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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP000387-CR

In the matter of sanctions imposed in
State v. Gregory Nielsen:

STATE OF WISCONSIN,
Plaintiff-Respondent,

STATE OF WISCONSIN COURT OF APPEALS,
Respondent,

v.

GREGORY K. NIELSEN,

Defendant-Appellant-Petitioner.

Review of an Opinion and Order of the District II
Court of Appeals Which Imposed a Monetary Sanction
on the Office of the State Public Defender

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

JOSEPH N. EHMANN
Assistant State Public Defender
State Bar No. 1016411

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8388
ehmannj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

ARGUMENT

I. The Court of Appeals Practice of Imposing a Monetary Sanction Summarily in a Final Opinion and Order Violates Due Process.

The gist of the court of appeals' argument is that providing after-the-fact notice of a judgment and fine for violating a law or rule satisfies due process if there is an opportunity to request reconsideration or to seek discretionary review. The procedure the court advocates runs contrary to the holdings of this court and the United States Supreme Court.

The Fourteenth Amendment to the United States Constitution decrees that no state shall "deprive any person of life, liberty, or property, without due process of law." The due process clause means that the government cannot deprive a person of liberty or property without first providing (1) notice of the charge or basis for the pending deprivation (***Taylor v. Hayes***, 418 U.S. 488, 500 n. 9, 94 S. Ct. 2697, 41 L. Ed.2d 897 (1974)), and (2) an opportunity to be heard in a meaningful way before a ruling is made. ***Goldberg v. Kelly***, 397 U.S. 254, 264, 90 S. Ct. 1011, 25 L. Ed.2d 287 (1970). The Court has stated that "'[t]he root requirement' of the Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest." ***Cleveland Board of Education v. Loudermill***, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed.2d 494 (1985).

The court of appeals argues that knowledge that a law or rule exists satisfies due process "notice." (Court's brief p. 11). But this contradicts the Supreme Court's view that "[n]o principle of due process is more clearly established than

that of notice of the specific charge, and a chance to be heard" on "the issues raised by that charge." ***Cole v. Arkansas***, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948); *also see* ***Taylor v. Hayes***, 418 U.S. at 500 n. 9, (1974)("a contemnor is entitled to elementary due process protections of 'reasonable notice of specific charges and opportunity to be heard on his own behalf.'"). It is notice of the charge, not notice of the rule or law, that is required and here there was no prejudgment notice—the court announced the charge at the same time it announced its ruling and penalty.

The court of appeals' argument that a motion to reconsider or a discretionary appeal to this court satisfies due process lacks legal support. (Court's brief pp. 2-3, 13). The Supreme Court has ruled "where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation…remedy." ***Zinermon v. Burch***, 494 U.S. 113, 132, 110 S. Ct. 975, 108 L. Ed.2d 100 (1990). Limited exceptions (e.g. where a prisoner's property is "taken" inadvertently or for truly de minimus action such as corporal punishment of a junior high student) do not apply here. ***Id.*** 494 U.S. at 128.

While the court of appeals argues that a predisposition hearing here would have inconvenienced the court, there can be no dispute that such a hearing would have been feasible. The court falsely asserts that the SPD is arguing that the process required in attorney sanctions cases "is analogous to the full weight of criminal justice protections." (Court's brief p. 15, n. 6). Actually, the SPD agrees there is no requirement or need for jury trials in these matters; but there is a due process requirement and need for both prejudgment notice and a meaningful hearing.

The SPD fully agrees that the type of process required depends upon the nature of the case. If the court of appeals alleges a simple appendix-content rules violation, the issuance of an order to show cause with an opportunity to respond before a judgment is rendered would in most cases satisfy due process. But if the court, as it does routinely, couples its appendix content charge with an allegation based on SCR 20:3.3 Candor to the tribunal or other Rules of Professional Conduct, more process is required. *See* SPD's brief, Issue III.

The court of appeals makes two curious assertions in its due process argument. First, the court argues that due process can be curtailed because "the issue presented here concerns rules applicable only to appellate lawyers, not to their clients or pro se parties." (Court's brief p. 16). Second, the court states that the "method by which the court of appeals has enforced and applied those rules is…to set a 30-day deadline for payment" which is "within…the 20-day window to file a motion for reconsideration, as well as the 30-day window for filing a petition for review." *Id.*

The court does not explain why less process would be due lawyers than pro se litigants or clients but, more fundamentally, the court is wrong in its claim that the rules apply only to lawyers. It is well established that "[*p*]*ro se* appellants…are bound by the same rules that apply to appellate attorneys on appeal." ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Perhaps, because of its reference to "counsel," the certification aspect of the appendix rule may not apply to pro se appellants, but the appendix content aspect of the rule certainly does. The court of appeals routinely invokes sanctions language in pro se cases for rules infractions as serious as failing to fully develop arguments or as minor as failure to provide pinpoint

cites or have a proper table of contents.[1] And, as we know, lawyers and judges do not surrender their constitutional rights by virtue of engaging in their chosen profession.

The court of appeals' statement that the "method" by which it has enforced rules violations is to "provide a 30-day deadline for payment" is false. While the court here provided a 30-day deadline, there is no 30-day rule and 30 days has not been the court's "method." Often the court provides far less time to pay.[2] But, as established above, allowing time for after-the-fact litigation does not satisfy due process. *See* ***Goldberg v. Kelly***, ***Id.***

Conspicuously absent from the court's due process argument is any mention of ***Anderson v. Circuit Court for Milwaukee County*****,** 219 Wis. 2d 1, 568 N.W.2d 653 (1998),

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[1] *See e.g.*, ***Haugen v. Hansen***, 2010AP115 (Pro se litigant's issue forfeited for, among other reasons, failure "to comply with rules of appellate procedure and provide a table of contents with page numbers…."); ***LeDuc v. Hayes***, 2010 WI App 159 (Pro se litigant's "citations to legal authority often lack pinpoint citations. Further violation of the rules may subject her to sanctions."); ***Renneke v. Florence Util. Comm'n***, 2011 WI App 1 (Pro se appellant admonished "offensive writings will not be tolerated and may result in imposition of sanctions."); ***Slocum v. Rivard***, 2009 WI App 141 ("attorneys fees and costs" imposed on pro se appellant for violating court rule regarding frivolous appeals.).

[2] *See e.g.*, ***State v. Rickard***, 2010 WI App 135, ¶ 2 n. 2 ("Counsel shall pay the [appendix rules violation] fine within fourteen days of the date of this opinion."); ***State v. Voeller***, 2010 WI App 120, ¶ 9 n. 3 ("The state shall pay the $150 sanction within fourteen days of this opinion."); ***State v. Wendel***, 2007 WI App 183, ¶ 18 (appendix sanction shall be paid within "fourteen days of this opinion."); and ***Keller v. Gaszek***, 2011 WI App 19, ¶ 8 n. 5 (sanction for failure to provide pin cites, use "Bluebook" citation form and arrange cases in table of cases alphabetically to be paid "within fourteen days.").

which contains this court's most full expression of what process is due in court sanctions matters. ***Anderson*** affirms that there must be notice and an opportunity to be heard before a rules violation is found and a sanction imposed. ***Anderson*** requires that a record be made and the court must "give the attorney an opportunity to explain his or her [conduct]" and must address with specificity the impact of the supposed violation on the court. ***Id.*** at ¶ 24. This court ruled that the failure to make this record and to "delineate the factors" that would justify the monetary sanction constitute "an erroneous exercise of discretion." ***Id.*** at ¶ 26.

Here the court made no record. There was no opportunity for Mr. Nielsen's attorney or the SPD to be heard prior to the court's ruling. Consequently, while the SPD believes there has been objective compliance with § 809.19(2), we cannot know what Mr. Nielsen's attorney believed or intended because she was not permitted an opportunity to be heard.

As for the requirement that the court "delineate the factors" to justify a fine, the court here offered no explanation beyond a bare claim of "an unwarranted burden." What that "burden" was is unknown. The information the court deemed missing from the appendix was referenced and explained in the body of Mr. Nielsen's brief. Much like the court's failure in ***Anderson*** to explain how an eight-minute delay warranted or "cost" $50, the court here did not make a record of how what it claimed was missing "cost" the court $150 or caused it to not "understand" the issue.

The court of appeals' brief confuses the court's explanation of its sentencing decision with an explanation of its sanctions decision. (Court's brief pp. 30-31). Given the relevant standard of review, Mr. Nielsen did not appeal the

sentencing ruling to this court. The court of appeals offered no meaningful explanation of its sanctions ruling and its imposition of a sanction based upon its ubiquitous claim of an "unwarranted" but unspecified "burden" is tantamount to the creating-a-culture argument rejected in ***Anderson***. And, as in ***Anderson***, the court's failure here to make a proper record explaining its ruling constitutes an erroneous exercise of discretion.

It is noteworthy that the cases the court of appeals cites in support of its "reduced" due process argument all involved process far greater than that provided here or resulted in rulings that due process was violated. *See* ***Neylan v. Vorwald***, 124 Wis. 2d 85 (1985)(Due process violated because no notice or opportunity to be heard); ***State v. Nordness***, 128 Wis. 2d 15 (1986)(Due process not violated because there was written notice and a predeprivation hearing); ***DeSilva v. DiLionardi***, 181 F.3d 865, 867 n. † (7th Cir. 1999)(Court giving attorney "14 days to show cause why sanctions should not be imposed" satisfied due process); ***Devaney v. Cont'l Am. Ins. Co.***, 989 F.2d 1154 (11th Cir. 1993)(Due process satisfied where motions, briefing, hearings, and written findings occurred before rules violation decided and sanction imposed).

Application of the facts and circumstances in the present case to the three-factor due process analysis the court cites from ***State v. Nordness***, ***Id.*** establishes that due process was violated here. (Court's brief p. 11). The first factor focuses on "the duration of any wrongful deprivation." ***State v. Nordness***, ***Id.***, p. 31. Here, the attorney is stripped of his or her money before any process occurs and unless the money is returned the deprivation is permanent. (SPD's brief p. 15).

The court's argument on the second factor, risk of an erroneous deprivation through the procedures used, is puzzling. The court's attorney states that "the value of any additional procedure is unlikely to reduce the already low risk of erroneous deprivation." (Court's brief p. 12). Risk is inherently elevated when a court takes action on a matter without notice to and input from the persons or parties affected. It is unlikely that the court would deem itself as infallible as its attorney apparently does and the SPD, as noted in its opening brief, has a more optimistic view of the court's willingness to listen to reason and apply the law.

But it is the court's argument regarding the third factor that most confounds. The court avers that because "additional procedures would consume more court time and funds, and provide no benefit in the majority of cases," no additional process is required. (Court's brief p. 18). Abrogating basic constitutional rights on the basis that doing so would not affect the outcome in the "majority" of cases is an argument truly without precedent.

There is no doubt that compliance with due process by means of an order-to-show-cause or some other prejudgment hearing will place some additional burden on the court. But the court's argument regarding a supposedly heavy burden is undermined by its acknowledgement that sanctions cases are "rare" and by the fact that it does comply with due process in some cases (Court's brief pp. 2, 7).[3] And, the court of

[3] The court's "best approximation" of cases claim is based on the sampling of cases in the SPD's appendix, not on complete data. A few minutes on LEXIS reveals other cases such as ***State v. Shunda P.***, 2006 WI App 244, ¶ 12, 297 Wis. 2d 586 (Appellant's attorney "shall, within fifteen days of the date this opinion is filed, file with the clerk of the court a letter explaining why sanctions should not be imposed" for violating brief appendix rules).

appeals ignores the burden that resolution by petition for review and appeal to this court would place on the Supreme Court.

The court of appeals seems to attempt to trivialize these sanctions matters, repeatedly referring to its punitive sanctions as "modest costs," and it in essence mocks the SPD's position as "[c]olorful rhetoric." (Court's brief p. 15) But this court more than 100 years ago got it right in ***State ex rel. Attorney General v. Circuit Court for Eau Claire County***, 97 Wis. 1, 12, 72 N.W. 193 (1897), when it cautioned that because of the awesome power courts possess, great care must be taken where the court perceives itself to be the aggrieved party and "becomes the accuser, judge, and jury." This court reaffirmed this principle in ***Anderson v. Circuit Court for Milwaukee County*****,** 219 Wis. 2d 1, 568 N.W.2d 653 (1998).

It is not colorful rhetoric, but adherence to the fundamental right of due process of law that should carry the day here. But to sum up on more colorful note, stated bluntly, if a court is unwilling to take the time, it should not impose a fine.

II. The Provisions of Wis. Stat. (Rule) §§ 809.19(2)(a) & (b) Are Insufficiently Definite to Provide Fair Notice of the Conduct Required Leading to Their *Ad Hoc* or Arbitrary Application. As a Result, the Rules Are Unconstitutionally Vague.

The court of appeals makes repeated reference to the appendix rule being "thoughtful" and "concise" but offers no thoughts or analysis in support of its claims. (Court's brief pp. 2, 8, 20). The court offers no analysis referencing the actual words of the rule and it conspicuously ignores its seminal case interpreting the rule, ***State v. Bons***, 2007 WI App 124,

301 Wis. 2d 227, and ***Bons*** reference to the more seemingly concrete aspects of the rule being meaningless.

The court states that the rule was "designed to provide…the entirety" of transcripts or rulings (Court's brief p. 25), but ignores that the rule states "limited portions" are all that is required. The court's attorney by example states if a plea is challenged the "full plea hearing transcript" must be included. *Id.* p. 24. The rule does not require this and criminal practitioners know that if a plea colloquy is challenged, the rule is satisfied by providing the transcript of the colloquy.

The court states that the SPD "mistakes discretion for subjectivity." (Court's brief p. 22). Actually, it is the court that mistakes discretionary application of the rule for arbitrary application. That the vagueness of the rule has lead to its arbitrary application is demonstrated by comparison of this case to ***State v. Knaus***, 2009 WI App 128, as explained in the SPD's brief at pp. 21-22.

The court's attorney faults the SPD for not providing the sentencing transcript or appendix from ***Knaus***, documents in her client's possession. The documents are not part of the record in this case. Mr. Nielsen's attorney could have added them had the court afforded her an opportunity to be heard. But, since the brief is a public document and the court can take judicial notice of court transcripts, ***State v. Watson***, 227 Wis. 2d 167, 595 N.W.2d 403 (1999), the ***Knaus*** sentencing transcript, including the sentencing judge's seven pages of remarks and the single transcript page from the brief, are provided in the appendix to this brief.

III. The Court's Summary Imposition of a Sanction for What It Perceives to Be a Violation of the Rules of Professional Conduct Violates Due Process and Impermissibly Circumvents or Supplants the Procedure Established by This Court through Its Creation of the Office of Lawyer Regulation.

The court's claim that the SPD is trying to "preemptively muzzle" the court is wrong. (Court's brief p. 29). The court of appeals is free to impose sanctions for procedural rules violations if it adheres to the requirements of due process. And, the court of appeals is free to reference rules of professional conduct to criticize or instruct and it can cite SCR 20 to make rulings on an issue or case. But the court of appeals is not authorized to impose sanctions for SCR 20 violations; that is the province of OLR and this court.

This point is clarified by ***Foley-Ciccantelli v. Bishop's Condo Ass'n.***, 2011 WI 36, ¶ 2, which states that violations of the Code of Professional Conduct are determined only by means of disciplinary action through the Office of Lawyer Regulation.

Morphing a procedural rule violation into a SCR 20:3.3 candor violation makes the matter a Code of Professional Conduct disciplinary proceeding which, pursuant to SCR 60.04(3)(b), the court of appeals must refer to OLR.

IV. Mr. Nielsen's Brief Fully Complied with the Requirements of Rule 809.19(2) and Did Not Contain a "False" Certification.

Mr. Nielsen's attorney provided in the appendix to her brief what the rule required and she signed an accurate certification. As the court under identical circumstances in ***State v. Knaus***, found no error, there was no error here.

Dated this 21st day of June, 2011.

Respectfully submitted,

JOSEPH N. EHMANN
Assistant State Public Defender
State Bar No. 1016411

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8388
ehmannj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,999 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of June, 2011.

Signed:

JOSEPH N. EHMANN
Assistant State Public Defender
State Bar No. 1016411

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8388
ehmannj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page