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SUPREME COURT  
STATE OF WASHINGTON  
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SUPREME COURT NO. 95479-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

ANTHONY SIMS,

Respondent,

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Salvatore F. Cozza, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT

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JENNIFER J. SWEIGERT  
Attorney for Respondent

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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A. ISSUES

1. Did the Court of Appeals correctly affirm remedial sanctions for contempt beginning on the date of the court's oral contempt finding?

2. Did the Court of Appeals correctly uphold the imposition of interest on the contempt sanctions because the legislature impliedly waived sovereign immunity by enacting the remedial contempt statute?

B. STATEMENT OF THE CASE

Respondent Anthony Sims is one of 28 respondents subjected to extended delays when doubts about their competency arose while awaiting trial on criminal charges in Spokane County. Sims was already on probation in mental health court when he was charged with second-degree burglary. CP 1794-95. The police report indicates he picked up a bag of dog food from the shelf at a Wal-Mart store and then attempted to return it for \$5.41 in cash CP 1792.

On October 14, 2014, the court entered an agreed order for an evaluation assessing Sims' competency to stand trial. CP 1796-99. A month later, no evaluation having occurred, counsel moved to compel the evaluation under chapter 10.77 RCW. CP 1800-24. On November 20, 2014, the court ordered Eastern State Hospital (ESH) to perform Sims' evaluation by December 2, 2014. CP 1825.

On November 26, correctly anticipating the evaluation would not occur by the deadline, counsel filed a motion for a show-cause order requesting sanctions of \$500 per day of delay past the December 2 deadline. CP 1533-43. In response, the State argued contempt was inappropriate for several reasons. CP 1544-56. The State claimed the December 2 deadline was ordered without an opportunity for ESH to be heard, ESH's violation of the court order was not willful, and the court lacked authority to impose punitive sanctions for contempt absent a criminal complaint filed by a prosecutor. CP 1544-56.

On December 12, the court found DSHS in contempt and ordered sanctions of \$200 per day. RP 55-58. The court explained that, while there was no apparent ill will on the part of ESH staff, intentional decisions made at higher levels of government in the legislative and executive branches were responsible for the backlog. 1RP 55-58; 2RP 12-13. The court explained the fines were not intended to be crippling, but to put pressure on the responsible parties to take action. 1RP 110.

The written contempt order was not entered until January 16, 2015. CP 1560-65. In the interim, Sims' evaluation was performed on December 15. CP 1563. The court ordered ESH to pay sanctions of \$200 per day between the December 2 deadline and December 14, 2014. CP 1563.

The same order imposed sanctions in four other cases among the 28 consolidated on appeal. CP 1560-65. The Sims hearing was the first in the group of cases, all of which resulted in essentially the same contempt orders over the course of 2015. 1RP2 58, 65-67, 89, 111, 121, 160-61, 179; 2RP 12-13.

Approximately 13 months after the contempt finding in Sims' case, on January 15, 2016, the court amended the order, specifying that sanctions be paid to the clerk of the court and directed to Spokane County Detention for the purpose of assisting mentally ill offenders in the jail. CP 1826-35. In Sims' case, judgment was entered against DSHS in the amount of \$2,600, \$200 per day for 13 days. CP 1564.

DSHS appealed, and Sims' case was consolidated with 27 others. CP 1557, 1569. For purposes of appellate review, Sims agreed his case serves as a template and the dates and amounts in the State's chart fairly represent the amounts and dates at issue in the other 27 cases.

The Court of Appeals partially affirmed the sanctions. State v. Sims, 1 Wn. App.2d 472, 406 P.3d 649 (2017). The Court held that the amounts imposed for delays after the December 2 deadline but before the finding of contempt on December 12 were punitive in nature and, thus, exceeded the court's statutory contempt power. Id. at 480. However, the Court affirmed the amounts imposed for delays after the oral contempt finding, including the

12 percent interest included in the written contempt order. Id. at 482, 484. This Court granted the State's petition for discretionary review of the effectiveness of the oral contempt finding and the implied waiver of sovereign immunity. Sims and the other respondents ask this Court to affirm.

C. ARGUMENT

1. THIS COURT SHOULD GIVE EFFECT TO THE TRIAL COURT'S ORAL CONTEMPT RULING.

The trial court here properly exercised its statutory authority to sanction the State for contempt when the State repeatedly and intentionally violated the court's orders to provide pre-trial competency services in a timely manner. Courts have statutory authority to impose sanctions for contempt of court. RCW 7.21.030. Remedial sanctions to enforce compliance with a court order may include imprisonment, forfeiture of up to \$2,000.00 per day that the contempt continues, (or any other remedial sanction necessary to enforce compliance), as well as any amount necessary to compensate for losses including costs and attorney fees. RCW 7.21.030. The question of a court's authority to impose contempt sanctions is a legal question reviewed de novo. In re Dependency of A.K., 162 Wn.2d 632, 644, 174 P.3d 11 (2007).

This Court should affirm the sanctions imposed dating from the oral contempt ruling. As the Court of Appeals correctly noted, parties are

not free to ignore judicial rulings merely because they have not yet been reduced to writing. Sims, 1 Wn. App. 2d at 482. The court explained, “We refuse to adopt a rule that would treat an oral contempt decision as ineffective. To do so would delay a court’s authority to enforce its own orders.” Id.

This conclusion is congruent with prior Washington practice and precedent and should be affirmed for four main reasons. First, parties generally are required to follow a trial court’s oral rulings. Second, this is not a case of a conflict between an oral ruling and a subsequent written order. Third, the remedy for a missing, but required, written finding is remand for entry of findings, not invalidation of the oral ruling. Finally, concerns for notice and the ability to seek appellate review are sufficiently protected by the remedial contempt statute and court rules.

- a. Parties are routinely required to abide by a trial court’s oral rulings.

Parties are routinely required to abide by trial court rulings and orders during trial, which can be final, even when not reduced to writing. This is particularly apparent in the case of evidentiary rulings. For example, in State v. Austin, 34 Wn. App. 625, 634, 662 P.2d 872 (1983), aff’d sub nom. State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984), the court explained:

When the court rules in limine that a prior conviction will be admitted and has not changed the ruling by the time the defendant must make a decision to testify or not testify, the ruling is no longer tentative, hypothetical, or advisory. It is, by then, a final ruling which the defendant should be allowed to treat as such and make decisions accordingly.

The effectiveness of the court's ruling admitting evidence is not delayed by the absence of a written ruling. Id. In some cases, an oral ruling may be so final and definite that the court's ability to alter the decision later is constrained. For example, belatedly changing an oral ruling that appears to be final may constitute reversible error if the defendant is thereby prejudiced. State v. Latham, 100 Wn.2d 59, 66, 667 P.2d 56 (1983).

This is often the case in the double jeopardy context. An oral ruling dismissing a charge for insufficient evidence may be final for purposes of double jeopardy, precluding further proceedings on that charge. Smith v. Massachusetts, 543 U.S. 462, 125 S. Ct. 1129, 160 L. Ed. 2d 914 (2005). In Smith, the trial court dismissed one of the charges for insufficient evidence during a sidebar. Id. at 465. Subsequently, after the state had rested and the defense presented a case, the trial court reversed itself and permitted the charge to go to the jury with the others. Id. at 465. The United States Supreme Court reversed the conviction on double jeopardy grounds. Id. at 474-75. The Court noted that the trial court's

acquittal did not appear tentative and “gave petitioner no reason to doubt the finality of the state court’s ruling.” Id. at 470.

A district judge’s oral ruling dismissing a DUI prosecution was treated as final for purposes of double jeopardy in City of Auburn v. Hedlund, 137 Wn. App. 494, 506, 155 P.3d 149 (2007), aff’d in part, 165 Wn.2d 645, 201 P.3d 315 (2009). The court discussed State v. Collins, 112 Wn.2d 303, 771 P.2d 350 (1989), holding that an oral dismissal order was not an acquittal for purposes of double jeopardy. Hedlund, 137 Wn. App. at 504-06. The court noted, however, that Collins, and other cases relying on that decision, involved a judge reconsidering his or her own decision. Hedlund, 137 Wn. App. at 505. In Hedlund, however, the City had sought, and obtained, a writ of review by the Superior Court as if the oral ruling were a final judgment. Id. at 506. The court concluded that “the trial court ruling depicted in the City’s application for writ of review and the superior court’s subsequent order does not evince the ambiguity the Collins holding was meant to alleviate.” Id. The Court of Appeals, therefore, reversed Hedlund’s conviction on double jeopardy grounds. Id. This Court affirmed the reversal without reaching the double jeopardy issue. 165 Wn.2d 645.

If questions of prejudice and double jeopardy are set aside, it is generally true that a court may revisit or reconsider an oral decision before a written order is entered. However, this does not mean that a court is

required to reconsider its decision at any point after an oral ruling. In Hidalgo v. Barker, 176 Wn. App. 527, 545-46, 309 P.3d 687 (2013), the Court of Appeals explained:

While it is true that an oral decision is not final and may be reconsidered or changed before it is made the subject of a final order, that does not mean that between the time a court makes and announces a decision and the time it signs an order, it is obliged to entertain whatever additional evidence or argument the parties wish to submit. See In re Estate of Leith, 42 Wn.2d 223, 226, 254 P.2d 490 (1953) (noting that a court could have reconsidered its oral decision, had it decided to do so, “[b]ut the court was not required to reconsider it.”)

Id.

The contempt ruling in this case on December 12, 2014, was the type of final oral ruling that should have been treated as final by the parties. It was neither tentative nor hypothetical. Smith, 543 U.S. at 470. From that point on, Sims and the other respondents were justified in treating the matter as settled, and the State should have done so as well. The court was not required to revisit or reconsider its decision on December 12 that remedial contempt sanctions should begin to accrue. Hidalgo, 176 Wn. App. at 545-46. The written order merely recorded what had already been decided. 1RP<sup>1</sup> 58; CP 1563.

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<sup>1</sup> There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Dec. 11-12, 2014, Jan. 16, Mar. 6, May 22, June 26, July 24, Oct. 23, Dec. 9, 2015; 2RP – Feb. 27, 2015; 3RP – Oct. 29, 2015.

- b. The oral finding of contempt is consistent with the ultimate written order.

An oral ruling that is consistent with a subsequent written order is not ineffective merely because it has yet to be written down. The cases purporting to undercut the effectiveness of oral rulings are inapposite to this case because, by and large, these cases do not involve the effectiveness of an oral court order, but instead a conflict between the terms of a written order and an oral pronouncement. In such scenarios, the written order takes precedence.

For example, in State v. Dailey, 93 Wn.2d 454, 457-58, 610 P.2d 357 (1980), the question was whether the ruling dismissing the case was based on CrR 8.3, permitting dismissal for government mismanagement, or CrR 4.7, which the State argued did not permit dismissal as a sanction for a discovery violation. The court held that, despite any oral comments, the written ruling made clear that the dismissal was properly based on CrR 8.3. Id. at 458.

Similarly, in Ferree v. Doric, 62 Wn.2d 561, 383 P.2d 900 (1963), the appellant relied on the court's oral ruling to argue the ultimate judgment was unsupported by a finding as to the date of possession of the property. Id. at 566. However, the court's written conclusions of law included that the possession was timely. Id. at 567-68. The court pointed

out, “statements, when at variance with the findings, cannot be used to impeach the findings or judgment.” Id. at 567 (citing Rutter v. Rutter, 59 Wn.2d 781, 370, P.2d 862 (1962)).

In L.K. Operating v. Collection Group, 181 Wn.2d 48, 81, 331 P.3d 1147 (2014), a disputed finding was omitted from the written ruling, but one side argued it was implied. This Court concluded the omission appeared intentional, the result of the trial court’s conscientious and careful consideration of the evidence. Id. at 81-82. Given the careful written findings, the court noted that it would not look to the court’s oral statements. Id. at 81, n. 17.

Sims and the other respondents are not attempting to enforce terms of an oral ruling that contradict the written order, add facts that were not included in the written order, or otherwise use the oral ruling to impeach the written order. There is no inconsistency. Both the oral and written contempt orders state that the contempt begins, and the remedial sanctions of \$200 per day begin to accrue after the court’s December 2 deadline. 1RP 58; CP 1563. Therefore, the long line of Washington cases declining to consider oral rulings that impeach written orders are of minimal value to the analysis in this case.

- c. The failure to reduce an order to writing is remedied by subsequent reduction to writing, not invalidation of the oral order.

The purpose of written findings of fact in these cases is to facilitate appellate review, not to make the order itself effective as against the parties. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). This is evident in the remedy that courts routinely impose when the findings are not set forth in writing as required. Notably, the remedy is not that the judgment of the court is ineffective. See, e.g., Head, 136 Wn.2d at 624-25. On the contrary, the only remedy is a remand so that the missing writing can be created. Id. The absence of a written order finding a defendant guilty does not vacate the court's judgment or make the defendant any less guilty under the law.

Even more on point is what occurred in Templeton v. Hurtado, 92 Wn. App. 847, 965 P.2d 1131 (1998). That case involved a contempt order without specific written findings of fact supporting the order. Id. at 852. On appeal, the court did not hold that the oral contempt order was not effective. As in Head, the court simply remanded for entry of the missing findings. Templeton, 92 Wn. App. at 853. The contempt sanctions in that case were also vacated, but only because the contemnor had not been given the opportunity to speak on his own behalf before the sanctions were imposed, as required by law and due process. Id. at 855.

None of these cases support the State's contention that an oral ruling of contempt is not effective or that remedial sanctions may not begin to run from the date of the oral contempt finding. Moreover, these cases stand for the proposition that the remedy for failure to enter written findings is remand for entry of the findings. Head, 136 Wn.2d at 624-25; Templeton, 92 Wn. App. at 853. Absent some showing of prejudice, the delay in entering the written findings is immaterial. Head, 136 Wn.2d at 624-25. As the State has failed to make any attempt to show prejudice here, the contempt sanctions should be affirmed beginning with the date of the court's oral contempt finding.

- d. Concerns for notice and facilitation of appellate review of contempt orders does not require invalidation of the oral contempt finding in this case.

Judge Korsmo in dissent in this case agreed that a court order did not have to be in writing to be effective, yet he expressed "sympathy" for the State's position that it needs a written order in a timely fashion. Sims, 1 Wn. App. 2d at 490-91. He expressed concern for notice and the ability to seek review of the order. Id. But such concerns do not require undercutting trial courts' authority by invalidating the effectiveness of an oral court order.

The purpose behind requiring written judgments and findings is to facilitate appellate review. Head, 136 Wn.2d at 622. But that does not mean that the absence of such findings invalidates the order during the interval between the oral decision and the written order. And such a holding is not necessary to protect parties' rights to appeal. A party wishing to appeal an oral order can present a proposed written order. CR 54. The 5-day notice of presentation can be waived in an emergency or if the order is presented immediately after the oral ruling, while opposing counsel is still present in court. CR 54(f)(2)(A), (C). Even a delay by the trial judge in signing a written order does not, ultimately, preclude appellate review of contempt sanctions, as evidenced by the appellate review that is ongoing in this matter.

The concern that a party may be unaware of a contempt sanction is simply not reasonable. By law, remedial contempt sanctions may only be imposed after notice and a hearing. RCW 7.21.030. In this respect, contempt sanctions are not comparable to temporary restraining orders under CR 65, which may be entered ex parte in emergencies. Under specified circumstances, "A temporary restraining order may be granted without written or oral notice to the adverse party or the adverse party's attorney." CR 65(b) (emphasis added). The court rules thus require a carefully specific written order and a hearing at the earliest possible time.

Id. Contempt sanctions, by contrast, may not be imposed without notice and a hearing. RCW 7.21.030(1). Concerns for notice to an affected party do not require a written order of contempt before sanctions can take effect.

The remedial contempt statute gives the courts power to enforce their orders against parties who are already before them. RCW 7.21.010(3); RCW 7.21.030; In re Pers. Restraint of King, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988). Dating from the moment of the oral contempt finding, the State knew what order it was violating, it knew what it had to do to comply with the court's order, and it knew what the penalty would be if it did not. The court rules already sufficiently provide for appellate review. This Court should affirm the sanctions dating from the court's oral ruling finding the State in contempt.

2. THE COURT OF APPEALS CORRECTLY DETERMINED SOVEREIGN IMMUNITY WAS WAIVED AS TO INTEREST ON CONTEMPT SANCTIONS.

Unlike many states and the federal government, Washington law holds that the State's sovereign immunity can be waived by implication even without an express statement of waiver. “[T]he consent to liability for interest ... can be an implied consent, and is not limited to the express statutory or contractual consent, which was required by subsequent cases.” Union Elevator & Warehouse Co. v. State ex rel. Dep't of

Transp., 171 Wn.2d 54, 62–63, 248 P.3d 83 (2011) (quoting Architectural Woods, Inc. v. State, 92 Wn.2d 521, 526, 598 P.2d 1372 (1979)). The Court of Appeals correctly determined that the wholesale relief afforded by the remedial contempt sanctions statute impliedly waives sovereign immunity as to sanctions imposed under that statute.

Courts do not require extreme levels of specificity to find an implied waiver of sovereign immunity. For example, in Architectural Woods, the court held sovereign immunity as to interest was waived by a statute providing that state colleges could contract with private parties. 92 Wn.2d at 527. The provision showed legislative intent that the colleges be bound to the same rights and responsibilities, including interest on debts, as any other party to a contract. Id. at 526-27. In general, an implied waiver can occur when the legislature enacts a statute providing “comprehensive relief to aggrieved claimants.” Union Elevator, 171 Wn.2d at 65 (discussing Smoke v. City of Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997)); see also Architectural Woods, 92 Wn.2d at 527.

The remedial contempt statute, RCW 7.21.030 is designed to provide this type of complete relief. The statute provides for more than one type of relief in a remedial contempt case. The law provides for imprisonment, forfeiture, or “any other remedial sanction.” RCW 7.21.030(2). Specifically, the court may order that a party be compensated

for any losses suffered, “in addition to the remedial sanctions set forth in subsection (2).” RCW 7.21.030(3). These relief provisions are quite broad. The subsection addressing compensatory relief is part and parcel of the broad scope of relief that courts may order in remedial contempt cases. The purpose of RCW 7.21.030’s provision for compensatory sanctions is to “provide complete relief. . . and eliminate the necessity of a second suit.” In re Rapid Settlements, 189 Wn. App. 584, 609-10, 359 P.3d 823 (2015).

Moreover, statutory language providing for attorney fees shows the legislature intended to provide complete relief. Union Elevator, 171 Wn.2d at 64-65. In addition to its broad discretion to impose remedial sanctions and compensate for losses, the remedial sanction statute specifically provides for costs and attorney fees. RCW 7.21.030. Because the remedial contempt statute is intended to provide comprehensive relief, it should be construed as implied waiving sovereign immunity with regards to interest on contempt sanctions.

This is not a case like Union Elevator, where this Court was urged to find a sovereign immunity waiver for one statute based on a grant of comprehensive relief in an entirely different statute located in a different chapter of the RCW. Union Elevator was a case under the Relocation Assistance Act, chapter 8.26 RCW. 171 Wn.2d at 57. This Court held that

the comprehensive relief afforded under chapters 8.04 and 8.28 RCW, dealing with eminent domain actions, did not apply to create an implied waiver of sovereign immunity in an entirely separate part of Washington law. Union Elevator, 171 Wn.2d at 65-68. By contrast, here, the provision affording attorney fees and costs is found in a subsection of the remedial contempt sanctions statute, RCW 7.21.030.

Whether the court specifically awarded compensatory sanctions in this case is entirely immaterial to the question of sovereign immunity. As the Court of Appeals correctly held, the implied waiver of sovereign immunity hinges on the legislative intent behind the statute, not the specific type of relief granted by the court in an individual case. Sims, 1 Wn. App. 2d at 484. Our courts have repeatedly held that implied waiver of sovereign immunity is a question of statutory interpretation. Union Elevator, 171 Wn.2d at 64-65; Locke v. City of Seattle, 162 Wn.2d 474, 480, 172 P.3d 705 (2007); Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). In ferreting out the legislature's intent, the court's inquiry "primarily focuses on the words used in the statute." Union Elevator, 171 Wn.2d at 59-60.

The provisions affording complete relief are found in the plain text of the remedial contempt statute itself. The statute provides for "Any other remedial sanction other than the sanctions specified in (a) through (c) of

this subsection if the court expressly finds that those sanctions would be ineffectual.” RCW 7.21.030(2)(d). “[I]n addition to the remedial sanctions,” the statute further provides compensation for “any losses suffered.” RCW 7.21.030(3). That compensation for loss includes, but is not limited to, “any costs incurred in connection with the contempt proceeding and reasonable attorney’s fees.” RCW 7.21.030(3). This plain language affords complete relief and is, therefore, an implied waiver of sovereign immunity with respect to interest. Union Elevator, 171 Wn.2d at 64-65.

Interest is part and parcel of affording complete relief. This Court has recognized that interest can be inseparable from just compensation because it compensates for the time value of money. See Sintra v. City of Seattle, 131 Wn.2d 640, 656, 935 P.2d 555 (1997). In the regulatory takings context, interest is “a measure of the rate of return on the property owner’s money had there been no delay in payment.” Id. At the time of the regulatory taking, the court assumes the person “has a beneficial use available for these funds.” Id. This is no less true for financial losses incurred due to contempt of court. The time value of lost resources is no less integral to making a party whole.

The remedial contempt statute is a “statutorily created cause of action including attorney fees showing the intent to provide

comprehensive relief.” Union Elevator, 171 Wn.2d at 65 (discussing Smoke, 132 Wn.2d 214). It therefore operates as a waiver of sovereign immunity as to interest. Id. The Court of Appeals was correct to find that sovereign immunity was impliedly waived. This Court should affirm the award of interest on the contempt sanctions.

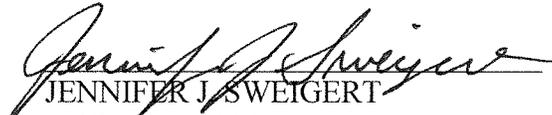
D. CONCLUSION

For the foregoing reasons, Sims and the other respondents request this Court affirm the Court of Appeals’ holding that the sanctions were properly imposed beginning with the date of the oral ruling and sovereign immunity was impliedly waived as to interest.

DATED this 2<sup>nd</sup> day of July, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

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