statute. CP 32-36. It also submitted a declaration from DSHS Office of Forensic Mental Health Services Director Dr. Thomas Kinlen explaining DSHS's delay in providing restoration services. CP 40-44.[1] No party submitted briefing or evidence in support of contempt.

At the show cause hearing, no party presented argument in favor of contempt, nor did any party argue that the contempt sanctions available under RCW 7.21.030(2)(a)-(c) were inadequate. The trial court concluded the six-minute hearing by ruling that "I'm going to find the State in contempt. I'm going to order $3,000 a day in fines." VRP 7, lns. 12-13.

A written order to that effect was entered by the trial court a week later without the inclusion of counsel for DSHS. CP 47; VRP 9-10.[2] Ms. Pond-Hill was ultimately admitted for restoration services, and the trial court entered a judgment requiring DSHS to pay $291,000 in contempt sanctions to the court (ninety-seven days in contempt multiplied by $3,000 per day). CP 62. In its oral and written rulings, the trial court never found

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[1] For reasons unknown, the Clerk's Papers omit page six of this declaration. The Cowlitz County Clerk's Office has indicated that it does not possess this page of the declaration.

[2] During the hearing on November 20, 2018, the court clerk noted that "CourtCall is not connected yet," the means through which counsel for DSHS was scheduled to appear for the hearing. VRP 10, ln. 6. The report of proceedings reflects that the trial court never connected counsel for DSHS to the hearing.

that a sanction prescribed by RCW 7.21.030(2)(a)-(c) would be ineffective to terminate the contempt. This appeal timely followed. CP 63-69.

V. ARGUMENT

The trial court exceeded its authority under RCW 7.21.030 by imposing a contempt sanction against DSHS that failed to comply with statutory limits. This Court should accordingly vacate the contempt order and judgment as it has done in prior cases providing relief from similar improper contempt sanctions.

A. Standard of Review

Whether the trial court exceeded its statutory authority to impose a contempt sanction is a question reviewed on appeal de novo. *See In re Schneider*, 173 Wn.2d 353, 358, 268 P.3d 215, 217 (2011) ("A superior court's statutory authority is a question of law that we review de novo.").

Factual findings are also reviewed de novo where, as here, the evidentiary record below was entirely documentary and there was no competing evidence for the trial court to weigh. *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174, 1180 (2003), as corrected (Oct. 27, 2003) (recognizing in a contempt appeal that the "general rule [is] that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases de novo

because that court is in the same position as trial courts to review written submissions.").

B. The Trial Court's Failure To Comply With The Limits of The Remedial Contempt Statute Should Be Reviewed By This Court

This Court should consider DSHS's argument, which implicates the trial court's statutory authority to impose contempt sanctions, regardless of whether it views the argument to be newly-raised on appeal. DSHS generally objected to the imposition of contempt sanctions and cited to RCW 7.21.030 in its trial court briefing, the statute that outlines the requirements for imposing remedial contempt. CP 32-38. The trial court was thus on notice of the statutory requirements for imposing contempt and had an opportunity to comply with them.

Regardless, questions regarding a trial court's statutory authority are regularly reviewed for the first time on appeal. *E.g., State v. Moen*, 129 Wn.2d 535, 546, 919 P.2d 69, 75 (1996) (reviewing for the first time on appeal whether a trial court exceeded its statutory authority by setting an untimely restitution hearing); *Neilson ex rel. Crump v. Blanchette*, 149 Wn. App. 111, 115, 201 P.3d 1089 (2009), as amended (Apr. 28, 2009) (electing to review an asserted error not raised below because it "concerns the trial court's authority to act" under the Domestic Violence Prevention Act);

Hecker v. Cortinas, 110 Wn. App. 865, 866, 43 P.3d 50 (2002) (reviewing a trial court's statutory authority to enter a protection order).

This Court should also exercise its discretionary authority under RAP 2.5(a) and RAP 1.2(a) to promote justice and facilitate a decision on the merits in this case. DSHS had no meaningful opportunity to make a more specific objection at the November 13, 2018 show cause hearing – the validity of the sanction did not become an issue until the trial court announced its ruling and concluded the hearing. VRP 7, lns. 12-13. The trial court also did not afford DSHS an opportunity to participate in the November 20, 2018 hearing at which the improper sanctions were reduced to a written order. VRP 9-10. This Court should accordingly consider the trial court's statutory authority to sanction DSHS as it did in this case.

C. The Trial Court's Contempt Order Exceeded Its Statutory Authority To Sanction

A trial court may impose remedial contempt sanctions "[i]f the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform." RCW 7.21.030(2). After finding contempt, the court is limited to imposing one or more of the following sanctions:

> (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

> (b) A 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.

RCW 7.21.030(2). However, the court may impose "any other remedial sanction other than the sanctions specified in (a) through (c) of [RCW 7.21.030(2)] if the court *expressly finds* that those sanctions would be ineffectual to terminate a continuing contempt of court." RCW 7.21.030(2)(d) (emphasis added). Thus, the trial court must expressly find that the sanctions identified in RCW 7.21.030(2)(a)-(c) are inadequate before it may impose any other sanction.

Here, the trial court's $3,000-per-day sanction could only be characterized as a sanction imposed pursuant to RCW 7.21.030(2)(d). This was not "an order designed to ensure compliance with a prior order of the court" made pursuant to RCW 7.21.030(2)(c), as courts have recognized that these sanctions are typically non-monetary in nature. *See In re Det. of Young*, 163 Wn.2d 684, 694, 185 P.3d 1180, 1185 (2008) (upholding a stay designed to ensure compliance with a prior order to submit to a mental examination); *In re Marriage of Mathews*, 70 Wn. App. 116, 126, 853 P.2d 462, 469 (1993) (upholding a wage assignment order designed to ensure compliance with a dissolution decree). Construing RCW 7.21.030(2)(c) to allow for monetary sanctions in excess of the cap set by

RCW 7.21.030(2)(b) would also improperly render the latter provision superfluous. *Wright v. Engum*, 124 Wn.2d 343, 352, 878 P.2d 1198, 1202 (1994) (recognizing that courts "do not interpret statutes so as to render any language superfluous.").

The trial court exceeded its statutory authority by imposing a contempt sanction under RCW 7.21.030(2)(d) because it failed to make an express finding that the sanctions available under RCW 7.21.030(2)(a)-(c) were inadequate, either orally or in its written orders. Because an express finding of inadequacy is a statutory prerequisite to imposing any other sanction, the sanction imposed was unlawful and should be vacated.

D. The Proper Remedy On Appeal Is Vacation Of The Contempt Sanctions Orders

The appropriate remedy for a trial court imposing a sanction under RCW 7.21.030(2)(d) without complying with statutory requirements is vacation of the sanctions. Both the Washington State Supreme Court and this Court have reached the same conclusion in an analogous case of a court relying on its inherent contempt authority without making the required express finding that statutory contempt remedies are inadequate.

Trial courts may not exercise their inherent contempt power to impose "punitive or remedial sanctions for contempt of court, whether that contempt occurs in or outside of the courtroom," unless they "specifically

find" all statutory contempt procedures and remedies are inadequate. *In re Dependency of A.K.,* 162 Wn.2d 632, 651, 174 P.3d 11 (2007) (plurality opinion). The remedy for the trial court's failure to make such a finding before exercising its inherent contempt power is vacation of the improper contempt order, not remand for an opportunity to make the necessary finding. *Id.* at 652-53 (characterizing a trial court's use of inherent contempt authority as "premature and improper" where statutory alternatives existed); *State v. Salazar*, 170 Wn. App. 486, 492-94, 291 P.3d 255 (2012) (vacating remedial contempt sanctions imposed under inherent authority without an express finding that statutory contempt remedies were inadequate); *see also State v. Jordan*, 146 Wn. App. 395, 405, 190 P.3d 516, 521 (2008) (vacating and dismissing contempt sanctions after the trial court failed to comply with statutory requirements for imposing contempt).

Just as a specific finding of inadequacy is required before a trial court can utilize its inherent sanctioning authority, a trial court must likewise "expressly find" that the sanctions listed in RCW 7.21.030(2)(a)-(c) are inadequate before it may impose a different sanction under RCW 7.21.030(2)(d). The trial court failed to make this finding here. As a result, its chosen sanction was "premature and improper" and must be vacated. *In re Dependency of A.K.,* 162 Wn.2d at 652.

Further, the evidence would not support a finding that the sanctions listed in RCW 7.21.030(2)(a)-(c) would be inadequate here. The only evidence offered below was presented by DSHS, which reflected DSHS's efforts to provide restoration services as quickly as possible despite unprecedented spikes in demand. CP 40-44 (Declaration of Dr. Thomas Kinlen). There is nothing in Dr. Kinlen's declaration from which the trial court could have reasonably concluded that the sanctions available to it in RCW 7.21.030(2)(a)-(c), which include imprisonment and any order "designed to ensure compliance with a prior order of the court," would have been ineffectual to terminate a continuing contempt of court.

E. The Trial Court's Inherent Authority To Impose Contempt Sanctions Is Inapplicable Here

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." *Salazar*, 170 Wn. App. at 492-93 (quoting *In re Dependency of A.K.*, 162 Wn.2d at 652). As the trial court below made no finding that its statutory contempt authority was inadequate, the trial court's unutilized inherent sanctioning authority could not save the deficient sanctions orders at issue.

VI. CONCLUSION

This Court should vacate the trial court's contempt order and judgment. The trial court failed to make the finding required by RCW 7.21.030(2)(d) that the remedial sanctions available under RCW 7.21.030(2)(a)-(c) would be inadequate to coerce compliance before imposing a different sanction, nor could it have made any such finding based upon the record before it.

RESPECTFULLY SUBMITTED this 10th day of October, 2019.

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CERTIFICATE OF SERVICE

I, *Malai Jordan*, 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 certify that on October 10, 2019, I served a true and correct copy of this **APPELLANTS' OPENING BRIEF** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as 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 10th day of October 2019, at Tumwater, Washington.

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SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

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