

31943-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

RICHARD M. PAYNE, APPELLANT

IN THE MATTER OF DAVID HEARREAN

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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FILED  
AUG 19, 2014  
Court of Appeals  
Division III  
State of Washington

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## **I. RESPONDENT'S 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.

## **II. ISSUES PRESENTED**

1. Did the contemnor violate the trial court's orders?
2. Did the contemnor inform the trial court as to his reasons for non-compliance?

3. Has the contemnor shown any authority requiring a "purge clause" in a non-criminal contempt order?

### **III. STATEMENT OF THE CASE**

The respondent accepts appellant's statement of the case for purposes of this appeal only.

### **IV. ARGUMENT**

- A. AN ACT WHICH THE CONTEMNOR REFUSED TO PERFORM IN SPITE OF BEING INFORMED OF THE COURT'S REQUESTS COULD NOT BE OTHER THAN A REFUSAL TO COMPLY WITH THE COURT'S ORDERS

The trial court exercised its powers under RCW 7.21.030 in an effort to force compliance with the requests of the court to ascertain the situation involving Mr. Hearrean and his sudden medical inability to perform as defense counsel.

The trial court asked for a document, signed under penalty of perjury, explaining the curious and sudden medical problems relayed to the court from the contemnor. The suddenness and peculiar nature of the medical problems would have given pause to any court. The case in question was over a year old. The messages being returned to the trial court indicated that Mr. Hearrean was not to conduct any business for at least two weeks. This medical ban apparently included a ban on signing a prepared document, or having his doctor supply complete information to the trial court.

The trial court postponed any imposition of fine or the imposition of repayment of costs the State incurred for prepaid, unrefundable airplane tickets. CP 30-32.

There was no incarceration discussed in the order. CP 30-32. The only actual costs imposed by the trial court were the costs of retaining a private counsel to be available and capable of trying this case should Mr. Hearrean once again be struck with an unknown medical condition. CP 30-32. Clearly, the trial court wanted the aged case to proceed.

Even as far back as 1897, it has been acknowledged that courts have the power to force compliance with its orders. “It is the duty of courts to enforce their orders, and when it comes to their knowledge that such orders are not obeyed they should require and enforce such obedience by punishment for contempt. The rule is that the burden of showing inability to comply with an order of this nature is upon the respondent.” *State v. Smith*, 17 Wash. 430, 50 P. 52 Wash. (1897).

The contempt order entered by the court states that Mr. David Hearrean is found in contempt for failure to:

- 1) Timely provide a declaration signed under penalty of perjury regarding his medical condition.

- 2) Provide adequate and detailed medical reports from his doctor.

CP 31.

Those are the only two reasons why the defendant was found in contempt. The next section of the contempt order provides:

- 1) If defense counsel, David Hearrean, continues to represent Mr. Richard Payne, in this matter, Mr. Hearrean must retain, at his own expense, private co-counsel who will be available and capable of trying this matter within 10 days of this order, if Mr. Hearrean is not able to do so.
- 2) If Defendant, Richard Payne, wants to remove Mr. Hearrean as counsel, the Court will entertain such a motion.
- 3) If defense counsel, David Hearrean, elects to resign as counsel in this case he should do so as soon as possible.
- 4) If defense counsel, David Hearrean, resigns he must provide his complete file to the new defense attorney within 48 hours of new counsel's request. Failure to turn over the file within 48 hours will result in a \$100 per day sanction payable by Mr. David Hearrean.

- 5) The Court is reserving its decision on recoupment of the cost of airline tickets, purchased by the prosecutor's office for the August 5th trial date, which are non-refundable.

CP 31.

The first assignment of error states that there was "no intentional act as required by law." App. Br., p. 8. This claim is not well supported by the record. The trial judge held a hearing with all the attorneys present to discuss various issues. RP 249. Mr. Hearrean showed no obvious medical issues. RP 250. On July 31, 2013, Ms. Hearrean sent an email to the court informing the court of sudden medical issues and advising the court to contact Dr. Condon if the court wanted more information. RP 251.

Certainly, at the time that the email was sent to the court, Mr. Hearrean was on notice that he had simply cast the trial court adrift on the issue of his medical condition. Mr. Hearrean's supporting material from Dr. Condon was a letter simply announcing the fact that Mr. Hearrean could not work for at least two weeks. RP 252. The trial court deemed the doctor's note to be worthless. RP 252. Ms. Hearrean was advised by court staff that the court wanted a signed declaration from Mr. Hearrean under penalty of perjury. RP 253. This declaration did not happen.

The trial court held another hearing at 3:00 p.m. on August 1, 2013. RP 260. The defendant did not provide a signed statement under penalty of perjury nor a doctor's report. It is inconceivable that with all the communications between the parties that Mr. Hearrean did not know what the trial court wanted him to provide. Yet, he chose not to provide the required documents.

This situation was not only strange; it cannot be anything but an intentional act.

**B. THE CONTEMNOR DID NOT INFORM THE TRIAL COURT EXACTLY WHY HE CLAIMED NOT TO HAVE THE MEANS OR ABILITY TO COMPLY WITH THE TRIAL COURT'S REQUESTS.**

The first sentence in Mr. Hearrean's Assignment of Error No. 2 is classic. The sentence begins: "Next, Mr. Hearrean claims that due to his sudden illness...." App. Br., p. 11. It was precisely "Mr. Hearrean's" "claims" that caused the whole kerfuffle. The trial court did not wish to operate based on Mr. Hearrean. The trial court was having difficulty taking actions to properly manage the trial docket. Mr. Hearrean appeared to be medically fine when he met with the trial judge in her office, but then the trial court began receiving messages that Mr. Hearrean was having medical problems of an unspecified nature. The trial court was unable to get specific information from Dr. Condon. The trial court could

not get specific information from Mr. Hearrean as to what the alleged medical issue might be.

Because the law presumes an individual is capable of performing the actions required under a court order, the inability to comply with the order is an affirmative defense. *In re Pers. Restraint of King*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988). A contemnor has both the burden of production on ability to comply (*United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 1552-53, 75 L.Ed.2d 521 (1983)), and the burden of persuasion (*Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)). The contemnor must offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible. *King, supra*, at 804.

Finally, the trial court found Mr. Hearrean in contempt because Mr. Hearrean seemed to be refusing to cooperate in supplying the trial court the desired data. The situation became even more mysterious when Mr. Hearrean would only supply the barest of pieces of information from his doctor.

The same attempts to operate in the legal arena relying on bald assertions continue with the assertion that Mr. Hearrean "...had neither the means nor the ability to comply with the terms of the decree." App. Br., p. 11.

As has been the situation throughout this case, the contemnor seems to believe that simply making a claim will suffice for facts. For example, Mr. Hearrean asserts that he did not have the means or ability to comply with the trial court's requests. The obvious question is: "why not?" Mr. Hearrean stacks claim upon claim, none with actual supporting evidence. Mr. Hearrean asserts that he had medical reason for not complying with the trial court's requests, but does not provide proof of a medical condition that would prevent him from taking a minute or two and responding to the trial court.

In this case, the trial court told Mr. Hearrean what sort of evidence the court would find credible. The trial court wanted a document from Mr. Hearrean, signed under penalty of perjury that explained the situation. Mr. Hearrean did not provide that document.

C. THE CONTEMNOR HAS SHOWN NO AUTHORITY THAT REQUIRED A "PURGE CLAUSE" IN THIS CASE.

Mr. Hearrean argues that the finding of contempt was in error because the contempt order did not contain a "purge clause."

The defendant cites no authority that the contempt order in this case needed to have a "purge clause." The defendant cites to *State v. Heiner*, 29 Wn.App. 193, 627 P.2d 983 (1981), to support his argument that the contempt order should have contained a "purge clause." *Heiner* is

of no relevance here as the context in that case involved incarceration. That is not the case here.

Similarly, the citation to *State v. Norlund*, 31 Wn.App. 725, 644 P.2d 724 (1982), has no application in this case as it discussed and dealt with the incarceration of a juvenile.

Mr. Hearrean takes a part of *State ex rel. Schafer v. Bloomer*, 94 Wn.App. 246, 973 P.2d 1062 (1999), out of context. The discussion in *Bloomer* involved incarceration, thus making Mr. Hearrean's reliance on *Bloomer* misplaced.

Lastly, Mr. Hearrean cites to *In Re Rebecca K.*, 101 Wn.App. 309, 2 P.3d 501 (2000). Like the previous cases Mr. Hearrean attempts to use to support his arguments, *In Re Rebecca K.* is inapposite as the context is partly criminal, not civil.

This assignment of error is an attempt to extract a picayune legal point and try to use that point to make headway in this case. The requests of the trial court could have been satisfied in a matter of moments by having his staff prepare a short explanatory statement and then sign said document under penalty of perjury. The request involving Dr. Condon could likewise be satisfied by simply informing Dr. Condon as to the concerns and requirements of the trial court. If this request was made to Dr. Condon and proof of the request supplied to the trial court, any non-

compliance on the doctor's part would have been dealt with separately by the trial court.

In essence, the entire contempt order was one large "purge clause."

## V. CONCLUSION

For the reasons stated above the defendant's convictions and sentences should be affirmed.

Dated this 19 day of August, 2014.

STEVEN J. TUCKER  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578  
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD M. PAYNE,

Appellant,

NO. 31943-1-III

CERTIFICATE OF MAILING

IN THE MATTER OF DAVID  
HEARREAN

I certify under penalty of perjury under the laws of the State of Washington, that on August 19, 2014, I mailed a copy of the Brief of Respondent in this matter addressed to:

David Matthew Miller  
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and to:

David R. Hearrean, Esq.  
801 E 2ND Ave, #101  
Spokane, WA 99202

8/19/2014

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)