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NO. 49392-6-II

No. 97277-0

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

RICHARD KING and RICHARD JACKSON, individually and
representing a class of similarly situated individuals,

Plaintiffs,

DEREK GRONQUIST,

Intervenor-Plaintiff

v.

CHASE RIVELAND and JANET BARBOUR in their official capacities; the
DEPARTMENT OF CORRECTIONS OF THE STATE OF WASHINGTON;
the INDETERMINATE SENTENCING REVIEW BOARD; and KEN
EIKENBERRY in his official capacity as Attorney General of the State of
Washington,

Defendants,

KING COUNTY PROSECUTOR DANIEL T. SATTERBERG,

Intervenor-Defendant.

BRIEF OF RESPONDENT DEPARTMENT OF CORRECTIONS

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I. STATEMENT OF THE CASE

A. Trial Court Proceedings

Appellant Derek Gronquist (Gronquist) is a Washington State inmate who was a member of a class of inmates who were granted a permanent injunction in this case in 1993 prohibiting the Department of Corrections (DOC) from releasing specified DOC Sexual Offender Treatment Program (SOTP) records outside of the SOTP. The trial court's grant of a permanent injunction was affirmed by the Washington Supreme Court in *King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160 (1994). Alleging that DOC had violated the permanent injunction in 2013-14, Gronquist filed a motion for contempt under the 1991 *King v. Riveland* trial court cause number in early September 2014. CP 31-33. Gronquist amended the caption of the *King v. Riveland* case making himself the lone plaintiff and naming DOC, DOC employee Anmarie Aylward, and the King County Prosecutor's office as defendants. CP 31.

DOC did not challenge Gronquist's motion for contempt on procedural grounds but instead responded to the merits of Gronquist's contempt claims on October 31, 2014. *See* Responding Brief of the Department of Corrections and Anmarie Aylward to Motion for Contempt, Declaration of Anmarie Aylward, Declaration of Aaron Heineman, Declaration of Douglas W. Carr, Declaration of Sharon Wiediger, and

Declaration of Jennifer Williams, Index Nos. 141-147. In its response on the merits DOC argued that it had not violated the *King v. Riveland* injunction and that Ms. Aylward was not involved in or responsible for the release of SOTP records to the King County Prosecutor in 2013-14. Responding Brief of the Department of Corrections and Anmarie Aylward to Motion for Contempt, Index No. 141.

Shortly after receiving DOC's and the King County Prosecutor's response to Gronquist's motion for contempt, the court indicated that it had concerns about the procedural posture of the case and therefore continued the hearing on the merits of Gronquist's contempt motion. CP 56-57. The trial court determined that Gronquist was required to file a motion to intervene in this case. CP 58. Gronquist's motion to intervene in the case was granted on July 17, 2015. CP 60-61. On September 23, 2015 the King County Prosecutor advised the court by letter that although the Prosecutor was not a party to *King v. Riveland* and could not be sued in Thurston County, the Prosecutor would be moving to intervene in the action. Letter From DPA to Court, Index No. 195. The trial court granted King County's motion to intervene on October 2, 2015. CP 77-78.

Shortly after being allowed to intervene, the King County Prosecutor moved to vacate or modify the permanent injunction as to Gronquist only. CP 79-100. DOC joined in the King County Prosecutor's

motion to vacate or modify the injunction as to Gronquist, arguing that such motion “if granted, is dispositive of Gronquist’s motion for contempt against both DOC and the King County Prosecutor.” CP 101-107. DOC also argued that Gronquist was precluded from proceeding with his contempt motion under the “clean hands” doctrine. *Id.* On January 14, 2016, the trial court granted the King County Prosecutor’s motion and vacated the injunction as to Gronquist only. CP 592-597. The court rejected DOC’s argument that the “clean hands” doctrine precluded Gronquist’s contempt motion. CP 595-596.

On June 30, 2016, DOC moved to deny Gronquist’s contempt motion as moot, arguing that the remedial contempt relief sought by Gronquist was no longer available to him as a result of the order vacating the injunction as to Gronquist. CP 598-604. The King County Prosecutor joined in DOC’s motion to deny Gronquist’s contempt motion, which was granted by the trial court on August 5, 2016. CP 707-713, 722-723. On August 31, 2016 Gronquist appealed the August 5, 2016 order denying his motion for contempt as well as several prior orders of the trial court, including the order requiring Gronquist to intervene, the order granting the King County Prosecutor’s motion to intervene, and the January 14, 2016 order vacating the injunction as to Gronquist. CP 724-725.

B. Appellate Proceedings

DOC accepts both Gronquist's and the King County Prosecutor's recitation of the appellate proceedings in this case.

II. ARGUMENT

A. The Court Reviews the Denial of a Contempt Motion for an Abuse of Discretion

A trial court's decision on a motion for contempt is reviewed for an abuse of discretion. *In re Marriage of Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (2010). A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons. *Id.* Because the order at issue on appeal is an order denying Gronquist's motion for contempt, the proper standard of review is for an abuse of discretion. *In re Williams, supra.*

Citing to *Washington Trucking Ass'n v. Emp't Sec. Dep't*, 188 Wn.2d 198, 393 P.3d 761 (2017), Gronquist argues that review of the trial court's order denying his motion for contempt is de novo since the trial court granted a "motion to dismiss." Gronquist's reliance on *Washington Trucking* is misplaced.

The plaintiffs in *Washington Trucking* filed an action in state court against a state agency and employees and officials of the agency asserting federal constitutional claims under 42 U.S.C. § 1983 and a "state common law claim for tortious interference with business expectancies." *Id.* at 202.

The superior court dismissed the action with prejudice, however, the Washington Court of Appeals reversed the dismissal in part and remanded the action to the trial court. *Id.* The Washington Supreme Court reviewed the trial court's dismissal of the plaintiffs' action. *Id.* In doing so, the Supreme Court cited the standards for dismissals of actions in state court:

We review CR 12(b)(6) and CR 12(c) dismissals de novo. "We treat a CR 12(c) motion . . . identically to a CR 12(b)(6) motion." Dismissal under either subsection is "appropriate only when it appears beyond doubt" that the plaintiff cannot prove any set of facts that "would justify recovery." On review, we presume the truth of the allegations and may consider hypothetical facts not included in the record.

Id. at 207 (citations omitted).

The standards for dismissals in *Washington Trucking* apply only to the dismissal of actions under CR 12. *Id.*

Washington Trucking does not apply to this case because DOC did not move to dismiss Gronquist's contempt motion under CR 12. Gronquist did not file an action but instead intervened in this existing case and filed a motion for contempt. CP 31-33. DOC moved to deny Gronquist's contempt motion as moot and the trial court entered an order "granting Defendants' motion to deny Intervenor Gronquist's motion for contempt." CP 722-723. The trial court's denial of Gronquist's contempt motion is reviewed under the abuse of discretion standard. *In re Williams, supra.*

B. DOC and the King County Prosecutor were not Judicially Estopped from Moving to Deny Gronquist's Contempt Motion as Moot

Gronquist first argues that DOC and the Prosecutor are judicially estopped from moving to deny Gronquist's contempt motion as moot because they took a contrary position on the Prosecutor's motion to remove Gronquist from the protections of the 1993 permanent injunction. Gronquist correctly states the law on judicial estoppel. However, Gronquist incorrectly applies this equitable doctrine to this case. As Gronquist concedes in his brief, equitable estoppel only applies when a **party's** later position is clearly inconsistent with its prior position. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). Notably, Gronquist fails to identify any statement, written or oral, made by DOC or the Prosecutor that is inconsistent with DOC's motion to deny Gronquist's contempt motion. The reason for this failure is because there were no such statements.

DOC's stated position on the effect the Prosecutor's motion to vacate would have on Gronquist's contempt motion was that the court's granting of the motion would have a significant, if not fatal, effect on Gronquist's contempt motion:

Defendant DOC joins in the Prosecutor's motion which, if granted, is dispositive of Gronquist's motion for contempt against both DOC and the King County Prosecutor.

CP 102-103.

In the foregoing sentence the phrase “is dispositive of” clearly means “precludes,” which is precisely what DOC subsequently argued in its motion to deny Gronquist’s contempt motion. DOC’s positions on both the Prosecutor’s motion to vacate and DOC’s motion to deny Gronquist’s contempt motion were entirely consistent, and DOC was therefore not judicially estopped from moving to deny Gronquist’s contempt motion.

Gronquist relies exclusively on two statements by the trial judge in its January 14, 2016 order vacating the permanent injunction as to Gronquist to establish judicial estoppel. The first statement is:

With respect to the collateral bar rule, the Court is persuaded that the rule does not prevent the prospective vacation of the injunction as to Gronquist, given Respondents’ concession that this aspect of their motion does not directly affect the current contempt action.

CP 595.

The second statement is:

Further, the Court’s order is prospective only, and does not resolve allegations of contempt in the past.

CP 595.

Based on these two statements Gronquist argues:

Judge Price found that the collateral bar rule did not preclude prospective invalidation of the injunction based upon the

Defendants stipulation that it would not affect the Courts contempt powers.

See Appellant's Opening Brief, at 10.

This Court should reject Gronquist's argument. Gronquist ignores other language in the order vacating the injunction that shows clearly that DOC and the Prosecutor advised the trial court that vacation of the injunction would affect Gronquist's contempt motion:

Respondents respond that their request is unrelated to the contempt request, except to the extent it may affect the remedies going forward.

CP 594.

This statement shows that the trial court was apprised by DOC and the Prosecutor that vacating the injunction would have an effect on Gronquist's contempt motion.¹ Indeed, as indicated above, DOC argued to the trial court that the vacation of the injunction was "dispositive" of Gronquist's motion for contempt against both DOC and the Prosecutor.

Finally, Gronquist reads far too much into the two statements by the trial court that he relies on to support his judicial estoppel argument. The trial court's statement that vacating the injunction did not "directly affect" Gronquist's contempt motion was legally and factually correct as DOC and

¹ This statement by the trial court is an understatement, to say the least, as both DOC and the Prosecutor advised the court that vacating the injunction would be fatal to Gronquist's contempt motion. CP 103 and 119.

King County were required to file a separate motion in the trial court to deny Gronquist's contempt motion. Also, this statement clearly left open the possibility that vacating the injunction as to Gronquist would have an indirect effect on Gronquist's contempt motion, which is consistent with the trial court's understanding that vacating the injunction "may affect the remedies going forward." CP 594. The court's statement that vacating the injunction did not in itself resolve Gronquist's contempt motion was also legally and factually correct and does not support Gronquist's argument on judicial estoppel.

DOC and the Prosecutor did not make any inconsistent statements in the trial court and were not judicially estopped from moving to deny Gronquist's contempt motion as moot after the injunction alleged to have been violated had been vacated.

C. The Trial Court did not Err in Denying Gronquist's Contempt Motion as Gronquist Only Requested Coercive, Remedial Relief Which Became Moot When the Trial Court Vacated the Injunction Protecting Some of Gronquist's SOTP Records

Gronquist argues that the trial court erred in denying his motion for contempt as moot for four reasons: 1) the trial court could have ordered DOC to comply with the injunction even though the injunction had been vacated; 2) the trial court could have ordered DOC and the Prosecutor to pay Gronquist's costs and attorney's fees; 3) the trial court could have either

requested the Prosecutor to initiate criminal contempt proceedings against DOC and the Prosecutor, or appointed special counsel to prosecute a criminal contempt proceeding; and 4) the trial court had the inherent authority to fashion a remedy for the allegedly contemptuous behavior of DOC and the Prosecutor. *See* Appellant's Opening Brief, at 23-34.

In making the foregoing arguments Gronquist attempts to paint a bleak picture of DOC running roughshod over Gronquist's rights under the 1993 permanent injunction in this case:

[O]n March 29, 2016, DOC informed Mr. Gronquist that it had interpreted Judge Price's January 14, 2016 order as no longer protecting existing SOTP records, and would disclose Mr. Gronquist's records to the Prosecutor unless he obtained a stay.

Appellant's Opening Brief, at 11. Gronquist further states:

The Defendants themselves brazenly admit that all of Mr. Gronquist's SOTP records are in the "possession of Prosecutor Satterberg." CP 710. That conduct constitutes contempt of court.

Appellant's Opening Brief, at 24.

Gronquist's misleading narrative is refuted by the record in this case.

Not surprisingly, getting all of Gronquist's SOTP records for purposes of a sexually violent predator prosecution under RCW chapter 71.09 was the Prosecutor's stated goal in moving to vacate the injunction:

A proposed order, which vacates the 1993 injunction as to Gronquist and frees the Department of Corrections to release his SOTP file in accord with the direct command of RCW 71.09.025, is attached.

CP 80.

Once the trial court vacated the permanent injunction as to Gronquist on January 14, 2016, DOC was required by law to provide the Prosecutor all of Gronquist's SOTP records. RCW 71.09.025. However, DOC did not immediately provide Gronquist's entire SOTP file to the Prosecutor after the trial court vacated the injunction as to Gronquist, even though the Prosecutor, rightly, asked DOC to provide him those records. Instead, DOC contacted Gronquist's counsel on March 29, 2016 and advised him that the Prosecutor was seeking Gronquist's entire SOTP file:

King County is now requesting that DOC provide it all Gronquist's SOTP records pursuant to RCW 71.09.025 as a result of Judge Price's January 14, 2016 ruling vacating the injunction as to Gronquist. I believe that King County is correct in its reading of RCW 71.09.025 and the effect of Judge Price's January 14, 2016 ruling. Please let me know what your position is with respect to King County's request, including whether you intend to file a motion to stay the judge's ruling pending an appeal of such ruling. Thanks.

CP 635 and CP 644.

Gronquist's counsel responded:

Thank you for contacting me. First, I wanted to let you know that we have reached out to Judge Anne Hirsch's clerk to schedule part two of the pending motion for contempt. Second, as to your concern below, we believe King County

does not yet have a right to the requested information/documents, unless and until there is a final order from Judge Price/Hirsch, and that no order would be final until (now) Judge Hirsch rules on the contempt motion. I appreciate the unusual posture of this case, and that King County intervened and filed its motion to modify the injunction. As a precaution, we will file a motion to stay enforcement of Judge Price's ruling so that the entire matter can be appealed at once if need be.

CP 635 and CP 644.

As a result of Gronquist's response above, DOC continued to resist the Prosecutor's requests for Gronquist's SOTP file until after it was clear that no further stays of the trial court's order vacating the injunction would be granted by either the trial court or this Court. At that point, DOC once again contacted Gronquist's counsel regarding the legal effect of the order vacating the injunction as to Gronquist:

I was not in the office last Friday afternoon so did not get your voice mail message until today. You should be aware by now that the COA has denied Gronquist's motion to modify, therefore there is no stay in place of Judge Price's January 14, 2016 ruling vacating the injunction as to Mr. Gronquist. Mr. Hackett has made his position clear on the effect of these rulings and I am inclined to agree with him. As such, unless you provide me some legal authority demonstrating that Mr. Hackett is incorrect concerning DOC's responsibility to provide King County all of Mr. Gronquist's SOTP records, DOC will likely be honoring King County's request. I will not be operating under Mr. Hackett's time frames and will therefore give you until 5:00 pm today to demonstrate to me that DOC is still obligated to honor the permanent injunction in this case and may not legally provide all Mr. Gronquist's SOTP records to King County. Thank you for your attention to this matter.

CP 692-693.

Gronquist's counsel responded:

Thank you for contacting me this morning, and allowing me to respond to Mr. Hackett's request. I appreciate the professional courtesy. On Friday, I had wanted to ask you to refrain from disclosing any records until there was a ruling from the Court of Appeals itself on the motion to modify the Commissioner's denial of stay. But as you point out, the Court of Appeals denied that motion today, and there appears to be no legal barrier at this point to bar DOC's production of the records, notwithstanding any legal arguments about the general applicability of RCW 71.09.125 or remaining effect of *King* that might be made at a later date. Also, you should soon be receiving Mr. Gronquist's motion to voluntarily withdraw the Petition for Discretionary Review, which we will file today for similar reasons as mentioned above.

Thanks again for communicating with me about these issues in advance of disclosure.

CP 692.

DOC provided the Prosecutor all of Gronquist's SOTP records in June 2016 only after being advised by Gronquist's attorney in writing that there was "no legal barrier" to DOC doing so. Gronquist's assertion that DOC "brazenly" and contemptuously released all his SOTP records to the Prosecutor is patently false. DOC did nothing more than comply with RCW 71.09.025 after giving Gronquist an opportunity to secure a stay of the trial court's order vacating the injunction as to Gronquist. This case should be viewed in this light, not the false light portrayed by Gronquist.

1. The Trial Court Properly Dismissed Gronquist's Contempt Motion as Moot as the Contempt Remedies Sought by Gronquist were no Longer Available to Him After he was no Longer Entitled to the Protections of the 1993 Injunction

The trial court's vacation of the permanent injunction as to Gronquist on January 14, 2016 and DOC's subsequent lawful provision to the King County Prosecutor of all of Gronquist's SOTP records rendered Gronquist's contempt motion seeking only remedial relief moot as such relief was unavailable as a matter of law.²

Gronquist filed a motion for contempt "under RCW 7.21.030" against DOC and the Prosecutor alleging violations of the 1993 injunction in this case. CP 5. Gronquist only requested "remedial sanctions." CP 5. A "remedial sanction" is a sanction imposed for the purpose of coercing a person to comply with an order of the court. RCW 7.21.010(3). Gronquist did not assert in his contempt motion, and does not argue now, that he suffered any economic losses as a result of DOC's alleged contempt. The trial court correctly denied Gronquist's purely remedial contempt motion as moot after the trial court vacated the 1993 injunction as to Gronquist.

A case or claim is moot and should be dismissed when a "court can no longer provide an effective remedy." *Hart v. Dep't of Soc. & Health*

² The records provided to the Prosecutor include some of the records at issue in this case, in particular, the records provided to King County from Gronquist's SOTP file in 2013.

Servs., 111 Wn.2d 445, 447, 759 P.2d 1206 (1988); *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). Civil contempt proceedings are designed “to remedy by coercing an action and compel compliance with an order or judgment requiring performance of some act by the contemnor”. *Marriage of Didier*, 134 Wn. App. 490, 501, 140 P.3d 607 (2006). Gronquist’s various requests for remedial contempt relief to bring DOC into compliance with the 1993 injunction were rendered moot when the trial court vacated the injunction as to Gronquist. *Id.*; and see *State v. Breazeale*, 144 Wn.2d 829, 31 P.3d 1155 (2001).

Breazeale presents facts analogous to the facts in this case and supports the dismissal of Gronquist’s civil contempt motion. In *Breazeale*, two individuals sought and received orders from the superior court vacating their criminal convictions. *Id.* The Washington State Patrol, which maintains the criminal records in Washington, refused to honor these orders. *Id.* The two individuals filed motions for contempt and a show cause hearing was conducted. *Id.* At the show cause hearing the court vacated its prior orders vacating the defendants’ convictions and declined to find the State Patrol in contempt. *Id.* The criminal defendants appealed the superior court’s rulings and the Court of Appeals held that the superior court erred both in reversing its order vacating the convictions and in failing to impose

sanctions on the State Patrol for its “willful contempt” of the superior court’s orders. *Id.*

The Washington Supreme Court affirmed the Court of Appeals ruling on the issue of vacating the defendants’ criminal records but held that the Court of Appeals had erred in ordering sanctions for contempt on the State Patrol:

The primary purpose of the civil contempt power is to coerce a party to comply with an order or judgment. . . . The contempt proceeding here was instituted to coerce compliance with the court’s order to vacate conviction records. As noted earlier, the trial court agreed with the patrol that it lacked authority to expunge Respondents’ records and reversed the vacation order. At that point, there was no order with which the Patrol failed to comply and the Court of Appeals erred in ordering the trial court to impose sanctions on remand for willful contempt by the patrol.

Id. at 842-43 (citation omitted).

In essence, the Supreme Court concluded that the civil contempt proceedings against the State Patrol were moot and could not proceed once the order on which the civil contempt motion was based was no longer in effect. *Id.* *Breazeale* supports the trial court’s denial of Gronquist’s contempt motion as moot after having vacated the injunction underlying Gronquist’s contempt motion.

A review of the relief/remedies Gronquist sought in his motion for contempt reveals the futility of further civil contempt proceedings in this case:

For the foregoing reasons, Plaintiff requests the following remedies:

(1) The Court should order Defendants to provide Plaintiff and the Court a full account of all breaches of the *King* injunction, including a list of all DOC and King County employees who have improperly received protected information and a summary of each employee's knowledge and any actions taken based on access to the protected information. Discovery may be necessary to determine the breadth and extent of the unauthorized disclosures, and Plaintiff hereby requests leave to conduct such discovery and/or that the Court hold an evidentiary hearing to make that determination.

(2) The Court should compel DOC to promptly transfer Plaintiff to community custody at one of the proposed addresses or other residence.

(3) The Court should order DOC-ESRC and Community Corrections Division to immediately destroy all improperly disclosed and obtained confidential information as described herein, under penalty of at least \$500 per contemnor for each day the contempt of court continues. *See* RCW 71.21.030(b).

(4) To adequately remedy the effect of these contemptuous breaches of *King*, the Court should deem inadmissible all improperly disclosed records and information for use in any civil commitment action or proceeding against Gronquist, and prohibit any testimony by Dr. Harry Hoberman on these issues. *See* RCW 71.21.030(d).

(5) The Court should award Plaintiff attorneys' fees and costs under RCW 7.21.030(3) for bringing this contempt motion.

Gronquist's memorandum in support of motion for contempt, CP 28-29.

In light of the injunction being vacated as to Gronquist, his requests for an accounting of all prior breaches and the destruction of improperly disclosed records/information were clearly moot. Gronquist's request for a penalty of \$500.00 per contemnor "for each day the contempt of court continues" was also obviously moot as there can be no continuing contempt in the absence of an enforceable court order or judgment. RCW 7.21.030; *State v. Breazeale, supra*. There was also no legal requirement or logical reason for the trial court to require DOC and the Prosecutor to identify, claw back, and destroy documents that the court had ruled were no longer protected by the injunction in this case and which had lawfully been provided to the Prosecutor by DOC under the state's sexually violent predator laws. *See* RCW 71.09.025. Finally, Gronquist's request for attorney's fees and costs was dependent on Gronquist prevailing on the merits of his contempt motion which, as demonstrated above, he could not do. The trial court properly denied Gronquist's motion for civil contempt which was moot. *Breazeale, supra*.

Gronquist argues that his contempt motion was not moot because the trial court had the authority to coerce DOC to comply with the *King* injunction via contempt proceedings even after the trial court vacated the injunction as to Gronquist.

Prospective application of Judge Price's ruling means that the *King* injunction remains in full force and effect for this case, and protects all SOTP records created prior to January 14, 2016.

See Appellant's Opening Brief, at 26.

In essence, Gronquist is arguing that the trial court did not actually vacate the 1993 injunction as to Gronquist. Gronquist's argument must be rejected. First, while Judge Price indeed indicated that his vacation of the injunction as to Gronquist was "prospective only" (CP 595), this meant only that the injunction no longer applied to Gronquist after January 14, 2016. DOC was required by RCW 71.09.025 to provide the Prosecutor all of Gronquist's SOTP records after this date in the absence of a stay of Judge Price's ruling. RCW 71.09.025 was, in fact, the basis of both the Prosecutor's motion to vacate and Judge Price's decision to vacate the injunction as to Gronquist:

Since 1995, however, the Legislature has unequivocally required disclosure to the prosecuting attorney of all records, including complete SOTP files, in connection with Sexually Violent Predator proceedings. RCW 71.09.025.

CP 594.

Gronquist's interpretation of Judge Price's January 14, 2016 ruling also must be rejected because the 1993 injunction did not apply to SOTP records created after 1993, much less to SOTP records created after January 14, 2016.

Finally, Gronquist, through counsel, conceded prior to DOC's motion to deny Gronquist's contempt motion that as a result of Judge Price's January 14, 2016 order DOC was not barred from providing Gronquist's complete SOTP file to the Prosecutor. CP 692. Judge Price vacated the injunction as to Gronquist for the very purpose of allowing DOC to immediately provide all Gronquist's SOTP records to the Prosecutor. As such, there was neither a legal basis nor a logical reason for the trial court to order DOC to claw back any SOTP records or otherwise comply with the injunction in contempt proceedings once the trial court removed Gronquist from the protections of the 1993 injunction. *State ex rel. Kerl v. Hofer*, 4 Wn. App. 559, 565, 482 P.2d 806 (1971) ("In a civil contempt proceeding, complainant in the main cause is the real party in interest with respect to a remedial order, and if for any reason complainant becomes disentitled to the further benefit of such order, the civil contempt proceeding must be terminated."); *see also Shell Offshore, Inc. v. Greenpeace, Inc.*, 815 F.3d 623 (9th Cir. 2016) (coercive contempt proceedings are moot when the order or injunction alleged to have been violated expires or is otherwise no longer in effect), and *Klett v. Pim*, 965 F.2d 587, 590 (8th Cir. 1992) (same). This Court must reject Gronquist's disingenuous interpretation of the trial court's January 14, 2016 order and its effect on his contempt motion.

2. Contempt Proceedings May Not Proceed When Remedial Contempt Sanctions are No Longer Available

Recognizing the obvious weakness of his argument that the trial court's January 14, 2016 order had no effect on his contempt motion, Gronquist alternatively argues that even if remedial coercive contempt relief is unavailable to him, his contempt motion is not moot as he may seek and be awarded his costs and attorney's fees under RCW 7.21.030(3) in establishing that DOC violated the 1993 injunction in 2013. Plaintiff's argument that he may proceed in an otherwise moot contempt proceeding to obtain nothing more than costs, including attorney's fees, should be rejected. RCW 7.21.030(3) states:

The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of . . . the contempt proceeding, including reasonable attorney's fees.

By using the phrase "in addition to," the legislature clearly intended the discretionary relief in subsection (3) to be awarded only if remedial sanctions under subsection (2) have been imposed. This is so because the definition of remedial sanction is "a sanction imposed for the purpose or coercing performance" with an existing court order or injunction. RCW 7.21.010(3). Gronquist cites no case and makes no legal argument to support his argument that a litigant may initiate or continue on with

contempt proceedings only for costs and fees when coercive remedial relief is unavailable. Under Gronquist's argument no contempt proceeding is moot if the litigant initiating the contempt proceeding has incurred any costs or attorney fees in such proceeding. This would clearly be an absurd result which is unsupported by any of the cases cited by Gronquist.

Gronquist's reliance on *In re Rapid Settlements*, 189 Wn. App. 584, 359 P.3d 823 (2015) is misplaced. *Rapid Settlements* involved contempt proceedings wherein the party establishing contempt was awarded attorney's fees as "losses," as well as its costs, including attorney's fees, incurred in prosecuting the contempt proceeding. *Id.* The court in *Rapid Settlements* recognized that "losses" are separate and distinct from the costs that may be awarded under RCW 7.21.030(3): "Losses are separately recoverable" *Id.* at 607. The court cited several Washington cases supporting that even though coercive contempt sanctions are moot, losses alone may support a contempt proceeding: "Compensating fines have been imposed in Washington contempt proceedings to address many types of loss and damage caused by a party's contumacious acts." *Id.* at 610. Notably, the court in *Rapid Settlements* did not hold, or cite any case holding, that a party may proceed in a contempt proceeding not involving coercive contempt sanctions or losses. To the contrary, the court suggested that a

contempt proceeding must involve either coercive remedial sanctions or losses:

[T]here are two types of remedial sanctions imposed in civil contempt proceedings . . . “Judicial sanctions may . . . be employed for either or both of two purposes; to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.”

Id. at 608-609.

Because Gronquist did not allege any economic “losses” resulting from the DOC’s alleged contumacious acts, and coercive contempt sanctions were not available to him after the trial court vacated the injunction as to Gronquist, the trial court properly denied Gronquist’s contempt motion as moot.

3. The Trial Court Did Not Err in Failing to Either Request a Prosecutor to Initiate Criminal Contempt Proceedings Against DOC or to Appoint Special Counsel to Prosecute Such Proceedings

Gronquist argues that his contempt “action” was not moot because the trial court could have referred this case to the local prosecutor for criminal prosecution or appointed special counsel to criminally prosecute DOC. Gronquist obviously makes this argument in connection with his flawed argument that the correct standard of review is *de novo* under *Washington Trucking, supra*. See Appellant’s Opening Brief, at 15-16. Gronquist’s argument concerning criminal contempt proceedings fails for

several reasons. First, Gronquist does not assert that he requested the trial court to refer this case to the prosecutor for criminal contempt proceedings or that he made this argument to the trial court in response to DOC's motion to deny his contempt motion. An "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); *see also Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). RAP 2.5(a) contains three exceptions:

[A] party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

None of the foregoing exceptions apply to Gronquist's criminal contempt argument and Gronquist does not argue otherwise. Under RAP 2.5(a) this Court should refuse to consider this argument which was not raised in the trial court.

Even if the Court were to consider Gronquist's criminal contempt argument, the Court should reject it. The trial court did not err in not referring this matter for criminal prosecution under RCW 7.21.040. First, referral is obviously discretionary as the statute states that a judge "may" make a request to a prosecutor for criminal prosecution. RCW 7.21.040(2)(c). The trial court did not err in not referring this highly contested contempt proceeding for criminal prosecution. Second, even if a

referral for prosecution is made, the prosecutor is not bound to file criminal contempt proceedings even if there is probable cause. RCW 7.21.040(2)(b).

Gronquist's argument concerning criminal contempt proceedings does not provide a basis to rescue his contempt motion from mootness.

4. The Trial Court Did Not Err in Failing to Resort to its Inherent Contempt Power to Sanction DOC

In direct contravention to his argument that the trial court had the statutory authority to hold DOC in contempt, Gronquist argues that the court should have resorted to its inherent contempt powers to impose criminal contempt sanctions on DOC to:

[E]njoin the DOC from confining Mr. Gronquist, the ESRC from characterizing him as a "Level III" sex offender, and the King County Prosecutor from filing a civil commitment proceeding.

Appellant's Opening Brief, at 33.

The trial court did not err in failing to resort to its inherent contempt authority in this case to rescue Gronquist's contempt motion from mootness. It is well established in Washington that a court may not resort to its inherent contempt powers unless the court specifically finds the statutory procedures to be inadequate. *Mead School Dist. No. 354 v. Mead Educ. Ass'n.*, 5 Wn.2d 278, 288, 534 P.2d 561 (1975); *Interest of Mowery*, 141 Wn. App. 263, 282, 169 P.3d 835 (2007). The trial court did not find its statutory contempt authority to be inadequate and only found Gronquist's

contempt motion to be moot. Moreover, Gronquist has not established that contempt proceedings brought under a Court's inherent contempt powers may not be dismissed or denied as moot.

Even if the trial court could have exercised its inherent contempt powers, the relief argued by Gronquist was unavailable to him. Trial courts do not have inherent criminal contempt authority. *Mowery, supra*. Moreover, the relief Gronquist requested, such as release from prison and a bar to Sexually Violent Predator proceedings, is beyond the scope of relief the trial court could grant under its contempt authority under the circumstances of this case.

Gronquist may not be released from prison as a contempt sanction. Washington law presumes that a prisoner will serve his entire sentence. *Blick v. State*, 182 Wn. App. 24, 29, 328 P.3d 952 (2014). The Department is authorized to transfer an offender to community custody in lieu of earned early release. RCW 9.94A.729; *Blick*, 182 Wn. App. at 30. However, the Department can deny a transfer if it determines that the offender's release plan "may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety." RCW 9.94A.729(5)(c). This statute only creates a right for offenders to have the Department consider the offender's

release plan. *Blick*, 182 Wn. App. at 31 (citing *In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 740, 214 P.3d 141 (2009)).

Mattson held that inmates do not have a protected liberty interest in release to community custody and that DOC may categorically deny community custody to an inmate when an expert has conducted a psychological examination and concluded that the inmate is a sexually violent predator as defined by Washington Civil Commitment Statutes:

The legislature granted DOC the authority to develop a program structuring the guidelines for eligibility and release of sex offenders into the community before expiration of their sentences. Under that authority, and in accordance with statutory definition, DOC determined that sexually violent predators present too great a risk to community safety to be eligible for release prior to the expiration of their sentence. Under this policy, DOC denied Mark Mattson's eligibility for release to community custody. We find no error in the department's actions and reverse the Court of Appeals.

Id. at 743.

Like *Mattson*, Gronquist has been found to meet the criteria as a sexually violent predator and DOC is entitled to consider this when investigating and deciding Gronquist's release plans. Gronquist has not shown any illegality in investigating and deciding his release plans and is

not entitled to release even if there has been a violation of the court's permanent injunction.³

Gronquist's other requests for contempt sanctions, including a bar to Sexually Violent Predator proceedings, fail for the same reasons his request for release fails: they are inappropriate and unnecessary to vindicate the trial court's authority to enforce its own orders and judgments.

III. CONCLUSION

For the foregoing reasons, respondent DOC requests that this Court affirm the trial court's denial of Gronquist's motion for contempt.

RESPECTFULLY SUBMITTED this 6th day of July, 2018.

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³ In making this argument, DOC does not in any way concede that it violated the 1993 injunction in releasing documents to the King County Prosecutor in 2013. DOC vigorously opposed Gronquist's contempt motion on the merits and is confident that had Gronquist's contempt motion not been moot, DOC would not have been found to have violated the 1993 injunction.

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused to be electronically filed the BRIEF OF RESPONDENT DEPARTMENT OF CORRECTIONS with the Clerk of the Court using the electronic filing system which will send notification of such filing to the following electronic filing system participant:

DAVID J. HACKETT David.hackett@kingcounty.gov
KING COUNTY PROSECUTOR'S OFFICE
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And I certify that I sent the document by United States mail, postage prepaid to:

DEREK GRONQUIST, DOC # 943857
MONROE CORRECTIONAL COMPLEX
TWIN RIVERS UNIT
PO BOX 888
MONROE, WA 98272-0888

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 6th day of July, 2018, at Olympia, Washington.

s/ Katrina Toal
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