

FILED
Court of Appeals
Division III
State of Washington
5/22/2019 4:39 PM
No. 36283-3-III

#352927

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

Lori Van De Graaf,

Respondent,

v.

Rod D. Van De Graaf,

Appellant

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
(Incarceration Orders NOA Filed 8/17/18)

**REPLY BRIEF OF APPELLANT ROD D. VAN DE GRAAF -
Incarceration Order**

Gregory M. Miller, WSBA No. 14459
Jason W. Anderson, WSBA No. 30512

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Rod D. Van De Graaf

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. REPLY ARGUMENT	2
III. CONCLUSION.....	5

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed. 2d 642 (1974).....	3
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	3
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	3
<i>State v. Barklind</i> , 87 Wn.2d 814, 557 P.2d 314 (1976).....	3
<i>State v. Sorrell</i> , 2 Wn.App.2d 156, 408 P.3d 1100 (2018).....	3
<i>In re Pers. Restraint of King</i> , 110 Wn.2d 793, 756 P.2d 1303 (1988).....	4
<i>State v. Boatman</i> , 104 Wn.2d 44, 46–47, 700 P.2d 1152 (1985).....	4
<i>In re Marriage of Didier</i> , 134 Wn. App. 490, 495, 140 P.3d 607 (2006).....	4
Constitutional Provisions	
United States Constitution, Due Process Clause.....	5
Wash. Const., Art. 1, sec. 17.....	2, 5

I. INTRODUCTION

This case calls for application of settled law which forbids jailing of persons for failure to make court-ordered payments they do not have the ability to make. The basic principles are stated in the Opening Brief in this matter, as well as in the briefing in the related “Contempt Orders” appeal, No. 35839-9-III (which briefing and arguments are adopted and incorporated by reference), and which need not be repeated in this brief.

Instead, Appellant Rod Van de Graaf refutes the unnecessary negative, personal attacks on him *in gross*, not in kind, to help the Court re-focus on the important and material legal issues he raised. He also wants the Court to understand he is not like the miscreants the Response Brief asserts. He has paid his maintenance and is current. He fought having to serve jail time (who would not?) by the legal process, not by leaving the jurisdiction or otherwise absconding. But when the appeal process did not grant him a further stay, he served the five days because he could not comply with the payment order. It had no coercive effect, only punitive, which was wrong and needs to be corrected.

Focusing on the legal issues Rod raised and the settled law is how the appellate courts fill their role of error correction of trial court mistakes that make a difference. A respondent like Lori, faced with clear legal errors below, too often resorts to pounding the table and besmirching the opponent to try and divert the Court from the legal issues fatal to her case and make the Court reluctant to return the case for more trial court proceedings.

This court should not be reluctant to reverse the material, prejudicial mistakes and remand with proper directions so that the record below can be cleared and the parties can move on with their lives under a more just resolution that comports with the law and the facts, including the law on incarceration and contempt.

II. REPLY ARGUMENT

Our Constitution states in Art. 1, sec. 17 that “There shall be no imprisonment for debt, except for absconding debtors.” The courts recognize in both civil and criminal contexts that no one is to be incarcerated when they cannot pay, either because they are indigent, or simply do not have the funds available given the other responsibilities and obligations they are already saddled with legally or contractually.

Thus, Judge Korsmo recognized in a recent dissent the well-known limits on incarceration of criminal offenders in a civil collection proceedings who are unable to pay legal financial obligations, and that they are entitled to proper hearing before action is taken against them. He wrote:

The constitution does not limit the ability of the states to impose financial obligations on convicted offenders. **It only prohibits the enforced collection of financial obligations from those who cannot pay them.** *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed. 2d 642 (1974); *State v. Blank*, 131 Wn.2d 230, 237-38, 930 P.2d 1213 (1997); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); *State v. Barklind*, 87 Wn.2d 814, 817-18, 557 P.2d 314 (1976). Accordingly, remission motions require that the court adjudge the offender's current or future ability to pay those costs. *Blank*, 131 Wn.2d at 242, 930 P.2d 1213. However, **punishment for failure to pay can only be imposed if the refusal is willful.** *Id.* at 241-42, 930 P.2d 1213.

State v Sorrell, 2 Wn.App.2d 156, 193-194, 408 P.3d 1100 (2018) (Korsmo, J., dissenting) (emphasis added).

As pointed out in the Opening Brief, as well as the Contempt Appeal briefing, the same principles apply in the dissolution arena before incarceration is an option. A person cannot be jailed for civil contempt except by willful disobedience of the court's order, and then they may be jailed only when that is used to coerce compliance

which the alleged contemnor is capable of doing. Otherwise, the jailing is punitive and not civil, and requires the full panoply of due process, including a jury trial:

If the [contempt] order is remedial, then the proceeding is civil and does not offend [the party's] due process rights. **However, if the order is punitive, then the proceeding is criminal and due process affords [the alleged contemnor] the same rights as a criminal defendant, including the right to a jury trial.** See *In re Pers. Restraint of King*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988) (citing *State v. Boatman*, 104 Wn.2d 44, 46–47, 700 P.2d 1152 (1985)).

In re Marriage of Didier, 134 Wn. App. 490, 495, 140 P.3d 607 (2006) (emphasis added).

As argued in the Opening Brief and the Contempt Appeal, the incarceration order was entirely punitive, as were the contempt orders. They were all too successful efforts at an abusive litigation tactic used to bully and impose undue expense on an opponent. This appeal gives the Court an opportunity to reverse the incarceration order and underlying contempt orders and so send a message to the lower courts and the Bar that such abuses of the legal process will not be tolerated, but that the basic, settled rules will be applied.

The incarceration order appealed herein must be vacated because when all the chaff is swept away, the trial court jailed

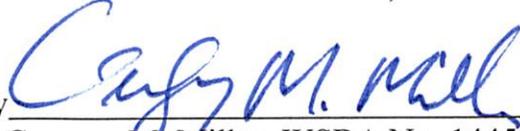
Appellant Rod Van de Graaf as punishment for not paying a debt he was not able to pay from his personal funds. By holding that he “had” the funds because he could borrow or otherwise obtain it from his parents, the trial court impermissibly expanded the jurisdiction of the court to essentially order the family to make those funds available. That was error which requires vacation of the incarceration order.

III. CONCLUSION

Appellant Rod Van de Graaf respectfully asks the Court to vacate the order of incarceration which was wrongfully issued without the proper evidentiary basis in violation of the Washington and federal constitutions, thus exceeding the trial court’s jurisdiction in enforcing its orders for the reasons given herein, and in the related “Contempt Orders” case, No. 35839-9-III.

Respectfully submitted this 22nd day of May, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By 

Gregory M. Miller, WSBA No. 14459

Jason W. Anderson, WSBA No. 30512

Attorneys for Rod D. Van De Graaf

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

David Hazel Hazel & Hazel 1420 Summitview Yakima, WA 98902 P: (509) 453-9181 F: (509) 457-3756 E: daveh@davidhazel.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> email <input checked="" type="checkbox"/> Other – via Portal
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8 th Avenue North Seattle, WA 98109 P: (206) 624-0974 F: (206) 624-0809 E: cate@washingtonappeals.com valerie@washingtonappeals.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> email <input checked="" type="checkbox"/> Other – via Portal
Joanne Rick Halstead & Comins Rick PS PO Box 511 ** 1221 Meade Ave Prosser, WA 99350 P: 509-786-2200; 786-2211 F: 509-786-1128 E: jgcrick@gmail.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> email <input checked="" type="checkbox"/> Other – via Portal

DATED this 22nd day of May, 2019.



Elizabeth C. Fuhrmann, PLS, Legal
Assistant/Paralegal to Greg Miller

CARNEY BADLEY SPELLMAN

May 22, 2019 - 4:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36283-3
Appellate Court Case Title: In re the Marriage of Lori Van de Graaf and Rod Van de Graaf
Superior Court Case Number: 11-3-00982-6

The following documents have been uploaded:

- 362833_Briefs_20190522163813D3397681_8634.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief.pdf

A copy of the uploaded files will be sent to:

- anderson@carneylaw.com
- andrienne@washingtonappeals.com
- cate@washingtonappeals.com
- daveh@davidhazel.com
- fuhrmann@carneylaw.com
- jgcrick@gmail.com
- valerie@washingtonappeals.com

Comments:

Sender Name: Elizabeth Fuhrmann - Email: fuhrmann@carneylaw.com

Filing on Behalf of: Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email:)

Address:

701 5th Ave, Suite 3600

Seattle, WA, 98104

Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20190522163813D3397681