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No. 362795

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EVARISTO JAVIER SANCHEZ

Appellant,

v.

HOPE ROSE

Respondent.

APPEAL FROM BENTON COUNTY SUPERIOR COURT
THE HONORABLE ALEXANDER EKSTROM

APPELLANT'S BRIEF

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INTRODUCTION

This is a case about a finding of contempt via summary proceeding. The trial court made the finding based upon Appellant's alleged failure to pay spousal maintenance and facilitate Respondent's collection of her personal belongings as required by a temporary court order. The temporary order was entered in a domestic relations matter. The Appellant was found in contempt when he appeared before the court in a domestic violence protection order case.

ASSIGNMENT OF ERROR

1. The trial court erred when it entered an order of contempt against the Appellant after summary contempt proceedings on July 20, 2018.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a trial court wrongly exercise summary contempt authority against a person appearing before it when the allegedly contemptuous conduct occurs outside the view of the court and the court learned of said conduct only by information obtained via unsworn testimony?
2. Does a trial court impermissibly violate the due process interest of a person appearing before said court when it finds the individual in contempt by summary proceeding and does not provide notice of the hearing, meaningful assistance of counsel, or an opportunity to prepare a defense?

3. Does a trial court impermissibly violate the due process interest of a person appearing before said court when it finds the individual in contempt based on unsworn testimony?

STATEMENT OF THE CASE

The Appellant, Evaristo J. Sanchez (“Mr. Sanchez”) and Respondent, Hope Rose (“Ms. Rose”) were involved in two concurrent matters at the time this appeal was lodged. Ex. 1; CP at 1–8. At the time of the contempt finding, the cases remained independent of one another. The divorce matter proceeded under Benton County Superior Court case number 18-3-00588-03 and Mr. Sanchez’s request for a domestic violence restraining order proceeded under Benton County Superior Court case number 18-2-01678-03. *Id.*

On July 11, 2018, in the divorce matter, Ms. Rose attended an ex parte hearing, without notice to Mr. Sanchez. RP at 25. Without demonstrating Mr. Sanchez’s financial status to that court, Judge Bruce Spanner granted an ex parte order to her requiring Mr. Sanchez to pay spousal maintenance and attorney fees. Ex. 1. The order also required Mr. Sanchez to facilitate Ms. Rose’s receipt of personal effects. *Id.* Because Mr. Sanchez was not notified of the hearing, he was unable to respond or present a financial declaration to rebut Ms. Rose’s assertions. RP at 25; Ex. 1.

Mr. Sanchez was ordered to pay \$5,000 in spousal maintenance “before the close of business on the day he is served with the order” and \$5,000 in attorney fees with no date specified. Ex. 1. The ex-parte order was served on Mr. Sanchez on July 12, 2018, at or after 5:00 p.m. RP at 4, 16. He did not make payment that day—though, he was not penalized for failing to pay on July 12. CP at 36.

The next day, on July 13, Mr. Sanchez appeared on the domestic violence protection order docket¹, prepared to argue for a protection order against Ms. Rose. CP at 29. Although the divorce case was not before the court that day, Judge Cameron Mitchell queried Mr. Sanchez regarding whether the spousal maintenance payment in the divorce case had been made. RP at 25. At that hearing, Judge Mitchell told Mr. Sanchez he was required to pay by the end of the day. RP at 21. Mr. Sanchez promised to pay the amounts ordered in the divorce case. *Id.* Judge Mitchell re-issued the temporary order for protection but entered no orders in the divorce case. CP at 36.

Three days later, Ms. Rose filed a *Motion for Contempt* in the divorce case, stating payment had not been made pursuant to the ex parte *Temporary Family Law Order*. Ex. 2. There is no record of a *Notice of*

¹ The domestic violence protection order docket is heard on Fridays in Benton County and divorce/family law matters are heard on Tuesdays in Benton County.

Hearing was ever filed regarding this motion or that it was even served on Mr. Sanchez. That *Motion for Contempt* and accompanying statements were not before the Court on July 20, 2018. RP at 1.

On July 20, 2018, the parties, along with Mr. Sanchez's then-attorney, were present in court to address the domestic violence restraining order. *Id.* at 4. Judge Alex Ekstrom called the domestic violence order case number 18-2-01678-3 and inquired of Mr. Sanchez whether he had paid the amounts ordered in the divorce case (case number 18-3-00588-03). *Id.* Mr. Sanchez was not informed by Judge Ekstrom that he need not say anything prior to the Court's inquiry. *Id.* He was, however, indirectly told "he need not say anything" prior to his opportunity to speak in mitigation after being found in contempt. *Id.* at 15.

Mr. Sanchez's attorney was not permitted to represent him at the time the Court made its inquiries; the answers upon which the Court found contempt. *Id.* However, Mr. Sanchez was permitted to speak to his attorney prior to his opportunity to speak in mitigation; though, his attorney was not permitted to speak for him. *Id.*

Additionally, the Court did not require Mr. Sanchez or Ms. Rose to take an oath or affirmation to speak truthfully at the outset of the hearing or prior to gathering the factual information upon which the Court found contempt. *Id.* at 4. Mr. Sanchez asserted in unsworn testimony that he had

not paid spousal maintenance in the divorce case pursuant to the ex parte order. *Id.* at 4. Mr. Sanchez’s own elicited words and the statements from Ms. Rose were the only evidence before the Court that Mr. Sanchez had not paid pursuant to the order, nor facilitated delivery of personal effects to Ms. Rose. *Id.* at 4-11. The Court affirmed this basis by stating, “I am certifying that I’ve seen or heard the acts constituting the . . . contempt[,] that they have happened, by your statements in court.” *Id.* at 14.

However, the Court stated later in the hearing that the specific findings of failure to pay were made after reviewing the FTR recording of the July 13, 2018 hearing, which could not contain reference to a failure to pay before close of business on July 13, 2018 pursuant to the *Temporary Family Law Order*, as the recording was made while the Court conducted business that day. *Id.* at 21, 24–25. The Court also stated the basis of the contempt ruling was “only . . . Judge Mitchell’s directions and [Mr. Sanchez’s promise] . . . in this matter[,]” though the written *Order on Findings of Summary Contempt* stated one of Mr. Sanchez’s “acts of contempt” was “in the form of . . . [f]ailing to pay \$10k as originally order [sic] by Judge Spanner in 18-3-00588-03. . . “ RP at 24–25; CP at 36.

The Court specified the contempt proceedings were conducted under “RCW 7.21.050, summary contempt . . . as opposed to contempt with notice. . . .” RP at 26. The Court ultimately ordered punitive sanctions of

one day imprisonment and a \$500 fine. CP at 37; RP at 21–22. The Court also ordered remedial sanctions of immediate imprisonment to continue unless and until the monies previously ordered were paid and until Mr. Sanchez assisted with Ms. Rose’s collection of various personal belongings. CP at 37–38; RP at 22–23.

Regarding the “continuing failure” to pay on July 14, 2018 the Court specified: “[Y]ou’re going to spend a day [imprisoned], but you don’t have to spend any longer than a day if you . . . make the payment of money.” RP at 22. The Court described the contempt order as “designed to punitively punish a course of conduct that’s unconscionable. . . [a]nd everything else . . . [in the order would be capable of] purge . . . by doing precisely the things [he was] supposed to do. . . .” *Id.* at 23.

The Court then issued the order, administered oaths to the parties and addressed the protection order matter. *Id.* at 28. At the conclusion of the hearing, Mr. Sanchez was then taken into custody and paid the monies to Ms. Rose’s attorney at approximately 3:10 pm that day; however, he was forced to spend the night in jail as a result of Judge Ekstrom’s actions. He was released from custody the following morning. CP at 60–63. This appeal follows. CP at 69–74.

STANDARD OF REVIEW

Washington case law holds that appellate review of a finding of contempt is reviewed “for abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.” *In re Interest of M.B.*, 101 Wn. App. 425, 454 (2000) (plurality). Whether a decision is based on untenable grounds “depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971).

A trial court's authority to impose sanctions for contempt, however, is a question of law, which is reviewed de novo. *In re Interest of Silva*, 166 Wn.2d 133, 140 (2009). As such, this Court should review the trial court's finding of contempt for an abuse of discretion and the authority to impose sanctions for the alleged contempt de novo.

Additionally, the determination of “the applicability of the constitutional due process guaranty is a question of law subject to de novo review.” *In re Det. of Fair*, 167 Wn.2d 357, 362 (2009). De novo review is, thus, applicable to this Court's inquiry regarding the constitutional permissibility of the procedures employed by the trial court in finding Mr. Sanchez in contempt of court via summary proceeding.

ARGUMENT

I. The contempt order against Mr. Sanchez’s should be vacated because his allegedly contemptuous conduct is properly characterized as indirect, rather than direct, contempt and indirect contempt is not punishable via the procedures and authority cited by Trial Court Judge Alex Ekstrom.

A. Inherent and Statutory Contempt

Washington courts are vested with contempt authority from two general sources: 1) inherently via their role as constitutional courts; and 2) by statute. *In re Dependency of A.K.*, 162 Wn.2d 632, 645 (2007) (plurality). Inherent contempt power is distinct from contempt power derived from statute. *State v. Ralph Williams' Nw. Chrysler Plymouth*, 87 Wn.2d 327, 335 (1976).

Case law in Washington has “long held that courts may not exercise their inherent contempt power “[u]nless the legislatively prescribed procedures and remedies are specifically found inadequate.”” *In re Dependency of A.K.*, 162 Wn.2d at 647 (internal citations omitted). In this case, Judge Ekstrom noted the contempt proceedings were conducted pursuant to “RCW 7.21.050, summary contempt . . . as opposed to contempt with notice. . . .” RP at 26. He also titled the order, “Order on Findings of Summary Contempt (RCW § 7.21.050)” in the caption. CP at 36. As such, Judge Ekstrom based his finding of contempt on statutory grounds, rather than through his inherent authority as a constitutional court.

However, even if inherent authority was the basis upon which the trial court made a finding of contempt in this case, the order cannot stand in view of the absence of reference as to why statutory proceedings were inadequate in the order. *See State v. Salazar*, 170 Wn. App. 486, 492-493 (2012). When a trial court makes a finding of contempt based on inherent authority but fails to specifically find statutory sources of authority to be inadequate “[t]he remedy for the trial court's failure to make such a finding before exercising its inherent contempt power is vacation of the contempt orders.” *Id.* As such, Judge Ekstrom’s contempt finding cannot be sustained as an exercise of inherent contempt authority because he did not specifically find why statutory remedies were inadequate—on the contrary, he cited to the statutory source by which it was pursuing the order. RP at 25.

B. The Grounds for Summary Contempt Under RCW § 7.21.050

Summary contempt proceedings are appropriate when “the offending behavior disrupts court proceedings and requires immediate judicial action to preserve order and protect the institution of the court.” *State v. Dugan*, 96 Wn. App. 346, 353 (1999). The summary contempt statute provides for “summary imposition of sanctions for a ‘direct contempt’, one committed in the courtroom.” *State v. Hobble*, 126 Wn.2d 283, 293 (1995). As such, summary contempt cannot be pursued in Washington without direct contempt before the court. *Id.*

C. Direct and Indirect Contempt

Long ago, the Supreme Court of the United States articulated direct contempt to be “an open insult in the face of the court to the persons of the judges while presiding. . .” *Ex parte Terry*, 128 U.S. 289, 309 (1888). One court further explained acts constituting direct contempt—and, thus, punishable by summary proceedings—must occur in the court’s “immediate presence.” *Nielsen v. Nielsen*, 38 Wn. App. 586, 588 (1984).

The *Nielsen* court elaborated that a judge sanctioning direct contempt must have “*personal* knowledge of all the essential elements of the offense and [be] in a position to evaluate the circumstances which evoked the contemptuous conduct.” *Nielsen*, 38 Wn. App. at 588 (emphasis in original). In one instance, the Washington State Court of Appeals held an attorney absenting himself from the courtroom during a trial was not sufficiently in the presence of the court to permit summary contempt punishment under RCW § 7.21.050(1). *State v. Jordan*, 146 Wn. App. 395, 404 (2008).

Contrariwise, the Supreme Court of Washington found an individual distributing pamphlets in the courtroom to be sufficiently disruptive in the court’s presence for a finding of direct contempt. *In re Willis*, 94 Wash. 180, 181 (1917). Direct contempt was also found when a court was required to

“temporarily suspend[] business” while parties participated in a particularly acrimonious verbal argument. *State v. Buddress*, 63 Wash. 26, 31 (1911).

Conversely, indirect contempt occurs outside of the court. *Id.* When the judge lacks “personal knowledge of the essential elements of the offense, a contemptuous act is indirect *even though the offender has admitted the act in open court.*” *Nielsen*, 38 Wn. App. at 588 (emphasis added). The United States Court of Appeals for the Ninth Circuit stated, “An indirect contempt is ‘contumacious behavior occurring beyond the eye or hearing of the court and for knowledge of which the court must depend upon the testimony of third parties or the confession of the contemnor.’” *United States v. Marshall*, 451 F.2d 372, 373 (9th Cir. 1971).

Here, Mr. Sanchez’s statements and those of Ms. Rose were the only evidence before Judge Ekstrom pertaining to the alleged contempt. *Id.* 4–11. As such, the trial court in this case lacked personal knowledge of the alleged elements constituting contempt required by *Nielsen*. With regard to Mr. Sanchez’s alleged contempt, Judge Ekstrom only had the information gathered from testimony at the hearing. Though “[a] court may conduct a hearing on contempt by affidavit, oral testimony or both,” the trial court in this case did not specifically find contempt based on an affidavit, only statements made before it. *In re Marriage of James*, 79 Wn. App. 436, 442 (1995). Indeed, Judge Ekstrom certified it had “seen or heard the acts

constituting the . . . contempt . . . [and] that they . . . happened [] by [Mr. Sanchez's] statements in court." RP at 14. Given this certification, Judge Ekstrom could have only gained personal knowledge of the elements of the alleged contempt indirectly by statements from Ms. Rose, a third party, and the "confession of the contemnor." Thus, under the jurisprudence outlined by the Ninth Circuit in *Marshall*, there was insufficient evidence of direct contempt necessary for a summary contempt proceeding.

D. Direct Contempt in the Absence of Disruptive Conduct

Mr. Sanchez's conduct before Judge Ekstrom did not disrupt the court proceedings sufficient for a finding of direct contempt. *Dugan*, 96 Wn. App. at 353. Unlike the quarrelers in *Buddress* and the pamphleteer in *Willis*, nothing in the record indicates Mr. Sanchez did anything to interrupt the court proceedings. *See* RP. In this case, Mr. Sanchez simply, lawfully appeared in a court proceeding and responded to inquiries from Judge Ekstrom. *See* RP.

On July 20, 2018, Mr. Sanchez was present in court for the matter that was scheduled on that day - the domestic violence restraining order. *Id.* Judge Ekstrom called the domestic violence protection order case and then inquired as to the orders that originated in the divorce matter. *Id.* Mr. Sanchez did not disrupt the protection order proceeding by his own conduct. Like the trial court in *Dugan*, "the only disruption in the courtroom was the

trial court's interruption to address the issue.” *See Dugan*, 96 Wn. App. at 354. Therefore, Mr. Sanchez’s actions in court on July 20th did not constitute direct contempt sufficient for the initiation and sustainment of summary proceedings against him.

Because the court did not have personal knowledge of the essential elements of the alleged offense, except unsworn testimony from Mr. Sanchez and Ms. Rose, the alleged contempt is properly characterized as indirect, rather than direct, contempt. As indicated above, indirect contempt is not punishable by summary contempt proceedings under the relevant statute. *See* RCW § 7.21.050(1); *Dugan*, 96 Wn. App. at 353. Moreover, inherent contempt authority is inadequate to support the trial court’s finding of contempt in this instance because Judge Ekstrom failed to make specific findings as to why statutory proceedings were insufficient. RP at 21–24.

A finding of summary contempt based on alleged actions which are properly characterized as indirect contempt is in violation of the statutory procedure governing the exercise of summary authority. The public interest is served when courts conduct proceedings in conformity with statutory obligations and other requirements derived from case law. As such, the finding of contempt against Mr. Sanchez is based on untenable grounds and is, thus, an impermissible abuse of discretion.

E. Limitation on Contempt for Appearance in Separate Proceeding

Additionally, the Supreme Court of Washington has stated when a person is held in contempt for appearing at a proceeding for which the purpose is “other than determining guilt of contempt, a court [is] without authority, absent an appropriate pleading, to find a party in contempt for an act committed outside its presence . . . [and t]he order . . . [is] reversed.” *Dimmick v. Hume*, 62 Wn.2d 407, 409 (1963). In this case, Mr. Sanchez’s appearance in court at the time of his contempt finding was for the domestic violence protection order—not the *Temporary Family Law Order* upon which the contempt finding was ultimately determined. Judge Ekstrom raised the issue of contempt regarding the domestic relations matter *sua sponte*, without reference to an appropriate pleading. Because Mr. Sanchez did not commit direct contempt and was present in court for a purpose other determining potential guilt for contempt, the contempt orders against Mr. Sanchez after summary proceedings cannot stand.

Furthermore, when a Washington appellate court finds a lower court’s contempt order to have violated a “constitutional [or] statutory procedural protection[] prerequisite to a valid contempt finding, [the appellate court will] vacate the trial court’s contempt orders and dismiss the sanctions imposed.” *State v. Jordan*, 146 Wn. App. 395, 398 (2008). In this case, the contempt orders against Mr. Sanchez were based upon an improper

and untenable exercise of the trial court's statutory summary contempt power. The orders violated protections embedded in the narrow application of the summary contempt statute. Therefore, the order should be vacated, and the sanctions reversed. *See id.*

II. The contempt finding as to Mr. Sanchez's alleged failure to pay spousal maintenance was a violation of his right to procedural due process because an obligor is entitled to notice and an opportunity to prepare an adequate defense when in jeopardy of a contempt order for non-payment.

The Revised Code of Washington directs an obligee to petition or motion a court to initiate a contempt action under chapter 7.21 RCW “[i]f an obligor fails to comply with a . . . maintenance order. . . .” RCW § 26.18.050(1). Said motion or petition can be filed “without notice” and, “[i]f the court finds there is reasonable cause” to find that the obligor has failed to comply with the order, require the obligor to “show cause” as to why contempt should not be found. *Id.* Service of the show cause order “shall be by personal service, or in the manner provided in the civil rules of superior court or applicable statute.” RCW § 26.18.050(2).

In one case, an obligor held in contempt under the statute challenged the lower court's finding based, in part, on the claim that his right to due process of law was violated because he received inadequate notice of the contempt action. *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 251 (1999). The Washington Court of Appeals disagreed, holding that the lower

court properly provided the alleged contemnor “notice of the time and place of the hearing and the nature of the contempt charge so he could adequately prepare a defense.” *Id.* In another case, notice in a contempt proceeding was declared to be sufficient “if it informs the accused of the time and place of the hearing, and the nature of the charges pending.” *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 335 (1986).

In *Bloomer*, the obligor received proper service of the “petition for contempt as well as its motion and declaration for order to show cause regarding contempt. These documents required Mr. Bloomer to be in the Yakima County Superior Court at a time certain one month later. This gave [Mr. Bloomer] time to prepare an adequate defense.” *Id.* In Mr. Sanchez’s case, nothing in the record indicates he had knowledge of Ms. Rose’s Motion for Contempt. See CP. Furthermore, nothing indicates Mr. Sanchez received service of an order that would have subjected him to show cause as to why he should not be found in contempt. *Id.*

When Mr. Sanchez appeared before Judge Ekstrom on the domestic violence protection order docket, he was impermissibly unaware he was in jeopardy of fines and incarceration based on his alleged inaction with respect to the ex-parte spousal maintenance order. Moreover, unlike the contemnor in *Bloomer*—who had the benefit of a motion, declaration, petition, and thirty days’ time to prepare a defense—Mr. Sanchez had no

record of court filings regarding potential contempt charges against him; he had a mere nine days to comply with ex parte temporary order and/or defend himself against a contempt charge after the spousal maintenance order was issued. Ex. 1 at 6; CP at 40.

Though the appellate court in *Bloomer* did not create a bright-line rule regarding the number of days' notice necessary to satisfy procedural due process, the facts in this case do not indicate Mr. Sanchez had notice sufficient to inform him of the "time and place" of a contempt proceeding and the "nature of the charges" that he would unexpectedly face, as is required by *Burlingame*. *Burlingame*, 106 Wn.2d at 335.

The constitutions of the United States and the State of Washington provide that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. Art. I, § 3; *See* U.S. Const. Amend. 5. The Washington Court of Appeals held "[a]ny exercise of the contempt power, whether it be to punish or to coerce, must comport with due process of law." *Nielsen*, 38 Wn. App. 586, 588 (1984).

Because Mr. Sanchez did not have the same or similar notice or time to prepare a defense as did the constitutionally-valid finding of contempt against the contemnor in *Bloomer*, Judge Ekstrom's summary contempt order as to Mr. Sanchez should be vacated as a violation of Mr. Sanchez's

right to due process of law. *See In re Interest of J.L.*, 140 Wn. App. 438, 440 (2007).

The United States Court of Appeals for the Ninth Circuit noted

The requirement that contempt be committed in the presence of the court is designed to limit summary dispositions to cases in which an ongoing proceeding is disrupted or frustrated and the authority of the court must be immediately asserted to restore order. If the alleged contempt was not committed in open court, where the judge would have personal and direct knowledge of it, it may be punished only after the due process requirements of notice, a reasonable time to prepare a defense, and a hearing are afforded.

United States v. Lee, 720 F.2d 1049, 1052 (9th Cir. 1983).

Importantly, “Washington's approach to summary contempt is consistent with federal practice.” *Dugan*, 96 Wn. App. at 353. As such, due process requires that summary contempt be limited to directly contemptuous actions where it is necessary to ensure the court's authority is not frustrated by an ongoing need to restore order. Here, the Court's proceedings were not interrupted by Mr. Sanchez's conduct, and due process was impermissibly violated due to an absence of notice, a hearing, and an opportunity to prepare a defense. As such, Judge Ekstrom's contempt order should be vacated. *See In re Interest of J.L.*, 140 Wn. App. at 440.

III. The contempt order against Mr. Sanchez should be vacated because the trial court impermissibly violated his right to due process when it failed to administer an oath or affirmation to witnesses, and those unaffirmed statements improperly constituted the basis of the court's summary finding of contempt.

Contempt is generally bifurcated into two classifications for due process considerations: 1) criminal; and 2) civil. *Jordan*, 146 Wn. App. at 401. In Washington, "contempt statutes define 'contemptuous conduct' but they do not distinguish between civil and criminal contempt. Instead, the statutes distinguish between punitive and remedial sanctions for contempt." *Id.* at 401-402.

A. Punitive and Remedial Sanctions and Due Process

A punitive sanction is one imposed to punish a past contempt of court. RCW § 7.21.010(2). It is levied to uphold the authority of the court. *Id.* Characteristics of punitive sanctions include a determinate sentence and no opportunity to "purge," or correct, the contemptuous conduct. *Rhinevault v. Rinevault*, 91 Wn. App. 688, 694 (1998). Punitive sanctions are criminal in nature. *Silva*, 166 Wn.2d at 141. Conversely, the "primary purpose of the civil contempt power[, and thus, remedial sanctions,] is to coerce a party to comply with an order or judgment." *State v. Breazeale*, 144 Wn.2d 829, 842 (2001).

Generally, substantial criminal due process protections are required prior to the imposition of punitive sanctions. *See* RCW § 7.21.040; *See State v. Boatman*, 104 Wn.2d 44, 46 (1985). The Supreme Court of Washington held “[i]n criminal contempt cases, the contemnor is afforded ‘those due process rights extended to other criminal defendants. . . .’” *Smith v. Whatcom Cty. Dist. Court*, 147 Wn.2d 98, 105 (2002).

B. The Trial Court Imposed Punitive and Remedial Sanctions

In this case, Judge Ekstrom’s *Order on Findings of Contempt* against Mr. Sanchez included both punitive and remedial sanctions. CP at 37–38. Judge Ekstrom ordered one day imprisonment and a \$500 fine—a determinative punishment without an opportunity to purge—and thus, Mr. Sanchez bore a punitive sanction in that regard. RP at 22. The trial court also ordered remedial sanctions of immediate imprisonment to continue until Mr. Sanchez paid monies and assisted with Ms. Rose’s collection of various personal belongings. CP at 37–38.

Judge Ekstrom described the contempt order against Mr. Sanchez as “designed to punitively punish a course of conduct that’s unconscionable. . . .” RP at 22. The Court stated “everything else . . . [in the order would be capable of] purge . . . by doing precisely the things [Mr. Sanchez was] supposed to do. . . .” *Id.* Regarding the “continuing failure” to pay on July 14, 2018, the Court specified: “So you’re going to spend a day [imprisoned],

but you don't have to spend any longer than a day if you . . . make the payment of money.” RP at 21. As such, Mr. Sanchez faced both punitive and remedial sanctions—according to both the characterizations in the order and case law. *Id.*; CP at 36–37.

C. Due Process Violations Regarding the Punitive Sanctions

The Washington Court of Appeals declared, “No court . . . may impose criminal contempt sanctions unless the contemnor has been afforded the same due process rights afforded other criminal defendants.” *In re Interest of J.L.*, 140 Wn. App. at 448. Said due process rights “include the . . . assistance of counsel, privilege against self-incrimination, and proof beyond a reasonable doubt.” *Id.* As discussed *supra*, the trial court in this case failed to provide adequate due process protections sufficient to support the imposition of a punitive sanction when it penalized Mr. Sanchez without sufficient notice or an opportunity to prepare a defense.

Additionally, the trial court violated Mr. Sanchez’s right to due process of law when it effectively denied him the benefit of counsel during the summary proceeding. RP at 15; *In re Interest of J.L.*, 140 Wn. App. 438, 448 (2007). Mr. Sanchez retained counsel to represent him in court, and his counsel was present in court on July 20, 2018, but his attorney was not permitted to speak in mitigation of the charge. RP at 15.

The Supreme Court of Washington in *Hobble* found the mitigation requirement of RCW 7.21.050(1) to be satisfied when counsel spoke on the contemnor's behalf, due to the contemnor's refusal to speak in mitigation. *Hobble*, 126 Wn.2d 283, 296. Another court found the mitigation requirement to be unsatisfied when the lower court refused to allow either the contemnor or his attorney the opportunity to speak in mitigation. *Templeton v. Hurtado*, 92 Wn. App. 847, 855 (1998) (stating "The court not only failed to give Templeton an opportunity to speak in mitigation, but also denied Templeton's attorney's request for an opportunity to speak.")

In this case, the Court permitted only a brief conversation between Mr. Sanchez and his attorney prior to the mitigation statement. RP at 15. The Court allowed this short conference only after stating, "I don't know if whether I have to allow it, but I will if that's what you wish." *Id.* When Mr. Sanchez's attorney inquired as to whether he could speak in mitigation on behalf of his client, Judge Ekstrom sternly advised him he was "not involved." *Id.* The Court elaborated, "This is between [Mr. Sanchez] and me. You will have the opportunity to speak at the hearing on the [protection orders] motion. Contempt is between him and me." *Id.*

By restricting Mr. Sanchez's opportunity to speak with counsel and barring counsel from speaking in mitigation prior to finding him in contempt, the Court impermissibly denied Mr. Sanchez the assistance of

counsel. This denial represents an impermissible violation of Mr. Sanchez’s due process interest.

Accordingly, Judge Ekstrom erred when it found Mr. Sanchez in contempt—and thereafter levied punitive punishments against him—without affording him the due process protections necessary for a punitive sanction to stand. Judge Ekstrom also violated Mr. Sanchez’s right to due process of law because Mr. Sanchez faced punishment for past behavior but did not have notice of the hearing, an opportunity to prepare a defense, or the meaningful benefit of counsel. *See In re Interest of J.L.*, 140 Wn. App. at 448. As such, the punitive sanction against Mr. Sanchez should be reversed because of the impermissible violations of due process guarantees.

D. Due Process Violations Regarding the Remedial Sanctions

As stated *supra*, Washington case law requires “[a]ny exercise of the contempt power, whether it be to punish or to coerce, [to] comport with due process of law.” *Nielsen*, 38 Wn. App. at 588. The Washington Court of Appeals held a finding of contempt based upon unsworn testimony—even when noncriminal, remedial sanctions were imposed—to be impermissibly tainted because of the importance of the oath requirement to the truth-finding process. *See In re Interest of M.B.*, 101 Wn. App. 425, 472 (2000). In another case, a Washington appellate court found the use of unsworn testimony in a civil service discharge administrative proceeding to

be an impermissible violation of due process because the swearing of an oath by witnesses was among “minimal due process guaranties” which should be afforded to a person appearing in that setting. *In re Appeal of Nirk*, 30 Wn. App. 214, 216 (1981).

The *Nirk* court noted “significant interests [were] at stake in an employment discharge hearing[] which require[d] a level of due process consistent with accepted notions of fair play.” *In re Appeal of Nirk*, 30 Wn. App. at 217. The court further found “[r]equiring witnesses to testify under oath has become a commonly accepted procedure.” *Id.* The court expressed a belief “that the administration of an oath is significant in arriving at the truth.” *Id.* at 218.

The Washington Court of Appeals addressed a contempt finding based on unsworn testimony in the case of an at-risk youth—styled R.T. in the court’s opinion—who was court-ordered to comply with certain tasks, including regular school attendance, drug and alcohol evaluations, and compliance with a curfew, among other things. *Id.* at 468. The youth’s parents filed a contempt motion after alleged non-compliance with the order. *Id.*

The lower court found R.T. in contempt under the juvenile contempt provision in RCW § 13.32A.250. *Id.* That court ordered three days detention and informed R.T. he could “purge his contempt by writing a 25-page,

single-spaced report. . . .” *In re Interest of M.B.*, 101 Wn. App. at 468. R.T. challenged the contempt finding on the grounds the lower court erroneously considered hearsay evidence and unsworn testimony. *Id.* at 469. After finding the erroneous admission of hearsay did not cause prejudice because the written findings—which trumped the oral findings—did not rely on hearsay statements, the appellate court turned to the reliance by the trial court upon unsworn testimony. *Id.* at 470.

The court held, just as “the rules of evidence . . . require[] that witnesses be sworn[, d]ue process also requires it.” *Id.* Thus, the court vacated the contempt finding on two grounds; the first being a violation of the rules of evidence, and the second being a due process violation. *Id.* The first basis was rooted in a finding that the rules of evidence apply to juvenile contempt proceedings—and thus, the oath requirement of ER 603 was apposite. *Id.*

E.. The Applicability of Evidentiary Rules to Summary Proceedings

Notably, the portion of that court’s holding regarding the applicability of evidentiary rules to unsworn testimony may not extend to the contempt finding in this case if this Court finds Mr. Sanchez committed direct contempt—thereby making summary proceedings proper—because the rules of evidence do not apply to “contempt proceedings in which the court may act summarily.” Wash. ER 1101(c)(3). However, if this Court

agrees Mr. Sanchez's alleged contemptuous conduct is properly characterized as indirect contempt, as is asserted *supra*, summary contempt proceedings would be inappropriate, and the portion of the court's opinion regarding evidentiary rules may be applicable to the July 20 hearing. As such, can be informative as to the inadmissibility of unsworn testimony against Mr. Sanchez. *See id*; Wash. ER 603.

Moreover, the second basis for vacating the contempt finding against R.T.—a violation of the minor's right to due process of law—is applicable in this case. As stated *supra*, the court in *In re Interest of M.B.* concluded due process requires that witnesses be sworn in a contempt proceeding in juvenile court. *In re Interest of M.B.*, 101 Wn. App. at 470. That court opined that the “procedural safeguards” in a hearing “must be tailored to the specific function to be served,” in order to satisfy due process *Id.*

F. Balancing Test to Determine A Due Process Violation

The factors the *M.B.* court balanced to determine whether procedural safeguards were sufficient to satisfy due process included: “the private interests affected by the proceeding; the risk of error created by the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and the countervailing governmental interest supporting use of the challenged procedure.” *Id.* at 471. This due process

balancing test was first adopted by the Supreme Court of the United States in *Mathews v. Eldridge*. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

First, the appellate court found R.T.’s “liberty interest” to be “obviously substantial.” *Id.* The court did not clearly state why the significance of the interest was “obvious[],” but it could be inferred that R.T.’s risk of—and actual subjection to—incarceration were the obviously substantial, self-evident private interests. *See id.* In this case, Mr. Sanchez’s personal interests are similarly “substantial,” as evidenced by the fact that he was incarcerated due to Judge Ekstrom’s finding of contempt based on unsworn testimony.

Second, the appellate court found the “risk of error” factor to be “high, because the primary function of requiring testimony under oath . . . is to provide ‘additional security for credibility’ by impressing upon witnesses their duty to tell the truth. . . .” *Id.* Impressing the importance of truth-telling upon a witness is particularly important in the context of family law and protection order matters. Family law matters are susceptible the potential for a witness to be unfamiliar with legal procedures, subject to passions of the moment, imbued with a sense of virtuousness in their perspective, and highly self-interested, given that familial considerations and interests are stake. As the court stated regarding the administrative proceeding in *Nirk*, “the administration of an oath is significant in arriving

at the truth.” *In re Appeal of Nirk*, 30 Wn. App. at 218. As such, the oath is particularly valuable in the context of family law and protection order court proceedings.

Furthermore, family law and protection order matters can be complex, invasive, and perplexing to an unsophisticated witness. The administration of an oath can serve to remind witness of the importance of deliberate and truthful representations to the court. As such, the risk of error factor, like in *In re Interest of M.B.*, weighs in favor of a due process violation, as applied to the contempt finding and remedial sanctions against Mr. Sanchez.

Finally, the *M.B.* court found the government had no interest in the use of unsworn testimony in juvenile contempt proceedings. *Id.* at 471. The court noted “sworn testimony serves the government's interest by ensuring that the integrity of the courts is not compromised and that courts do not appear to use their authority arbitrarily.” Considering the “substantial benefits and minimal burden of administering the oath,” the court “conclude[d] that due process requires that contempt [in juvenile proceedings] be based on sworn testimony.” *Id.* at 471–472.

Similar to the juvenile proceeding in *In re Interest of M.B.*, trial courts addressing family law issues are presented with significant risks to private interests, high risks of error, and an absence of a government interest

in avoiding or neglecting the administration of an oath or affirmation. Though R.T. was before a juvenile court when he was erroneously found in contempt based on unsworn testimony, the risks of due process violation in family law matters similarly attach when unsworn testimony can be used by a trial court as the foundation for a finding of contempt and a remedial sanction.

In this case, Ms. Rose testified at the protection order hearing, without the administration of an oath, that Mr. Sanchez “refused to give [her access to a] truck[,]” and that he had blocked access to her horse trailer with a truck. RP at 7. Mr. Sanchez’s assertions that he had not paid a sum as ordered was similarly unaffirmed. *Id.* at 4. As the court stated in *In re Interest of M.B.* “the primary function of requiring testimony under oath . . . is to provide ‘additional security for credibility’ by impressing upon witnesses their duty to tell the truth” *In re Interest of M.B.*, 101 Wn. App. at 471. Thus, the oath requirement is “important to the truth-finding process[, and f]ailure to require testimony under oath, therefore, ‘taints the integrity of the entire proceeding.’” *Id.* The appellate court therefore vacated the contempt finding based on the use of unsworn testimony. *Id.* As such, this Court should similarly vacate the finding of contempt against Mr. Sanchez because unsworn testimony formed the basis of the court’s contempt finding.

G. Contempt Based on Unsworn Testimony Violates Due Process

In sum, the trial court's finding of contempt against Mr. Sanchez—and the concomitant punitive and remedial sanctions—should be vacated as an impermissible violation of his interest in due process of law. Due process must be satisfied whenever a court imposes sanctions via contempt proceedings. Contempt proceedings which are punitive in nature must afford similar procedures to those found in a criminal proceeding. Judge Ekstrom in this case failed to provide Mr. Sanchez notice of the charges, an opportunity to prepare a defense, or the meaningful benefit of counsel. These omissions impermissibly violated Mr. Sanchez's due process interest as the basis for the contempt finding and the imposition of punitive sanctions.

Moreover, Judge Ekstrom's failure to administer an oath prior to a finding of contempt and imposition of remedial sanctions also violated Mr. Sanchez's interest in due process of law. Mr. Sanchez had a significant interest in his liberty and monetary, property interest at stake at the hearing. The risk of error was high, given the subject matter of the case, as family law matters are emotionally-significant and present a risk that witnesses may not appreciate the importance of truth-telling to judicial process. Finally, the government interest in truth-finding is significant and failure to administer said oath "taints the integrity of the entire proceeding." *In re*

Interest of M.B., 101 Wn. App. at 471. As such, the finding of contempt against Mr. Sanchez, and the punitive and remedial sanctions imposed against him, should be vacated as impermissible violations of the due process guarantees of the Washington and United States Constitutions.

IV. Mr. Sanchez should be awarded attorney fees under RCW § 7.21.030(3) because Mr. Sanchez was found in contempt of court in violation of his due process interests and Washington law permits an appellate court to award attorney's fees at its discretion.

Mr. Sanchez should be awarded reasonable attorney's fees pursuant to Rules of Appellate Procedure 18.1(a). Wash. RAP 18.1(a). That provision states fees can be awarded, "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court. . . ." *Id.* Under RCW § 7.21.030(3), attorney's fees are available to pay a party "for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees." RCW § 7.21.030(3). Furthermore, RCW 26.09.140 states "[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." RCW 26.09.140.

CONCLUSION

In sum, the contempt orders against Mr. Sanchez should be vacated because the trial court abused its discretion by finding Mr. Sanchez in contempt via summary proceedings for allegedly indirect contemptuous conduct.

Additionally, the trial court impermissibly violated Mr. Sanchez's interest in due process of law when it summarily held what were in effect criminal contempt proceedings against him without providing notice, an opportunity to prepare a defense, or the meaningful benefit of counsel.

Finally, the trial court transgressed Mr. Sanchez's due process interest when it found him to be in contempt of court based upon unsworn testimony of witnesses.

In summary, this Court should vacate the contempt orders against Mr. Sanchez for abuse of discretion in exercising authority beyond that provided in statute and as an unwarranted violation of Mr. Sanchez's rights under the constitutions of the State of Washington and the United States.

Dated this 23rd day of April, 2019.

Respectfully submitted,

Edward F. Shea, Jr.
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Dated this 23rd day of April, 2019.



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APPENDIX

7.21.050. Sanctions — Summary imposition — Procedure.

(1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

(2) A court, after a finding of contempt of court in a proceeding under subsection (1) of this section may impose for each separate contempt of court a punitive sanction of a fine of not more than five hundred dollars or imprisonment for not more than thirty days, or both, or a remedial sanction set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial sanction under this subsection may not exceed more than five hundred dollars for each day the contempt continues.

RCW § 7.21.050.

KUFFEL, HULTGRENN, KLASHKE, SHEA & ELLERD

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