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No. 56171-5-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Detention of  
ANDRE BRIGHAM YOUNG

FILED  
COURT OF APPEALS DIV. #1  
2006 FEB 27 AM 11:24

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**STATE'S RESPONSE BRIEF**

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**I. INTRODUCTION**

Appellant Andre Brigham Young successfully petitioned for a recommitment trial under RCW 71.09.090(2) where it is the State's burden to prove beyond a reasonable doubt that he remains a sexually violent predator. In order to meet its burden, the State obtained a March 21, 2005 order from the trial court requiring Young to participate in an evaluation with the State's expert and to participate in a video deposition. Young refused to follow the court's order. As a result, Young was held in contempt and the recommitment proceeding were stayed pending his compliance with the March 21 order. Young's challenge to the trial court's authority to hold him in contempt was fully resolved by this court in *In re Broer*, 93 Wn. App. 852, 957 P.2d 281 (1998). Because Young provides no argument for revisiting this case, the order of contempt should be affirmed.

**II. ISSUES PRESENTED FOR REVIEW**

A. Does a trial court have the authority to hold Young in civil contempt due to Young's willful and intentional refusal to comply with court orders that he submit to a forensic evaluation as required by RCW 71.09.090(3)(a) and that he participate in a video deposition?

B. Did the trial court abuse its discretion by staying the proceedings in order to coerce Young's compliance with the March 21, 2005 order when this sanction is specifically authorized by *In re Broer* and

Young has failed to assign error to the trial court's finding that a stay was least restrictive remedial sanction "most reasonably calculated to result in" Young's compliance with the order?

### **III. STATEMENT OF THE CASE**

Appellant Young is well known to Washington and federal appellate courts. *E.g.*, *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993); *Seling v. Young*, 531 U.S. 250 (2001); *In re Young*, 120 Wn.App. 753, 86 P.3d 810 (2004). At the age of 49, respondent was civilly committed as a sexually violent predator in 1991 following a lengthy history of rape and sexual assault. *See generally In re Young*, 122 Wn.2d at 13-17 (recounting facts and commitment trial). His commitment was affirmed by this court in *In re Young*, but remanded for a trial addressing less restrictive alternatives (LRA). *Id.* at 60. An LRA was held in 1994 where the jury rejected Young's placement in a less restrictive setting.

The current chapter in Young's civil commitment under RCW 71.09 is a trial to re-commit him under RCW 71.09.090(3). The recommitment trial emerges from a release petition filed by Young that was supported by Dr. Howard Barbaree, a Canadian expert. This court, in *In re Young*, 120 Wn.App. 753, determined that Young had established probable cause for a recommitment trial under the requirements of former RCW 71.09.090. The matter was remanded back to the Superior Court for

purposes of holding the recommitment trial proceeding. *Id.*

Following remand, as allowed by RCW 71.09.090(3)(a), the State sought an order requiring Young to participate in an evaluation by the State's retained expert. The statute provides that the State "shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state." *Id.* The State also noted a video deposition of Young.

Young opposed the State's request for an evaluation and sought to quash the video deposition. He was unsuccessful. On March 21, 2005, Judge Richard Jones ordered Young to submit to an interview with the State's retained expert. CP 118. The court also denied respondent's motion to quash the video deposition and ordered him to participate in the State's deposition.<sup>1</sup> *Id.*

Through his counsel, Young provided "formal notice" that he would "not appear at his deposition on April 4 and 5, 2005" and that he would "not appear for the interview" with the State's expert. CP 159-60. The State brought a motion for contempt.

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<sup>1</sup> As noted in Young's brief, he sought discretionary review of the March 21, 2005 order. The trial court refused to stay the order pending discretionary review and Young never obtained a stay from this court. A Commissioner of this court denied discretionary review and a panel of this court refused to modify the Commissioner. Young has sought further discretionary review by the Washington Supreme Court.

At the contempt hearing, when queried by Judge Jones, Young confirmed that he was refusing to comply with the March 21, 2005 order requiring his participation in the evaluation and the video deposition:

THE COURT: And so you will not at this point in time comply with the Court's directive as ordered on March 21, 2005, is that correct, sir?

[Mr. YOUNG]: That is correct.

VRP 4/1/2005 at 11: 19-22.

In written findings of fact dated April 1, 2005, the court found that:

In open court on April 1, 2005, Mr. Young confirmed that he was refusing to comply with the requirements of the March 21, 2005 order. Mr. Young's refusal to comply with the order of this court is done willingly and intentionally. His refusal to appear at, and participate in, the deposition and interview constitutes contempt of court.

CP 119. The court considered a variety of sanctions, including jail and stay of the proceedings. *See* VRP 4/1/2005 at 11-20. The court determined that:

The remedial sanction most reasonably calculated to result in respondent's compliance with this court's order regarding the deposition is to stay the proceedings until he purges his contempt. The court has considered lesser coercive sanctions, but finds that they are unlikely to secure Mr. Young's compliance with the court's order and would work to prejudice the ability of the State to present its case. The court will consider the possibility of a progressive sanction, including jail, if the stay fails to secure Mr. Young's compliance with the March 21, 2005 order.

CP 119. In the current appeal, Young has assigned error to none of the trial court's factual determinations.

IV. **LEGAL ARGUMENT**

Young's willful refusal to participate in the evaluation and his refusal to submit to the video deposition independently support the trial court's decision to hold Young in contempt. Under *Broer*, the trial court did not abuse its discretion in finding that Young's behavior constituted contempt and that a stay was necessary to coerce Young's compliance with the court's lawful order.

A. **Young Is Barred From Collaterally Attacking Either the Evaluation or Deposition Order in this Contempt Appeal**

Young is barred from collaterally attacking the March 21, 2005 order in the current contempt appeal. As this court held in *Broer*, "[g]enerally, a court order may not be collaterally attacked in contempt proceedings arising from violations of that order." 93 Wn.App. at 855. The only exception to this rule is when the order underlying the contempt is "void." *Id.* at 858. The *Broer* decision holds that an order requiring a mental evaluation "is not void, and . . . the trial court did not abuse its discretion in directing the examination that is required by the statute." Similarly, a trial court has authority to compel a video deposition under CR 37 and such an order cannot be characterized as outside the trial court's jurisdiction. For these reasons, the scope of review is limited to examining the scope of the trial court's authority to enforce its lawful

orders through contempt proceedings.

B. **The Trial Court Has Authority to Enforce Its Orders Through Contempt**

The trial court's authority to enforce its orders through contempt is set forth in statute and is within a trial court's "inherent" powers. This Court reviews a contempt order and its related sanctions under the abuse of discretion standard. *Broer*, 93 Wn.App. at 287.

1. **Standards for Contempt Order.**

The standards for civil contempt are set for in RCW 7.21.030. Under this statute, "contempt of court" includes intentional "[d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1); *King v. Dep't of Soc. & Health Servs.*, 110 Wash.2d 793, 797, 756 P.2d 1303 (1988). The power to censure contemptuous behavior flows from both statute and the inherent power of the courts. *In re Marriage of Nielsen*, 38 Wash.App. 586, 588, 687 P.2d 877 (1984).

Contempt may be criminal or civil. *King*, 110 Wash.2d at 799, 756 P.2d 1303. The Supreme Court has noted that: "[t]he primary purpose of the civil contempt power is to coerce a party to comply with an order or judgment." *State v. Breazeale*, 144 Wash.2d 829, 842 (2001). If a court finds that "the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in

contempt of court” and impose a “remedial sanction,” including fines or imprisonment until the contempt is purged. RCW 7.21.030(2). Indeed, the statute defines “remedial sanction” as “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.” *Id.*

2. **Refusal to Participate in the Statutory Interview Merits Civil Contempt**

The *Broer* case addresses civil contempt under a highly analogous factual situation. Like Young, Mr. Broer refused to participate in a court-ordered statutory interview. *Id.* at 856. As with Young, Mr. Broer was ordered to cooperate in the evaluation and answer any questions that might be posed to him consistent with potential Fifth Amendment protections. *Id.* As a result of Mr. Broer’s refusal to participate in the evaluation, “[t]he State requested that Broer be held in contempt for failing to comply with the prior order that he participate in a mental examination for the purpose of evaluation under the act.” *Id.* Due to his refusal to participate in the statutory evaluation, Mr. Broer was held in contempt. *Id.*

This Court affirmed the order of contempt. The appellate court determined that a statutory evaluation provided for under RCW 71.09 constitutes a “special proceeding” not subject to the limitations of CR 35 or 37. *Id.* at 865. Because the statutory SCC evaluation is a “special

proceeding,” the provisions of “CR 37(b)(2)(D) do[] not act as a bar to the use here of the sanction of contempt.” *Id.* As a result, the appellate court held that the trial court had authority to hold Mr. Broer in contempt for his failure to participate in the statutory evaluation:

While RCW 71.09.040 does not expressly address the court's power to enforce its order for a mental examination by holding the potential sexually violent predator in contempt, the court has the inherent power to punish for contempt. Moreover, there is also statutory authority supporting the court's exercise of its power of contempt. RCW 7.21.010 defines contempt, in relevant part, as "(b) Disobedience of any lawful judgment, decree, order, or process of the court[.]" RCW 7.21.030(2)(a) provides that imprisonment is a permissible sanction for contempt resulting from disobedience of a court order. Thus, the trial court, in addition to its inherent contempt power, also had power to hold Broer in contempt under this statute.

*Id.* (footnotes omitted).

The decision of *In re Williams*, 147 Wn.2d 476, 488 (2002) confirmed that a statutory evaluation ordered pursuant to RCW 71.09 is a “special proceeding” apart from the civil rules. In *Williams*, the court rejected the availability of a CR 35 mental health examination by the State’s privately retained expert precisely because the probable cause portion of the statute already required a mental health examination by the SCC expert pursuant to RCW 71.09.040(4). *Id.* The final holding of the court was that “the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4).” *Id.* at 491. In reaching

this holding, the court noted the similar statutory evaluation process in RCW 71.09.090, which is the source of Young's current evaluation order. Thus, in rejecting the availability of CR 35 evaluations for privately retained experts, the court trumpeted the necessity of the statutory evaluations contained in RCW 71.09.040 and .090.

Appellant's argument that CR 37 somehow saves him from contempt is misplaced. First, as in *Broer*, the evaluation by the State's expert is a right conferred by statute. Under RCW 71.09.090(3)(a), the State has a "right" to both a jury trial and an evaluation of Young by an expert of its choosing: the State "shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state." It is significant that these "rights" are granted in the same sentence of the statute. Certainly, Young could not argue that the State's right to a jury trial is dependant on a showing of "good cause" because there is no such language in the statute. He similarly cannot argue that a "good cause" requirement should be implied into the evaluation provision because "good cause" language is also missing from this provision. As held in *Broer*, "we conclude that the requirement of showing good cause in CR 35 is *inconsistent* with the statute's directive that upon a determination of probable cause, an examination *shall be conducted*." 93 Wn. app. at 864 (emphasis added). Because the State's evaluation is a statutory *right*

unconditioned by the requirements of CR 35, this court should apply the *Broer* holding that “ CR 37(b)(2)(D) does not act as a bar to the use here of the sanction of contempt.”

Second, Young's argument cannot prevail because any bar to contempt in CR 37 cannot trump the statutory remedy of contempt in RCW 7.21. The contempt statute provides a substantive right for a party to seek contempt. The fact that contempt is not available under CR 37 for violation of a CR 35 order does not eliminate RCW 7.21 as an independent source of contempt powers. *See State v. Templeton*, 148 Wash.2d 193, 212, 59 P.3d 632 (2002) (“Creation of substantive rights is in the province of the Legislature in the absence of any constitutional prohibitions.”). The procedural rule adopted in CR 37 cannot and should not be read to trump the substantive contempt remedy adopted by the Legislature in RCW 7.21.

3. **Refusal of a Court Order to Engage in a Deposition Merits a Civil Contempt Sanction**

Likewise, a trial court has the authority to hold Young in contempt for refusing the deposition order. CR 37 applies to depositions. Under CR 37(b)(1) and (2)(E), contempt is one of the sanctions available for refusal to participate in a deposition. Also, Young's refusal to participate in the State's deposition clearly falls within the category of contempt that consists of “an omission or refusal of an act that is yet within the person's power to perform.” RCW 7.21.030(2).

Young argues that contempt for a deposition is also barred by CR 37, but this argument is contrary to specific language in the rule authorizing "an order treating as contempt of court the failure to obey *any* orders." CR 37(b)(2)(D); *see also* CR 37(b)(1). Young points to CR 37(D), which establishes a quick route to sanctions for parties that fail to attend their own deposition, and argues that it should provide the exclusive remedy for the State. However, no language in CR 37(d) makes it an exclusive remedy or overrides the contempt provisions of CR 37(b)(1) and (2).

CR 37(b), by its plain terms, applies to the special situation where the court is presented with a discovery violation that is also a violation of a court order. As Tegland and Ende point out, "sanctions authorized by CR 37(b) must be predicate upon the violation of some specific court order and are not available in the absence thereof." Washington Handbook on Civil Procedure Sec. 56.3 (2004). Under CR 37(b)(2)(D), if a "party . . . fails to obey an order to provide or permit discovery" the court may enter an order for "contempt of court." Here, there was a specific order requiring respondent to engage in the deposition and he is violating it. CR 37(b)(2)(D) is specific to this situation and authorizes issuance of a contempt order to enforce the discovery order.

In contrast, the CR 37(d) rule relied upon by Mr. Young operates

to provide more limited sanctions without requiring the opposing party to first seek a discovery order. Tegland and Ende point to CR 37(d) as an example of a rule that “authorize[s] the court to impose sanctions in connection with discovery even if the conduct in question does not violate a specific court order.” Civil Handbook Sec. 56.8. The rule appears intended to allow the aggrieved party to opt for a lesser remedy where the situation allows without the need to first obtain a discovery order. It is not intended for use by the party refusing the discovery to avoid the effects of his own contempt when the aggrieved party has successfully obtained a court order compelling the discovery. Respondent Young cites no authority that would allow him to use CR 37(d) as a means of avoiding the effects of his contempt.

In short, Mr. Young cannot avoid the court’ s authority to exercise contempt powers under RCW 7.21, CR 37 and the court’ s inherent authority to enforce its own orders. Mr. Young has intentionally and willfully determined to violate the discovery order. The trial court's order holding him in contempt should be affirmed. *E.g. In re Interests of M.B.*, 101 Wn. App. 425, 431 (2000) (“ It is axiomatic that a court must be able to enforce its orders.”).

C. **The Trial Court Did Not Abuse Its Discretion by Staying the Case as a Coercive Sanction**

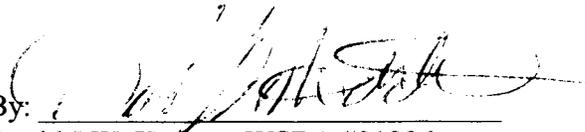
Upon a finding of civil contempt, the court is empowered to impose a “remedial sanction” designed to coerce compliance with the court’s order. A remedial sanction is defined as “a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal of an act that is yet in the person’s power to perform.” RCW 7.21.010.

Young cannot prove an abuse of discretion in the current case with the stay remedy. First, Young does not challenge the trial court’s finding of fact that a stay was the least restrictive sanction likely to coerce Young’s compliance with the order. CP 119. This finding is now a verity on appeal and mirrors the requirements of case law in determining a lawful civil contempt sanction. “The *primary purpose* of the civil contempt power is to coerce a party to comply with an order or judgment.” *State v. Breazeale*, 144 Wn.2d 829, 842 (2001) (emphasis added); accord *Smith v. Whatcom County District Court*, 147 Wn.2d 98, 105 (2002).

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's contempt order.

DATED this 22nd day of February 2006

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FILED  
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2006 FEB 27 AM 11:24

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

In re the Detention of:

NO. 56171-5-I

ANDRE BRIGHAM YOUNG,

DECLARATION OF SERVICE

Respondent.

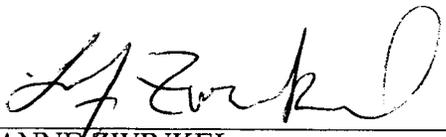
I, LEEANNE ZWINKEL, being first duly sworn on oath, deposes and says:

On February 22, 2006, I arranged for service a copy of the *State's Response Brief* by US Postal Service to the following:

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DATED this 22nd day of February, 2006.

By:

  
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