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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 319431-III

IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Richard M. Payne, Appellant

In The Matter of David Hearrean

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Superior Court of Spokane County, State of Washington, erred in cause no. 12-1-02242-0 by entering the Order finding defendant's attorney, David Hearrean, in contempt of court under RCW 7.21.010 when there was no intentional act as required by statute.

2. The Superior Court of Spokane County, State of Washington, erred in cause no. 12-1-02242-0 by entering the Order finding defendant's attorney, David Hearrean in contempt of court when he had neither the means nor the ability to comply with the terms of the decree due to a sudden illness.

3. The Superior Court of Spokane County, State of Washington, erred in cause no. 12-1-02242-0 by entering the Order finding defendant's attorney, David Hearrean in contempt of court when there was no purge clause allowing dismissal once all court ordered requirements are complete.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Honorable Judge O'Connor abused the court's discretion when she found defendant's attorney, David Hearrean, in contempt when there was no proof of a lawful court order served

on Mr. Hearrean or that Mr. Hearrean committed an intentional act. [ISSUE NO. 1].

2. Whether Honorable Judge O'Connor's order finding defendant's attorney, David Hearrean, in contempt should be reversed when he had neither the means nor the ability to comply with the terms of the decree due to illness. [ISSUE NO. 2].

3. Whether Honorable Judge O'Connor's order finding defendant's attorney, David Hearrean, in contempt should be reversed when there was no purge clause allowing dismissal once all court ordered requirements were complete. [ISSUE NO. 3].

C. STATEMENT OF THE CASE

1. Factual Background. On July 26, 2013, Mr. David Hearrean, attorney for defendant, Richard Payne, was prescribed new medication for high blood pressure and started this medication on Monday July 29, 2013 after the pharmacy expressed concerns about adverse reactions. (CP 85, 92, 102). Unfortunately, during the afternoon hours of July 31, 2013, Mr. Hearrean suffered some serious side effects from the new medication including dizziness, chest pains and poor focus and memory. (CP 103). As a result of this unexpected medical condition, Mr. Hearrean's physician, Dr,

Condon ordered his patient to not work for (2) two weeks which included writing declarations. (CP 85). Dr Condon also wrote a letter verifying his instructions and a copy was furnished to the Honorable Judge O'Connor on July 31, 2013. (CP 24). As a result, Mr. Hearrean was not present during an August 1, 2013 presentment hearing and instead, another attorney, Erika Snyder, attended the hearing and asked the court for a continuance based upon Mr. Hearrean's doctor's orders. (August 1, 2013 Motion RP 2, 9-10). The Honorable Judge O'Connor verbally directed her judicial assistant to advise Mr. Hearrean to write a declaration under penalty of perjury and produce the declaration at 3:00 that afternoon. There is no evidence that Mr. Hearrean actually received such notice or order. The hearing was then continued until that time with Judge O'Connor also requesting a report from Dr. Condon. (August 1, 2013 Motion RP 11-12). Since Dr. Condon had ordered Mr. Hearrean not to work including writing declarations, Ms. Hearrean offered to write a detailed declaration; however, Judge O'Connor refused. (August 1, 2013 Motion RP 14). At the scheduled afternoon session, Ms. Snyder informed Judge O'Connor that Mr. Hearrean was suffering from high blood

pressure (195 over 109) and had very specific instructions from his doctor to not work including writing declarations. Judge O'Connor verified that she also received an email from Ms. Hearrean also explaining that Dr. Condon ordered that Mr. Hearrean not work including writing declarations. Judge O'Connor was instructed by Dr. Condon to call him if she had any questions (CP 24) and she refused. Judge O'Connor also stated that she wanted a report from Dr. Condon by tomorrow. Judge O'Connor also changed her original request and stated that Mr. Hearrean could have completed a declaration "about three or four sentences" and even stated that she would accept a two or three sentence declaration. (August 1, 2013 Motion RP 18-22). Subsequently, Judge O'Connor on her own motion ordered the prosecutor to prepare at her request an Order to Show Cause re Contempt for Mr. Hearrean's failure to provide a declaration, his failure to appear at the August 1, 2013 hearing, failure to timely provide a doctor's report and possible sanctions which the deputy prosecutor completed per her verbal order. (CP 2-8). The judge also scheduled another hearing at 3:00 p.m. the next day and stated that she would sign the Order to Show Cause re Contempt at that time. (August 1, 2013 Motion

RP 24-28). As requested by Judge O'Connor, Dr. Condon furnished the court on August 2, 2013 with another letter explaining the seriousness of Mr. Hearrean's medical condition. (CP 23). At the August 2, 2013 hearing, Judge O'Connor verified that she received the additional letter from Dr. Condon (CP 23) and again changed her original request and stated that all Mr. Hearrean had to do was write a declaration which simply says "I have a spike in my blood pressure that's very concerning". Thereafter, Judge O'Connor signed the Order to Show Cause re Contempt and set the contempt hearing for August 16, 2013. However, the judge stated that "if I get some satisfactory information signed by him, the doctor, et cetera, I probably wouldn't automatically hold him in contempt for failing to appear". (August 2, 2013 Scheduling Hearing RP 2-4, 7-14). On August 13, 2013, Dr. Condon wrote another letter under penalty of perjury and this letter was delivered to the court and prosecutor again explaining the seriousness of Mr. Hearrean's medical condition. (CP 22).

At the August 16, 2013 show cause contempt hearing, Mr. Hearrean appeared as the written show cause order stated despite being under doctor's orders to not work. It was clear that he was

drowsy, confused and suffering facial flushing as well as increased tremors. It should be noted that Mr. Hearrean was personally served with the order requiring him to be present and he abided by the served order and appeared. Mr. David Miller, appellant's counsel at the show cause contempt hearing verified to Judge O'Connor that Mr. Hearrean was still sick and under doctor's orders to not work and, thus, requested a continuance and recusal of Judge O'Connor. The judge denied both motions and read in open court the (3) three doctor's letters. She also stated that all she wants is a sworn declaration from Mr. Hearrean and that he did not have to "go into everything". At the Show Cause Contempt hearing, appellant's counsel requested a short break in order to write the declaration for Mr. Hearrean and have Mr. Hearrean sign the declaration after written. It should be noted that Mr. Hearrean could not write the declaration at that time due to him still being under the effects of the adverse reaction to the new blood pressure medication. (August 16, 2013 Show Cause Contempt Hearing RP 31-46: CP 103). Judge O'Connor acknowledged receipt of the sworn declaration and stated she appreciated receiving the declaration but she still does not have the doctor's report. (August

16, 2013 Show Cause Contempt Hearing RP 49-52, 59; CP 25-26). Judge O'Connor ruled that "I want to recognize that it is not his fault if he is ill, and I do not want to punish him for that". August 16, 2013 Show Cause Contempt RP 63). However, Judge O'Connor still found Mr. Hearrean in contempt of court under RCW 7.21.010 for "failing to provide the information to the court that is necessary to assist in making this decision and for failing to provide the doctor's report". (August 16, 2013 Show Cause Contempt RP 60). Additionally, Judge O'Connor wrote and filed an Order on Show Cause finding Mr. Hearrean in contempt for failure to (1) Timely provide a declaration signed under penalty of perjury regarding his medical condition and (2) Provide adequate and detailed medical reports from his doctor.(August 16, 2013 Show Cause Contempt RP 60-83; CP 30-32). Subsequently, Mr. Hearrean furnished Judge O'Connor with a copy of his complete medical records and a detailed declaration both from Mr. Hearrean and Dr. Condon. Additionally, Mr. Hearrean retained co-counsel at his own expense as subsequently ordered by the court and timely tried the case as set on September 30, 2013. Mr. Hearrean appeals this contempt

finding and asks this court to reverse the contempt finding or purge.

(CP 22-26, 84-98, 100-104).

D. ARGUMENT

1. David Hearrean claims that the Honorable Judge O'Connor erred by finding him in contempt under RCW 7.21.010 when there was no intentional act as required by law. [ASSIGNMENT OF ERROR NO. 1].

Mr. Hearrean certifies that he suffered an unexpected medical emergency due to an adverse reaction to medication that was recently prescribed which caused confusion, dizziness, chest pains and poor focus and memory. (CP 100-104). Since the present case involves a civil contempt proceeding, the moving party has the burden of proving contempt by preponderance of evidence. *State v. Boren*, 44 Wn.2d 69, 73, 265 P.2d 254, 256 (1954). Additionally, the law is clear that "Contempt of court' means **intentional...disobedience** of any lawful...order." RCW § 7.21.010(1)(b) (emphasis added). The court's contempt power also must be used with "*great restraint.*" *State Ex Rel. Daly v. Snyder*, 117 Wn. App. 608, 72 P. 3d 780 (2003); *Interest of M.B.*, 101 Wn. App. 425, 439, 3 P. 3d 780 (2000), *review denied*, 142 Wn. 2d 1027 (2001). As the United States Supreme Court noted:

"The contempt power uniquely is "liable to abuse.""

International Union Untied Mine Workes of America v. Bagwell, 512 U. S. 821, 831, (1994), *quoting*, Bloom v. Illinois, 391 U. S. 194 (1968), *quoting*, Ex-Parte Terry, 128 U. S. 289, 213 (1888).

Indeed:

... unlike most areas of the law where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. Contumacy often strikes at the most vulnerable and human qualities of a judge's temperament ... and its fusion of legislative, executive, and judicial powers summons forth the prospect of the most tyrannical licentiousness Young v. U.S. ex rei Vuiton, 481 U. S. 787, 822 (1987), (Scalia, J., *concurring in 2 judgment*).

A trial court may also impose a contempt sanction using its inherent constitutional authority or under statutory provisions found in Title 7 RCW. *A.K.*, 162 Wash.2d at 645, 652, 174 P.3d 11. A finding of contempt and punishment, including sanctions, lies within the sound discretion of the trial court. *State v. Dugan*, 96 Wash.App. 346, 351, 979 P.2d 885 (1999). The courts will not disturb a trial court's contempt ruling absent an abuse of that discretion. *Dugan*, 96 Wash.App. at 351, 979 P.2d 885. A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons. *State v. Berty*, 136 Wash.App. 74, 83–84, 147 P.3d

1004 (2006) (citing *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995)). Thus, contempt of court is only appropriate if there is evidence of intentional disobedience of a court order. See RCW § 7.21.010. Mr. Hearrean claims that as a result of and due to this serious medical condition, he never intentionally violated any court order. There also was no evidence of disobedience presented or that could be presented that Mr. Hearrean was not sick or that he went on vacation or that he has a history of being sick in order to avoid court hearings or trials. Additionally, there were no intentional delays. Mr. Hearrean took immediate action once his medical condition worsened and informed his physician, Dr. Condon, (who ordered him not to work for (2) two weeks) to send the court a letter documenting the condition. Additionally, Mr. Hearrean could not communicate or work due to this sudden adverse reaction and was never aware or properly served with the court order that he was alleged to have purposefully violated. The record should also reflect that there was no such clear or written court order directing Mr. Hearrean to immediately produce medical records and declarations. However, Mr. Hearrean directed his doctor to send the court (3) three letters including one that was

certified under penalty of perjury. Thus, Mr. Hearrean claims that there was never an intentional violation of a court order as required by RCW 7.21.010 and Judge O'Connor abused her discretion when she exercised this discretion in a manifestly unreasonable manner and based her decision on untenable grounds and reasons.

2. David Hearrean claims that the Honorable Judge O'Connor erred by finding him in contempt when he had neither the means nor the ability to comply with the terms of the decree. [ASSIGNMENT OF ERROR NO. 2].

Next, Mr. Hearrean claims that due to his sudden illness, he was not capable of understanding or intentionally violating Judge O'Connor's orders similar to a citizen not having the means or ability to pay on a court order. In the case of *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653, the court said: 'The sole defense to the show cause order was that the appellant had neither the means nor the ability to comply with the terms of the decree. If this defense was established by clear and satisfactory proof, the judgment must be reversed, for it is always a defense to a proceeding of this kind to show that the disobedience was not willful but was the result of pecuniary inability or other misfortunes

over which the accused had no control. Walton v. Walton, 54 N. J. Eq. 607, 35 Atl. 289; Newhouse v. Newhouse, 14 Or. 290, 12 Pac. 422; Peel v. Peel, 50 Iowa, 521; Schuelele v. Schuele, 57 Ill. App. 189; 9 Cyc. 14.' Mr. Hearrean had no control over a sudden adverse reaction to recently prescribed blood pressure medication or the timing of the side effects. Thus, he asks this court to reverse the judgment of contempt.

3. David Hearrean assigns and claims that the Honorable Judge O'Connor erred by finding him in contempt when there was no purge clause allowing dismissal once all court ordered requirements are complete. [ASSIGNMENT OF ERROR NO. 3].

Mr. Hearrean also claims that the contempt order was remedial; thus, it should have contained a purge clause in order to allow dismissal once all court ordered requirements are complete. Otherwise, the contempt order would be punitive and result in an everlasting record punishment similar to criminal. In State v. Heiner, 29 Wash.App. 193, 197, 627 P.2d 983 (1981), the court reviewed the three bases for contempt in Washington, stating:

A court may use the civil contempt statute, RCW 7.20, as both a coercive and punitive remedy; but it may not use civil contempt

solely as a punitive remedy.... The main thrust of the civil contempt statute is to coerce rather than to punish. Thus, any proceeding under the civil contempt statute must seek a coercive, remedial punishment to compel compliance.

Also, in order for the court to find someone in contempt, the record must also demonstrate egregious circumstances, and that all less restrictive alternatives have failed. *State v. Norlund*, 31 Wash.App. 725, 729, 644 P.2d 724 (1982). Where a contempt proceeding has only punishment as its purpose, it does not retain its civil character, and becomes instead a punitive criminal contempt proceeding.

State v. Heiner, 29 Wash.App. 193, 197, 627 P.2d 983 (1981). See *Keller v. Keller*, 52 Wash.2d 84, 88–89, 323 P.2d 231 (1958).

Additionally, the statute authorizes several different types of sanctions against a party who “failed or refused to perform an act,” including imprisonment, fines, and reimbursement of costs. RCW § 7.21.030(2). However, “an order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for non-

compliance.” State ex. Rel. *Shafer v. Bloomer*, 94 Wn. App. 246, 253, 973 P.2d 1062, 1066 (1999). A remedial sanction may be “imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet within the person’s power to perform.” RCW § 7.21.010(3). Again, a remedial sanction is imposed for civil contempt, while a punitive sanction is imposed for criminal contempt. In re Rebecca K. (2000) 101 Wash.App. 309, 2 P.3d 501 . Therefore, since Judge O’Connor was dealing with a remedial remedy and civil contempt, a purge language should be implied and the contempt purged after compliance.

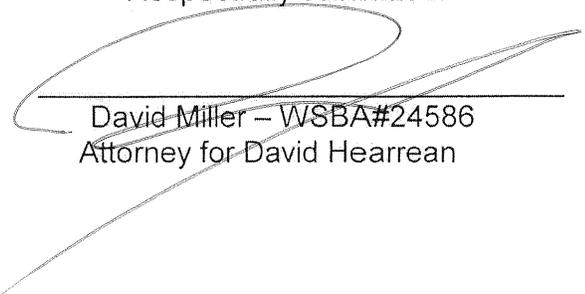
E. CONCLUSION

In the present case, Mr. Hearrean had a medical emergency due to an unexpected adverse reaction to some new medication and was medically incapable of working including writing declarations as his doctor informed the court on numerous occasions. Therefore, Mr. Hearrean never committed an intentional act of contempt. Additionally, the Order finding Mr. Hearrean in contempt never clearly alleged that he violated a court order as

required by statute. In fact, Mr. Hearrean was home ill and never was personally served with an order requiring him to waive HIPAA and furnish Judge O'Connor with all his medical records including his doctor's report and declaration. However, Mr. Hearrean did comply with every requirement of the court Order finding him in contempt once he was released by his doctor. He also completed the trial as set for September 30, 2013 and filed with the court all relevant medical records including a detailed report from Dr. Condon. Mr. Hearrean also completed and filed a detailed declaration of his medical condition and history. Finally, Mr. Hearrean complied with Judge O'Connor's concerns about having standby counsel and hired co-counsel. (CP 36-37). Therefore, Mr. Hearrean asks this court to reverse the contempt finding and purge. Every aspect of Judge O'Connor's order and concerns have been addressed and completed; thus, the coercive purpose of RCW 7.21.010 is moot and in fairness the law requires that the contempt finding be reversed and purged.

DATED this 9 day of July, 2014.

Respectfully submitted:



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Attorney for David Hearrean