FILED
November 14, 2016
Court of Appeals
Division III
State of Washington

NO. 34120-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

v.

ANTHONY JASON SIMS

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Appellant.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

In each of the twenty-eight cases now consolidated on appeal, the trial court unlawfully imposed punitive contempt sanctions against the Department of Social and Health Services (DSHS) after delays in providing competency services to criminal defendants. Though some of the contempt orders also included remedial sanctions that DSHS does not challenge, at least a portion of the sanctions imposed in each case were punitive because the trial court sanctioned DSHS for past contempt without allowing DSHS an opportunity to avoid incurring the sanctions. The court imposed these sanctions contrary to the strict requirements of the punitive contempt statute, RCW 7.21.040, which provides that punitive sanctions may be imposed only in a separate action initiated by a prosecutor.

The trial court also erred by imposing post-judgment interest against DSHS in each case after the contempt orders were reduced to judgments. The State of Washington has not expressly waived its sovereign immunity in respect to interest on contempt judgments, which precludes the imposition of judgment interest against DSHS.

This Court should partially vacate the twenty-eight contempt orders on appeal and remand with instructions that contempt sanctions may be imposed only for periods of time following entry of a written order

of contempt. It should also vacate the twenty-eight corresponding judgments and reaffirm that judgment interest may not be imposed against DSHS absent an express waiver of sovereign immunity.

II. ASSIGNMENTS OF ERROR

A. In each case on appeal, the trial court erred by imposing contempt sanctions for periods of time that preceded the trial court's written order of contempt.

B. In each case on appeal, the trial court erred by imposing post-judgment interest against DSHS.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the trial court erred by imposing punitive contempt sanctions against DSHS without adhering to RCW 7.21.040, which permits punitive contempt sanctions to be imposed only in a separate action initiated by a prosecutor. (Assignment of Error A)

B. Whether the trial court erred by entering judgments against DSHS bearing interest at a rate of twelve percent per annum where the State of Washington has not expressly waived sovereign immunity in respect to post-judgment interest. (Assignment of Error B)

IV. STATEMENT OF THE CASE

All but one of the twenty-eight cases now before this Court stem from distinct Spokane County Superior Court criminal proceedings before the same judge. The remaining case, *State v. Lopez*,[1] is procedurally similar but took place in Adams County Superior Court. Because each of the proceedings below involves a materially identical procedural

[1] Adams County Superior Court Cause No. 15-1-00106-1.

background for purposes of this consolidated appeal, DSHS will outline the material facts pertaining to *State v. Sims*, Spokane Cty. Super. Ct. No. 14-1-01738-4 – a proceeding that would serve as a template for the subsequent contempt proceedings – and then supply a chart that details the information material to all twenty-eight cases on appeal.

A. *State v. Sims*

On November 20, 2014, the Spokane County Superior Court ordered DSHS to evaluate Anthony Sims' competency to stand trial pursuant to RCW 10.77 by December 2, 2014 in the then-pending criminal proceeding against him. CP 1533-534. After a delay in performing the evaluation, Mr. Sims' defense counsel obtained an order requiring Eastern State Hospital, a mental health facility operated by DSHS, to show cause why it had not completed the evaluation and why it should not incur contempt sanctions for the delay. CP 1533-534. Defense counsel asked that remedial contempt sanctions be imposed against DSHS. CP 1536.

Pursuant to the court's order, a show cause hearing in Mr. Sims' criminal proceeding occurred on December 11-12, 2014.[2] CP 1572. DSHS submitted briefing beforehand making numerous arguments in opposition to contempt. CP 1544-556. Relevant to this appeal, DSHS argued that the

[2] At the hearing, the court simultaneously considered defense counsel's request for contempt sanctions against DSHS in five other criminal cases. CP 1572. Those cases are also part of this consolidated appeal.

court could not impose punitive sanctions against it under RCW 7.21.040. CP 1555.

The trial court concluded the hearing by finding DSHS in contempt of the court's competency evaluation order and stating that it would impose sanctions of $200 per day "measured from the dates in which the Court had set the evaluations to be done." *State v. Cooper, State v. Johnston, State v. Larson, State v. Owen, State v. Ponders, State v. Sims* VRP at 57-58. The oral decision was not reduced to a written order until January 16, 2015, in which the court imposed sanctions of "$200 per day . . . from December 2, 2014 through December 14, 2014." CP 1577. As recognized by the contempt order itself, DSHS completed Mr. Sims' competency evaluation on December 15, 2014. CP 1577.

The trial court's contempt order was later reduced to a $2,600 judgment that named DSHS as the judgment debtor and summarized the basis for the judgment. CP 1578-79. The judgment stated that it would bear interest at "12% per annum." CP 1578. DSHS timely appealed from the judgment, CP 1557, leading to the instant appeal.

B. Summary Of The Remaining Twenty-Seven Cases On Appeal

Between January of 2015 and February of 2016, twenty-seven contempt orders materially identical in form to the order in *State v. Sims* were entered against DSHS after following a similar procedure:

- Defense counsel sought remedial contempt sanctions after a delay in providing court-ordered competency evaluation or restoration services;
- DSHS objected, arguing, *inter alia*, that imposition of punitive contempt sanctions would be improper;
- A hearing occurred in each defendant's criminal proceeding during which the court stated that DSHS was in contempt;
- A written contempt order was later entered imposing sanctions at a rate of $200 per day of noncompliance, to include a number of days preceding the contempt finding; and
- The contempt order was reduced to a judgment against DSHS, bearing interest at 12% per annum.

The spreadsheet attached to this brief as Exhibit 1 identifies the relevant portions of the record for each appeal and the periods for which sanctions were imposed against DSHS in each case. It also identifies when the contempt order in each proceeding was entered and the amount of punitive sanctions imposed.

V. ARGUMENT

This Court should partially vacate the twenty-eight contempt orders on appeal and remand with instructions that sanctions may only be imposed for periods of time following entry of the written contempt order

in each proceeding. It should do so because the punitive sanctions imposed prior to that point exceeded the trial court's statutory authority to sanction under RCW 7.21.040.

This Court should also vacate the twenty-eight corresponding judgments and reaffirm that judgment interest may not be imposed upon the State or its agencies without the State's consent. Given that the State has not expressly waived its sovereign immunity in respect to judgment interest on contempt sanctions, the court erred by imposing it against DSHS.

A. The Trial Court's Contempt Orders Should Be Partially Vacated Because The Court Unlawfully Imposed Punitive Contempt Sanctions In Each Case

Contempt of court occurs where there has been an intentional disobedience of a court order. RCW 7.21.010(1)(b). Once contempt has been found, a court may impose remedial or punitive sanctions pursuant to RCW 7.21 so long as the statute's required procedures are followed. In each of the cases on appeal, the trial court's contempt orders imposed monetary punitive contempt sanctions against DSHS. These punitive sanctions must be vacated because they were imposed without adherence to the required statutory procedures.

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1. Punitive sanctions were imposed against DSHS in each matter on appeal.

The contempt statute, RCW 7.21, distinguishes between remedial and punitive contempt sanctions and makes specific provisions for how each type of sanction may be imposed. Remedial sanctions, also known as civil sanctions, are sanctions "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." RCW 7.21.010(3). Remedial sanctions must "permit[] the contemnor to avoid the sanction by doing something to purge the contempt." *In re Det. of Young*, 163 Wn.2d 684, 693 n.2, 185 P.3d 1180 (2008); *see also King v. Dep't of Soc. & Health Servs*., 110 Wn.2d 793, 800, 756 P.2d 1303 (1988) (concluding that a "sanction is civil if it is conditional and indeterminate, *i.e*., where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order.").

Conversely, punitive sanctions are imposed to "punish a past contempt of court," RCW 7.21.010(2), and do not afford the contemnor an opportunity to avoid incurring the sanctions. A contempt sanction is punitive, and thus criminal rather than civil, if it "is imposed to punish a past contempt of court, results in a determinate sentence, and does not

afford the defendant an opportunity to purge the contempt by performing the acts required in the original order." *State v. Buckley*, 83 Wn. App. 707, 711, 924 P.2d 40 (1996).

Each contempt order on appeal imposed punitive sanctions against DSHS. The sanctions were punitive because DSHS had no opportunity to avoid the contempt sanctions imposed. In *State v. Sims*, for example, the court imposed sanctions of "$200 per day . . . from December 2, 2014 through December 14, 2014" on January 16, 2015, thus imposing sanctions against DSHS for a period of past contempt. CP 1577. These sanctions could not have been intended to coerce future compliance with the underlying competency order because they were determinate and unavoidable. CP 1577. Each of the twenty-seven other contempt orders at issue similarly imposed determinate, unavoidable sanctions against DSHS for past contempt. *See* Exhibit 1 (comparing the date each contempt order was entered with the period of time for which DSHS was sanctioned). Thus, at least a portion of the sanctions imposed in each case were punitive in nature.[3]

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[3] Sanctions imposed for periods of time after the entry of a contempt order in some of the cases on appeal were remedial in character because DSHS had an opportunity to avoid incurring the sanctions by complying with the court's order. DSHS does not contest the coercive portion of the sanctions imposed.

Determining whether the sanctions were imposed for past conduct should be measured from entry of the written contempt order.[4] Considerable authority underscores that for a ruling of the court to become effective, it must be reduced to writing. *See, e.g.*, *Templeton v. Hurtado*, 92 Wn. App. 847, 853, 965 P.2d 1131 (1998) ("To protect its own authority to enforce a contempt sanction, a trial court must be sure written findings are entered, either by delegating the task to opposing counsel or writing them out personally."); *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (holding that oral opinions have no final or binding effect and are "no more than oral expressions of the court's informal opinion at the time rendered"); *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963) (holding that a court's oral decision "is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned").

The trial court's final determination of contempt in each proceeding did not occur until entry of a written contempt order. At that

[4]Written contempt orders in these proceedings were typically not entered by the trial court until weeks after the contempt hearings at which the court would orally find DSHS in contempt. *See* Exhibit 1 (comparing contempt hearing dates with the date of the order imposing sanctions). For example, in *State v. Sims*, the contempt hearing occurred on December 11-12, 2014, but a written contempt order was not entered by the court until January 16, 2015. CP 1577. Even if the finding of contempt became effective at the time of the oral ruling instead of the date the order finding contempt was entered, there would still have been a significant amount of punitive sanctions imposed in each case as demonstrated by Exhibit 1.

point, DSHS was found in contempt and the sanctions imposed prior to that date must be considered punitive in character.

2. The court erred in each matter by imposing punitive sanctions in disregard of the punitive contempt statute.

"Washington's criminal contempt statute, RCW 7.21.040, provides that a punitive sanction for contempt of court may be imposed only in a separate action initiated by a public prosecutor."[5] *In re Mowery*, 141 Wn. App. 263, 276, 169 P.3d 835 (2007), *as amended* (Nov. 8, 2007). The information or complaint that commences the action must charge contempt and must recite the punitive sanction sought to be imposed. RCW 7.21.040(2)(a), (b). A judge presiding in an action to which the contempt relates may request a public prosecutor to act, or may appoint a special counsel to prosecute the action "if required for the administration of justice." RCW 7.21.040(2)(c). A judge who requests prosecution is disqualified from presiding at the trial. *Id*.

Here, contrary to the express requirements of RCW 7.21.040, punitive sanctions were imposed against DSHS in the midst of unrelated criminal proceedings, not after the filing of a separate criminal complaint against DSHS or its agents by a prosecutor. *See* Exhibit 1. There has been no criminal complaint regarding contempt filed in relation to any of the

[5] The single exception is for contempt committed in the courtroom in the presence of the judge. RCW 7.21.040(1), referring to the summary imposition procedures provided in RCW 7.21.050. This exception has no applicability here.

proceedings on appeal, making the imposition of punitive contempt sanctions in each matter unlawful.

Although the trial court in each proceeding attempted to rely upon its statutory contempt authority rather than its inherent contempt authority,[6] inherent authority likewise would have afforded no authority for the court to impose the punitive sanctions at issue. As a prerequisite to the exercise of a court's inherent contempt power to impose "punitive or remedial sanctions for contempt of court," it must " 'specifically find' all statutory contempt procedures and remedies are inadequate." *State v. Salazar*, 170 Wn. App. 486, 492-93, 291 P.3d 255 (2012) (quoting *In re Dependency of A.K.*, 162 Wn.2d 632, 652, 174 P.3d 11 (2007)). As the trial court in each proceeding made no finding that its statutory contempt authority was inadequate, the trial court's unutilized inherent sanctioning authority could not save the deficient sanctions orders at issue.

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[6] The January 16, 2015 contempt order entered in *State v. Sims* served as the template for the orders entered in the twenty-six other Spokane proceedings. CP 1572-577. In that order, the trial court cited only to its statutory contempt authority to impose remedial sanctions. CP 1576 ("The Court considered the definition of contempt under RCW 7.21.030 regarding remedial measures under what is traditionally referred to as civil contempt."). This language was repeated in the other Spokane contempt orders. None of the contempt orders on appeal purported to rely upon the court's inherent contempt authority.

B. Sovereign Immunity Precludes An Award Of Judgment Interest Against The State

The trial court erred in each proceeding by requiring DSHS to pay 12% interest per annum on the principal awarded in each judgment because sovereign immunity precludes such an award.[7]

The doctrine of sovereign immunity requires the State's consent before a court can hold it liable for interest on its debts. *Our Lady of Lourdes Hosp. v. Franklin Cty*., 120 Wn.2d 439, 455–56, 842 P.2d 956 (1993) (holding that a county was not entitled to interest on an award reimbursing it for an inmate's medical expenses because no statute or contract indicated that the state had consented to liability for interest). "A statutory waiver of sovereign immunity as to interest will apply only in those circumstances specifically delineated by statute." *State v. Thiessen*, 88 Wn. App. 827, 829-30, 946 P.2d 1207 (1997); *see also Shum v. Dep't of Labor & Indus*., 63 Wn. App. 405, 411, 819 P.2d 399 (1991).

Neither RCW 4.56.110, which generally provides for interest on judgments, nor RCW 7.21, the contempt statute, waives the State of

[7] Although DSHS did not raise this issue below, the issue of whether sovereign immunity precludes an award of judgment interest may be raised for the first time on appeal. *See State v. Lee*, 96 Wn. App. 336, 345 n.10, 979 P.2d 458 (1999) (rejecting that RAP 2.5(a) could bar consideration of whether sovereign immunity precluded the State from being held liable for interest on its debts incurred under RCW 9A.16.110). In *Lee*, the court concluded that "[a] State's waiver of sovereign immunity . . . must be unequivocally expressed. Here, the failure to assert the defense is not an unequivocal expression of consent and the State is not estopped from raising it on appeal." *Id*. (citation omitted).

Washington's sovereign immunity in respect to paying interest on contempt judgments. Additionally, RCW 4.56.115, which does contain a limited waiver of sovereign immunity for interest, applies only to "judgments founded on the tortious conduct of the state." Given that a contempt proceeding does not involve allegations of tortious conduct but rather determination of whether a court order has been complied with, any subsequent judgments would not be "founded on the [State's] tortious conduct" and the limited waiver of sovereign immunity in RCW 4.56.115 would not be applicable. *See Thiessen*, 88 Wn. App. at 829-30 (holding that the state is not required to pay interest on a reimbursement award made to a criminal defendant under RCW 9A.16.110(2) in part because the award was not founded on the State's tortious conduct).

A number of statutes specifically provide for interest on awards against the State, and thus waive sovereign immunity as to interest in specific instances. RCW 4.56.115 (tort actions); RCW 51.32.080 (industrial insurance); RCW 82.32.060 (tax refunds). RCW 7.21 does not. It provides only for the imposition of monetary sanctions of up to $2,000 per day, and does not authorize the state's payment of interest on the award.

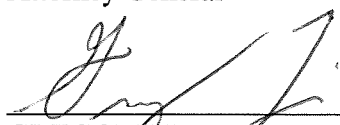
Accordingly, it was error for the trial court in each proceeding to impose judgment interest against DSHS.

VI. CONCLUSION

This Court should partially vacate the twenty-eight contempt orders on appeal and remand with instructions that sanctions may only be imposed for periods of time following entry of the written contempt order in each proceeding. It should do so because the punitive sanctions imposed prior to that point exceeded the trial court's authority under RCW 7.21.040 to sanction. This Court should also vacate the twenty-eight corresponding judgments and reaffirm that judgment interest may not be imposed upon the State or its agencies without the State's consent.

RESPECTFULLY SUBMITTED this 14th day of November, 2016.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

Beverly Cox, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

I certify that on November 14, 2016, I served a true and correct copy of this **APPELLANTS' OPENING BRIEF** and this **CERTIFICATE OF SERVICE** as follows:

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

Dated this 14 day of November, 2016, at Tumwater, Washington.

Beverly Cox

BEVERLY COX
Legal Assistant

Contempt Sanctions Judgments

Criminal Proceeding	Appellate Cause Number	Clerk's Papers: DSHS Briefing Opposing Contempt	Clerk's Papers: Contempt Order and Judgment	Date of Contempt Hearing	Date of Contempt Sanctions Order	Sanctions Period	Total Days of Punitive Sanctions*	Total Days Sanctioned	Punitive Sanctions Imposed*	Total Sanctions
Alexander, Derrick	34132-1	59-69	83-88	5/22/2015	7/24/2015	4/20/15 - 6/1/15	43	43	$8,600	$8,600
Anderson, Jennifer	34139-9	107-117	131-136	10/23/2015	11/2/2015	9/7/15 - 12/10/15	56	95	$11,200	$19,000
Beggs, Jonathan	34143-7	215-225	239-244	12/9/2015	12/29/2015	11/19/15 - 1/3/16	40	46	$8,000	$9,200
Blake, Valerie	34125-9	271-282	296-301	1/16/2015	1/26/2015	1/2/15 - 2/4/15	24	34	$4,800	$6,800
Cooper, Benjamin F.	34124-1	313-325	341-348	12/12/2014	1/16/2015	11/21/14 - 1/13/15	54	54	$10,800	$10,800
Fairfield, Jason (1)	34127-5	373-384	413-422	3/6/2015	3/19/2015	2/27/15 - 4/1/15	20	34	$4,000	$6,800
Fairfield, Jason (2)	34127-5	385-395	399-409	5/22/2015	7/24/2015	4/15/2015 - 5/31/15	47	47	$9,400	$9,400
Fleming, Audra D.	34133-0	436-446	460-465	5/22/2015	11/6/2015	4/17/15 - 6/2/15	47	47	$9,400	$9,400
Fletcher, Anthony	34134-8	531-541	555-560	5/22/2015	8/12/2015	5/5/15 - 7/5/15	62	62	$12,400	$12,400
Fregoso, Jesus	34142-9	561-571	609-614	11/6/2015	12/29/2015	10/22/15 - 1/3/16	68	74	$13,600	$14,800
Graham, Amy	34140-2	725-735**	653-658	10/23/2015	11/2/2015	8/19/15 - 11/09/15	75	83	$15,000	$16,600
Johnston, Joseph	34123-2	671-683	699-706	12/12/2014	1/16/2015	12/2/14 - 3/5/15	45	94	$9,000	$18,800
Keranen, Alexandra	34141-1	725-735	749-754	10/23/2015	11/2/2015	9/25/15 - 12/13/15	38	80	$7,600	$16,000
Larson, Bryce	34121-6	765-777	793-800	12/12/2014	1/16/2015	12/3/14 - 1/14/15	43	43	$8,600	$8,600
Lennartz, Patrick	34130-5	858-868	882-887	5/22/2015	7/31/2015	4/28/15 - 7/12/15	76	76	$15,200	$15,200
Lopez, Eduardo	34205-1	09-020	24-27	12/11/2015	2/12/2016	9/25/15 - 12/20/15	87	87	$17,400	$17,400
Mccarthy, Matthew	34131-3	1503-1513**	944-949	5/22/2015	7/24/2015	5/7/15 - 7/19/15	74	74	$14,800	$14,800
Montoya, Jesse	34136-4	1012-1022	1036-1041	6/26/2015	7/24/2015	5/21/15 - 7/19/15	60	60	$12,000	$12,000
Owen, Christopher	34122-4	1054-1066	1082-1089	12/12/2014	1/16/2015	12/2/14 - 12/22/14	21	21	$4,200	$4,200
Pal, William	34126-7	1117-1128	1142-1147	1/16/2015	1/26/2015	12/18/14 - 1/21/15	35	35	$7,000	$7,000
Rettinger, Shawn	34138-1	1210-1220	1234-1239	6/26/2015	7/24/2015	5/29/15 - 7/19/15	52	52	$10,400	$10,400
Sackmann, Hailey	34137-2	1299-1309	1323-1328	6/26/2015	7/24/2015	4/24/15 - 6/28/15	66	66	$13,200	$13,200
Sandstrom, Christian	34180-1	1412-1422	1430-1433	12/9/2015	12/29/2015	12/4/15 - 1/24/16	25	52	$5,000	$10,400
Schilling, Loran Scott	34135-6	1503-1513	1527-1532	5/22/2015	10/16/2015	5/2/15 - 6/25/15	52	52	$10,400	$10,400
Sims, Anthony J.	34120-8	1544-1556	1572-1579	12/12/2014	1/16/2015	12/2/14 - 12/14/14	13	13	$2,600	$2,600
Spain, Daniel	34129-1	1604-1615	1628-1632	2/27/2015	3/6/2015	2/19/15 - 7/15/15	15	147	$3,000	$29,400
Tall, Sidappa (1)	34128-3	1657-1668	1759-1763	3/6/2015	3/19/2015	3/2/15 - 4/8/15	17	38	$3,400	$7,600
Tall, Sidappa (2)	34128-3	1730_1740	1764-1769	5/22/2015	7/24/2015	4/27/15 - 7/12/15	77	77	$15,400	$15,400
TOTALS									**$266,400**	**$337,200**

*This calculation includes every day of sanctions imposed prior to entry of the written contempt order. Sanctions were imposed at $200 per day in each case.

** This citation refers to a brief opposing contempt filed by DSHS in a concurrently-heard contempt proceeding, demonstrating that the issue of punitive contempt was before the court in each proceeding. Out of an abundance of caution, Appellant may file a motion to supplement the clerk's papers with the opposition briefing specific to this defendant.

Exhibit 1