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DIVISION II

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STATE OF WASHINGTON  
BY  JURY

NO. 34422-0-II  
Cowlitz Co. Cause NOS. 05-8-00438-2 AND  
05-8-00436-6 (CONSOLIDATED)

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

STATE OF WASHINGTON,

Appellant,

v.

**ERNESTO HERNANDEZ-PICHARDO AND JUSTIN LEE  
JOHNSTON**

Respondents.

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**BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

	Page
<b>I. ASSIGNMENT OF ERROR.....</b>	<b>1</b>
<b>THE TRIAL COURT IMPROPERLY DECIDED THAT IT LACKED THE AUTHORITY TO IMPOSE CONTEMPTS PURSUANT TO THE INHERENT CONTEMPT POWER ON JUVENILES APPEARING BEFORE THE COURT ON A TRUANCY ORDER UNDER RCW 28A.255.090. ....</b>	<b>1</b>
<b>II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....</b>	<b>1</b>
<b>DID THE COURT IMPROPERLY DECIDE THAT IT LACKED THE AUTHORITY TO UTILIZE THE CONSTITUTIONALLY VESTED INHERENT CONTEMPT POWER TO IMPOSE DETENTION TIME BEYOND SEVEN DAYS FOR JUVENILES PUNISHED PURSUANT TO RCW 28A.225.090 AND 7.21.030. ....</b>	<b>1</b>
<b>III. STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>IV. ARGUMENT .....</b>	<b>3</b>
<b>DID THE COURT IMPROPERLY DECIDE THAT IT LACKED THE AUTHORITY TO ACT PURSUANT TO THE INHERENT CONTEMPT POWERS VESTED BY ARTICLE IV, SECTION 1, OF THE WASHINGTON STATE CONSTITUTION? .....</b>	<b>3</b>
<b>V. CONCLUSION.....</b>	<b>9</b>

## TABLE OF AUTHORITIES

Page

### Cases

<u>Blanchard v. Golden Age Brewing Co.</u> , 188 Wn. 396, (1936).....	3, 4
<u>Deskins v. Walt</u> , 81 Wn.2d 1, 499 P.2d 206 (1972) .....	3
<u>In re M.B.</u> , 101 Wn. App. 425, 3 P.3d 780 (Div. I, 2000).....	5, 6, 7
<u>In re the Dependency of A.K.</u> , 130 Wn. App. 862, 125 P.3d 220 (2005) .....	6, 7, 8, 9
<u>In re: Marriage of Nielsen</u> , 38 Wn. App 586, 687 P.2d 877 (1984).....	6
<u>In. re: Interest of Rebecca K.</u> , 101 Wn. App. 309, 3 P.3d 780 (Div III, 2000) .....	7
<u>Mead School District 354 v. Mead Education Association</u> , 85 Wn.2d 278, 287-88 (1975).....	5
<u>State v. A.L.H.</u> 116 Wn. App. 158, 64 P.3d 1262 (Div. II, 2003).....	2, 7, 8
<u>State v. Ralph Williams North West Chrysler Plymouth Inc.</u> , 87 Wn.2d 327, 553 P.2d 442 (1976).....	3, 4

### Statutes

RCW 13.32A.....	4
RCW 13.34.165(1).....	6
RCW 28A.225.090.....	i, 1, 4
RCW 28A.255.090.....	i, 1
RCW 7.21.030 .....	1

RCW 7.21.030(2)(e) ..... 3, 4, 6  
RCW 7.21.040(2)(a) ..... 7, 8  
RCW 9.23.010 ..... 3

**Other Authorities**

Article IV, Section 1, Of The Washington State Constitution..... i, 3

## I. ASSIGNMENT OF ERROR

**THE TRIAL COURT IMPROPERLY DECIDED THAT IT LACKED THE AUTHORITY TO IMPOSE CONTEMPTS PURSUANT TO THE INHERENT CONTEMPT POWER ON JUVENILES APPEARING BEFORE THE COURT ON A TRUANCY ORDER UNDER RCW 28A.255.090.**

## II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

**DID THE COURT IMPROPERLY DECIDE THAT IT LACKED THE AUTHORITY TO UTILIZE THE CONSTITUTIONALLY VESTED INHERENT CONTEMPT POWER TO IMPOSE DETENTION TIME BEYOND SEVEN DAYS FOR JUVENILES PUNISHED PURSUANT TO RCW 28A.225.090 AND 7.21.030.**

## III. STATEMENT OF THE CASE

On November 22, 2004, Commissioner Gary Bashor signed an Order to Attend School requiring Justin Johnston to attend school regularly with no unexcused absences. CP 1(JJ)<sup>1</sup>. On April 18, 2005, Commissioner Bashor signed an Order to Attend School requiring Ernesto Hernandez-Picardo to attend school regularly with no unexcused absences. CP 1 (H-P)<sup>2</sup>.

As a result of the excessive unexcused absences and the failure to coerce the juveniles under the statutory remedy, the State made a motion to the court on December 12, 2005, requesting that the court use its

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<sup>1</sup> Hereinafter CP (JJ) refers to Clerk's Papers for Justin Johnston

<sup>2</sup> Hereinafter CP (H-P) refers to Clerk's Papers for Hernandez-Pichardo

inherent contempt power to impose a sanction beyond seven days. CP 2 (both)<sup>3</sup>. The state also filed a criminal information alleging the same conduct. CP 2 (both).

The juvenile court heard argument regarding the proper application of the law and precedent. Based on a perceived split of authority between Division I and II the court decided that they lacked the authority to impose sanctions beyond seven days. RP1<sup>4</sup> 7-8. The court did state however that “I believe that—that the seven days has been inadequate in this case, and I would enter an order to that effect...Ill find that the circumstances are right; that, in fact, the seven days has been inadequate; that if I could, I would exercise greater authority in these cases to get people’s attention; I think these children are going nowhere.” Id.

The State filed a motion for reconsideration based on a new Division III case that allowed the court to utilize inherent contempt authority when statutory remedies fail. CP 5 (both). The court, in its response to the motion for reconsideration stated that “While the Court does retain its inherent contempt authority, in State v. A.L.H., Division II, specifically held that, when a juvenile subject to an ARY order violates that order, the State is expressly limited by statute to seek remedial

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<sup>3</sup> Hereinafter CP (both) refers to the same Clerk’s Paper No. for both appellants.

<sup>4</sup> RP1 is the verbatim report of proceedings from Tuesday, December 20, 2005.

sanctions under RCW 7.21.030(2)(e).” CP 7 (both). This appeal timely follows.

#### IV. ARGUMENT

#### **DID THE COURT IMPROPERLY DECIDE THAT IT LACKED THE AUTHORITY TO ACT PURSUANT TO THE INHERENT CONTEMPT POWERS VESTED BY ARTICLE IV, SECTION 1, OF THE WASHINGTON STATE CONSTITUTION?**

Courts in Washington have three different bases for contempt proceedings: “the criminal contempt prosecution under RCW 9.23.010; the civil contempt initiated under RCW 7.20; and the inherent contempt power of a constitutional court.” State v. Ralph Williams North West Chrysler Plymouth Inc., 87 Wn.2d 327, 335, 553 P.2d 442 (1976). The issue in the present case is whether the court may exercise its inherent contempt in instances where the statutory civil contempts have failed.

It is recognized that courts in Washington have “the inherent power to punish for contempt.” Deskins v. Walt, 81 Wn.2d 1, 2,499 P.2d 206 (1972). This power is vested in the courts by the Constitution of the State of Washington. Blanchard v. Golden Age Brewing Co., 188 Wn. 396, 415, (1936). Blanchard states that the contempt power; “comes into being upon the very creation of such a court and remains with it as long as the court exists.” Id. Because the power to hold a party in contempt is “essential to the efficient action of the court and the proper administration

of justice, it is lodged permanently with that department of the government, and the Legislature may not, by its enactments, deprive the court of that power or curtail its exercise.” Id. at 424.

Inherent contempt powers allow a court to: “punish conduct occurring in the court’s presence; to enforce orders or judgments in aid of the court’s jurisdiction; and to punish violations of orders or judgments.” Williams at 335. This inherent power has been utilized recently by the courts to coerce juveniles into complying with orders under the BECCA Bill.

The Revised Code of Washington establishes a mechanism for punishment for failures to comply with the BECCA bill. Juveniles subject to the compulsory attendance laws in the State of Washington are subject to contempt sanctions for failure to comply with the order to attend school. RCW 28A.225.090. This statute subjects juveniles to contempt punishments pursuant to 7.21.030(2), with the limits placed on remedial sanctions in RCW 13.32A. Id.

RCW 7.21.030(2)(e) states that the court may find a person in contempt if they failed to perform an act currently within their power to perform and may impose a sanction of no greater than seven days in proceedings under chapters 13.32A, 13.34, and 28A.225. The “remedy is specifically determined to be a remedial sanction.” Id. Recently, courts

have begun utilizing the inherent contempt power when this statutory remedy fails.

In the case of In re M.B., 101 Wn. App. 425, 3 P.3d 780 (Div. I, 2000), the court addressed a challenge raised in the Amicus brief alleging that the juvenile courts were able to rely on their inherent contempt authority instead of the statutory scheme set up in 7.21.030. Id. at 451. The court stated that, though there does exist an inherent power that cannot be nullified by the Legislature, the inherent power cannot be used to nullify statutes “unless statutory powers are in some specific way inadequate.” Id. at 452, citing Mead School District 354 v. Mead Education Association, 85 Wn.2d 278, 287-88 (1975).

According to M.B.; “On the rare occasion when a juvenile court decides it must disregard the statutory seven day limit and resort to its inherent contempt powers, the court must enter a finding as to why the statutory remedy is inadequate and articulate a reasonable basis for believing why some other specified period of detention will achieve that seven days will not.” In re M.B., at 453. If the inherent power is used to impose sanctions that are themselves punitive, the contemnor is afforded due process protections. Id.

More recently, the issue of inherent contempt was raised by Division III in In re the Dependency of A.K., 130 Wn. App. 862, 125 P.3d 220 (2005). In A.K., the court addressed contempts based on dependency placement orders. Id. at 868. The orders were subject to the statutory limitations of RCW 7.21.030(e)(2), however the court “concluded that the statutory scheme did not provide an adequate remedy and decided to resort to its inherent contempt power.” Id.

The court in A.K., relying in part on M.B., held that a court could utilize its inherent contempt power so long as it entered findings that; “the period of detention under RCW 7.21.030(2)(e) and RCW 13.34.165(1) is inadequate for a specific reason, and another determinate period of detention is required to achieve what the statutory period could not. Id. at 869; citing M.B. at 453. That is “the surest way to guard against the systemization of what is meant to be a rare utilization of the court’s inherent contempt power”. Id. at 877.

In addition to the safeguard above, the court noted, “a court’s exercise of its inherent power of contempt—whether civil or criminal—must comport with due process.” Id.; citing In re: Marriage of Nielsen, 38 Wn. App 586, 588, 687 P.2d 877 (1984). A contempt is punitive when the intent of the court is to punish, and the juvenile is not given an opportunity to purge. Id. “Punitive contempt is a criminal proceeding; consequently;

In A.K., however, the juvenile court did not conduct statutory contempt proceedings. Id. “The court’s inherent contempt power to find a contempt and punish violations of its orders is not dependent on statute.” Id. Despite the fact a contemnor in a criminal contempt action is required to be provided the due process rights of a criminal defendant, “an inherent contempt proceeding is not subject to the criminal contempt statute’s specific requirement that the proceeding be initiated by a criminal information.” Id. It was sufficient to satisfy the due process notice requirement that the juveniles were served with a motion seeking the punitive sanctions; the failure to file a criminal information was not fatal to due process. Id. at 880.

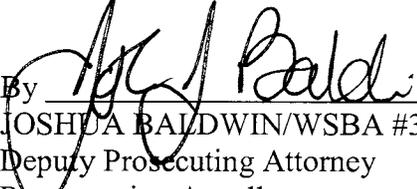
The lower court in the present case based its decision on this Court’s decision in A.L.H. CP 7 (both). However, based on the decision in A.K., A.L.H. is distinguishable from the facts in the present case. The State did not file a criminal contempt under RCW 7.21.040(2)(a), it requested the court use its inherent contempt power and impose sanctions greater than seven days. The state, in an attempt to comply with due process, filed an information to effectuate notice. That does not change the nature of the contempt requested and does not remove from the court the power that is inherent in their creation.

## V. CONCLUSION

The lower court stated that if it had the power to exercise its inherent authority to impose sanctions beyond seven days it would have done so. Based on relevant case law, the court was in error in believing that it lacked the authority to impose sanctions beyond seven days when circumstances are appropriate and due process is followed. We ask the case be remanded with instruction to the lower court that they have authority, pursuant to the safeguards established in A.K., to initiate inherent contempt actions against juveniles who violate ARY and Truancy orders.

Respectfully submitted this 25<sup>th</sup> day of August, 2006

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