

NO. 36027-6-II

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COURT OF APPEALS  
DIVISION II

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IN THE COURT OF APPEALS STATE OF WASHINGTON  
FOR THE STATE OF WASHINGTON BY \_\_\_\_\_  
DIVISION II DEPUTY

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STATE OF WASHINGTON,

Respondent,

v.

RYAN MICHAEL JORDAN

In Re: Michael Nagle,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR THURSTON COUNTY

The Honorable H. Christopher Wickham, Judge  
Cause No.s 06-1-02143-0; 06-1-02272-0; 06-1-01966-4

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BRIEF OF RESPONDENT

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## I. ISSUES PRESENTED

- A. An attorney's absence from court does not constitute direct contempt of court, as there may be reasons for the absence of which the court is not aware. The lower court provide Mr. Nagle the opportunity to present mitigating information before making a final determination that his absence constituted contempt. Did the court abuse its discretion in finding contempt and imposing a sanction therefore?
- B. Where the State neither requested that counsel be held in contempt nor argued in favor of such a finding, should it be assessed attorney fees?

## II. STATEMENT OF THE CASE

Attorney Michael Nagle was appointed to represent Ryan M. Jordan in three Thurston County Superior Court cases.<sup>1</sup> A pretrial/omnibus hearing was scheduled for January 22, 2007,<sup>2</sup> but was continued at the agreement of the parties for one week—to January 29, 2007.<sup>3</sup> On January 29, 2007, Mr. Nagle did not appear for the hearing.<sup>4</sup> The Honorable Chris Wickham found Mr. Nagle in contempt of court for failing to appear, and for failing to advise the court or opposing counsel's office of a reason for the absence. The court imposed a sanction of two days in jail, but allowed for mitigation or purging of the sanction by

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<sup>1</sup> Supp. CP at \_\_. [Notice of Appearance and Demand for Discovery]

<sup>2</sup> Supp. CP at \_\_. [Agreed Order of Trial Continuance]

<sup>3</sup> Supp. CP at \_\_. [Clerk's Minutes reflecting continuance]

<sup>4</sup> CP 5.

payment of \$50.00 to the court.<sup>5</sup> The court set a “show cause” hearing for February 1, 2007.<sup>6</sup> Mr. Nagle filed a written response, explaining the reasons for his absence, and providing legal argument to persuade the court that it should not find him in contempt or impose sanctions.<sup>7</sup> At the February 1, 2007 hearing, Mr. Nagle addressed the court. He provided the court with the reasons for his absence at the January 29, 2007 hearing, and argued that the court should not find him in contempt under the circumstances of the case, directing the court’s attention to legal authority supporting his arguments.<sup>8</sup> The court then provided Mr. Nagle with another opportunity to provide an explanation for his absence, and asked him several questions.<sup>9</sup> At the conclusion of this colloquy, the court imposed a \$50.00 sanction on each of the three cases. Mr. Nagle now appeals.<sup>10</sup>

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<sup>5</sup> CP 5-6.

<sup>6</sup> CP 6.

<sup>7</sup> CP 7-13.

<sup>8</sup> RP 3-7.

<sup>9</sup> RP 11-15.

<sup>10</sup> CP 16-18.

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### III. ARGUMENT

- A. AN ATTORNEY'S ABSENCE FROM COURT DOES NOT CONSTITUTE DIRECT CONTEMPT OF COURT, AS THERE MAY BE REASONS FOR THE ABSENCE OF WHICH THE COURT IS NOT AWARE. THE LOWER COURT PROVIDE MR. NAGLE THE OPPORTUNITY TO PRESENT MITIGATING INFORMATION BEFORE MAKING A FINAL DETERMINATION THAT HIS ABSENCE CONSTITUTED CONTEMPT. DID THE COURT ABUSE ITS DISCRETION IN FINDING CONTEMPT AND IMPOSING A SANCTION THEREFORE?

Mr. Nagle argues that his conduct—i.e., his absence from court and failure to notify either the court or opposing counsel that he would be absent—cannot constitute contempt in the court's presence; and that he was not afforded due process.

Punishment for contempt of court, including sanctions, lies within the sound discretion of the trial court, which the reviewing court will not disturb absent an abuse of that discretion.<sup>11</sup> A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or gives untenable grounds or reasons.<sup>12</sup>

Contempt can be either civil or criminal, with the latter requiring the constitutional safeguards extended to other criminal defendants.<sup>13</sup>

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<sup>11</sup> *State v. Dugan*, 96 Wn. App. 346, 351, 979 P.2d 885 (1999).

<sup>12</sup> *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

<sup>13</sup> *State v. Berty*, 136 Wn. App. 74, 84-5; 147 P.3d 1004, 1009-1010 (2006), citing *In re*

RCW 7.21 et seq define contemptuous conduct but do not distinguish between civil and criminal contempt. Rather, the contempt statutes distinguish between punitive and remedial sanctions.<sup>14</sup> A “punitive sanction” is one “imposed to punish a past contempt of court for the purpose of upholding the authority of the court.”<sup>15</sup> A “remedial sanction” is “a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.”<sup>16</sup>

RCW 7.21.050<sup>17</sup> provides for summary imposition of sanctions, without prior notice and hearing, for contempt committed in the courtroom and authorizes both punitive and remedial sanctions. A court may impose summary sanctions only “if the judge certifies that he or she saw or heard the contempt” and “only for the purpose of preserving order in the court

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*the Marriage of Didier*, 134 Wn. App 490, 500, 140 P.3d 607 (2006); and *In re the Interest of M.B.*, 101 Wn. App. 425, 438-40, 3 P.3d 780 (2000)).

<sup>14</sup> *In re Didier*, 134 Wn. App at 500, 140 P.3d 607 (2006); RCW 7.21.010, .030, .040.

<sup>15</sup> RCW 7.21.010(2).

<sup>16</sup> RCW 7.21.010(3).

<sup>17</sup> RCW 7.21.050 (1) provides:

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.

and protecting the authority and dignity of the court.”<sup>18</sup> The contempt must occur in the judge's presence.

In the present case, the lower court found Mr. Nagle’s absence from court and failure to communicate a reason for that absence to be contemptuous.<sup>19</sup> While it is well-established that absence does not occur in the court’s presence,<sup>20</sup> for purposes of finding summary contempt, the cases establishing this precedent may be distinguishable from the present case.

In *State v. Winthrop*,<sup>21</sup> the court held that absence does not occur in the presence of the court. The court reflected that:

The absence of an attorney, a juryman, a witness, an officer (including even a member of the bench himself), from the courtroom at the precise time due there may be susceptible of many innocent explanations.<sup>22</sup>

In *State v. Hatten*,<sup>23</sup> the court took the explanation of this rationale a step further. While still holding that an attorney’s absence from the courtroom does not constitute contempt in the court’s presence, the *Hatten* court’s primary concern was that the court in whose presence the absence

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<sup>18</sup> RCW 7.21.050(1).

<sup>19</sup> CP 5.

<sup>20</sup> *State v. Winthrop*, 148 Wash. 526, 269 P. 793 (1928); *State v. Hatten*, 70 Wn.2d 618, 621, 425 P.2d 7, 9 (1967)

<sup>21</sup> *Supra*.

<sup>22</sup> *Id.* at 531.

occurred does not know the reason for the absence, which if know, might excuse the absence. “Consequently, the contemnor is entitled to be heard and produce his witness or other evidence.”<sup>24</sup> Apparently, of paramount concern to the *Hatten* court was that the alleged contemnor be afforded due process prior to the final determination of contempt, and imposition of a sanction therefore. The lower court recognized this in 1) setting a “show cause” hearing to afford Mr. Nagle the opportunity to provide the court with an explanation for his absence and lack of communication thereof; and 2) explicitly stating that it was affording the right identified by the *Hatten* court—i.e., distinguishing its actions from those underlying the *Hatten* decision:

Mr. Nagle, in preparation for this hearing, I did go over the case law and discovered *State v. Winthrop*, a 1928 case, which seems to stand for the proposition that absence from the courtroom cannot be considered a basis for direct contempt, which to my mind is the form of contempt that is being sought here.

However, as I read the *Hatten* case, it permits the Court to find contempt for the absence of counsel under certain circumstances, and the *Hatten* case seems to allow the Court to impose that kind of contempt if counsel is given the opportunity to explain himself.

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<sup>23</sup> *Supra* at 9.

<sup>24</sup> *Id.*

So, as an officer [of] the Court, I would like you to consider yourself sworn and give you the opportunity to do that as to why you were absent on the 29<sup>th</sup>, other than [the] fact that you had thought that there wasn't going to be a hearing.<sup>25</sup>

Insofar as the lower court honored Mr. Nagle's right to due process prior to "find[ing] that [his] failure to appear was without good cause...",<sup>26</sup> the court did not abuse its discretion in finding him in contempt for being absent from court and for failing to notify the court or opposing counsel of the reason for that absence.

B. WHERE THE STATE NEITHER REQUESTED THAT COUNSEL BE HELD IN CONTEMPT NOR ARGUED IN FAVOR OF SUCH A FINDING, SHOULD IT BE ASSESSED ATTORNEY FEES?

Nagle next argues that he should be awarded attorney fees, for having to appeal the lower court's ruling. He concedes that the State had naught to do with the lower court's *sue sponte* order to show cause, but posits that he should not bear the cost of having to appeal the lower court's erroneous order and sanction. As he provides neither a factual nor legal basis for this position, and because—as argued above—he does not

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<sup>25</sup> RP 11.

<sup>26</sup> CP 14.

establish that the lower court abused its discretion, an award of attorney fees—especially against the State—is inappropriate.

#### IV. CONCLUSION

The court did not abuse its discretion in finding that Mr. Nagle's absence from a scheduled hearing, and failure to notify the court or opposing counsel of the reason for the absence constituted contempt of court. In affording Mr. Nagle the opportunity to explain the reasons for his absence from court, the lower court afforded Mr. Nagle due process. Consequently, Mr. Nagle is not entitled to attorney fees—especially from the State, which did not seek the lower court's contempt finding.

Respectfully submitted this 19<sup>th</sup> day of December, 2007.

EDWARD G. HOLM

Thurston County Prosecuting Attorney

By:



J. ANDREW TOYNBEE, WSBA #22582  
Criminal Trials Division Chief

CERTIFICATE

I certify that on 12-19-07, I mailed a copy of the foregoing response by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

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COURT OF APPEALS  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

DATED this 19<sup>th</sup> day of December, 2007.

J. Andrew Toyne  
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