

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP002359

In re the Finding of Contempt in:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAFIA M. JONES,

Defendant-Appellant.

On Notice of Appeal from an Order for Contempt Entered on
November 10, 2017 in Fond du Lac County Circuit Court,
the Honorable Robert J. Wirtz, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Was Ms. Jones' choice not to sign her bond form, when ordered to do so, contempt of court, and if so, did the circuit court properly use the summary contempt procedure?

The circuit court summarily found Ms. Jones to be in contempt of court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested in this case.

STATEMENT OF THE FACTS AND CASE

On October 10, 2017, the State charged Shafia M. Jones with one count of battery by prisoner, as a repeater, contrary to Wis. Stats. §§ 940.20(1), 939.50(3)(h) and 939.62(1)(b), in Fond du Lac County Case 2017-CF-581. (1).

An initial appearance was held before the Honorable Gary R. Sharpe on October 24, 2017. (32). Ms. Jones appeared at that hearing, *pro se*, by videoconference from Taycheedah. (32). The state, noting that Ms. Jones was in custody, requested a \$1,000 signature bond with a no contact provision. (32:3). Ms. Jones objected, stating she wanted "a low cash bail." (32:4). The court proceeded to order a \$1,000 signature bond. (32:4).

On November 10, 2017, Ms. Jones appeared before the Honorable Robert J. Wirtz for a preliminary hearing. (33; App. 102-106). The court noted that the bond form was never signed and had the clerk provide it to Ms. Jones, stating “she needs to sign that.” (33:3-4; App. 102-103).

Defense counsel informed the court that Ms. Jones was “declining to sign the bond.” (33:4; App. 103). The court asked the state for its position and the following exchange occurred:

THE COURT: Well, then, either she’s on no bond or the Court will order her to sign the bond, she’ll be in contempt of court for failing to abide by the Court’s order to sign the bond.

MR. BORSHEIM: Then I would request that you go forward with the order.

THE COURT: Any particular reason, Mr. Borkowicz, as to why your client is refusing to sign the bond, other than mere obstreperousness?

MR. BORKOWICZ: Other than what? I’m sorry, I didn’t hear you.

THE COURT: Mere obstreperousness.

THE DEFENDANT: Well, the reason I refuses (sic) to sign the bond, Your Honor, is because a signature bond does me no justice. I ask for a minimum cash bail and I’m not in agreeance (sic) with the signature bond.

THE COURT: Well, I understand your legal argument and you have the right, through your lawyer, to petition for anything that is appropriate, the Court will hear whatever argument you want to make about bond, but the fact that you disagree with the decision that was made by someone is an insufficient reason for refusal.

So, I'm going to order you to sign the bond or I'll hold you in contempt of court.

THE DEFENDANT: I'll take contempt, Your Honor.

(33:4-5; App. 103-104). The court and defense counsel then discussed alternative ways to impose a no contact order before the court turned to Ms. Jones:

THE COURT: Anything you wish to say, Ms. Jones? You've violated the Court's order to sign the bond form, which is required in all cases, and you've impeded the authority and the decorum of the court today at about 9:40, while we're conducting this preliminary hearing or about to. Anything you want to say in response to the finding of contempt?

THE DEFENDANT: I've said enough, Your Honor.

THE COURT: Court orders an additional 30 days time, consecutive to any other time, for contempt of court for failure to sign the bond.

(33:5-6; App. 104-105).

A written contempt order was entered that same day. (13; App. 101). In the order, the court found that Ms. Jones "impugned the decorum and the dignity and good order of the Court by appearing before the Court and refusing the Court's Order to sign the Bail/Bond Form." (13; App. 101).

This appeal follows.

ARGUMENT

The Court's Finding of Contempt and Subsequent Sentence Must Be Vacated As Ms. Jones' Actions Did Not Fall Within the Definition of Contempt of Court and the Court's Use of the Summary Contempt Procedure Was Improper.

The circuit court's summary finding of contempt against Ms. Jones was contrary to the great weight and clear preponderance of the evidence. Ms. Jones did not commit contempt of court when she chose not to sign the bond form in this case. The circuit court could not require her to agree to conditions of release by forcing her to sign the bond. Moreover, Ms. Jones' choice was not disruptive and did not interfere with the court proceedings or administration of justice. Additionally, the circuit court's use of the summary contempt procedure was inappropriate as Ms. Jones' behavior did not necessitate an immediate sanction to preserve order in the courtroom or protect the authority and dignity of the court. Consequently, the circuit court's finding of contempt and 30 day jail sentence must be vacated.

Section 785.01(1) of the Wisconsin Statutes provides the definition of "contempt of court." Wis. Stat. § 785.01(1). As relevant to this case, contempt of court includes intentional "[d]isobedience, resistance or obstruction of the authority, process or order of a court." Wis. Stat. § 785.01(1)(b).¹ The statutes provide for summary and

¹ Under Wis. Stat. § 785.01(1) "contempt of court" also includes intentional:

- (a) Misconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court;

nonsummary procedures through which a court may impose either remedial or punitive sanctions after finding that a contempt of court was committed. Wis. Stat. §§ 785.02, 785.03.

Under the summary contempt procedure, a judge “may impose a punitive sanction upon a person who commits contempt of court in the actual presence of the court.” Wis. Stat. § 785.03(2). The Wisconsin Supreme Court has clarified that the summary contempt procedure may only be used if all of the following circumstances are present:

- (1) the contumacious act must have been committed in the actual presence of the court;
- (2) the sanction must be imposed for the purpose of preserving order in the court;
- (3) the sanction must be imposed for the purpose of protecting the authority and dignity of the court; and
- (4) the sanction must be imposed immediately after the contempt.

Matter of Finding of Contempt in State v. Kruse, 194 Wis. 2d 418, 429-30, 533 N.W.2d 819 (1995)(citing ***Gower v. Marinette County Circ. Court***, 154 Wis. 2d 1, 10-11, 452 N.W.2d 355 (1990)).

...

- (bm) Violation of any provision of s. 767.117(1);
- (br) Violation of an order under s. 813.1285(4)(b)2.;
- (c) Refusal as a witness to appear, be sworn or answer a question; or
- (d) Refusal to produce a record, document or other object.

As summary contempt is meant to preserve order in the court and to protect the authority and dignity of the court, it is only to be used when there is a compelling reason for immediate punishment related to those purposes. **Kruse**, 194 Wis. 2d at 437-38 (Abrahamson J., concurring).

Whether an act or remark constitutes contempt of court is a finding of fact that this court reviews under the clearly erroneous standard. **Kruse**, 194 Wis. 2d at 427-28. However, whether the circuit court used the proper contempt procedure is a question of law that this court reviews de novo. **Id.** at 429; **Currie v. Schwalbach**, 139 Wis. 2d 544, 552, 407 N.W.2d 862 (1987).

- A. The circuit court's finding that Ms. Jones committed contempt of court by choosing not to sign the bond form was clearly erroneous.

Contrary to the circuit court's assertion, a bond form is not required in every criminal case and Ms. Jones could not be required to sign the signature bond in this case. As Ms. Jones was not required to sign the bond form in her case, her decision not to do so does not constitute contempt of court. Ms. Jones did not disobey, obstruct, or resist the authority or process of the court; she simply exercised her right not to sign the signature bond. Moreover, Ms. Jones' words and actions were not disruptive, rude, or disrespectful and did not interfere with the court proceedings or administration of justice. Accordingly, the circuit court's finding of contempt is contrary to the great weight and clear preponderance of the evidence and the contempt order must be vacated.

The circuit court found that Ms. Jones committed contempt of court when she chose not to sign the bond form. (13; 33:6; App. 101, 105). Specifically, in making this finding, the circuit court informed Ms. Jones:

You've violated the Court's order to sign the bond form, which is required in all cases, and you've impeded the authority and the decorum of the court today at about 9:40 while we're conducting this preliminary hearing or about to.

(33:6; App. 105). While Ms. Jones did choose not to sign the signature bond, the record is void of any facts to support the circuit court's finding that such a choice was intentional "[d]isobedience, resistance or obstruction of the authority, process or order of a court." Wis. Stat. § 785.01(1)(b).

First, the circuit court never specifically ordered Ms. Jones to sign the bond form. The court stated, "I'm going to order you to sign the bond or I'll hold you in contempt of court." (33:5; App. 104). The court essentially gave Ms. Jones a warning that it was planning to order her to sign the bond and would find her in contempt if she refused. But the circuit court never actually said, "I am ordering you to sign the bond" or any other words to that effect. Rather, in response to the court's warning, Ms. Jones reiterated that she was not going to sign the bond, which caused the circuit court to proceed with summary contempt. (33:5-6; App. 104-105).

Second, even if the circuit court had explicitly ordered Ms. Jones to sign the bond, it did not have the authority to do so and Ms. Jones' decision not to comply with such an order does not constitute contempt of court. Ms. Jones had a right to choose not to sign her bond and remain in custody throughout the proceedings in this case. *See State v. Wilcenski*, 2013 WI App 21, ¶18, 346 Wis. 2d 145, 827 N.W.2d 642; *State v.*

Dewitt, 2008 WI App 134, ¶17, 313 Wis. 2d 794, 758 N.W.2d 201. The circuit court could not compel her to agree to comply with the terms of the signature bond.

With some exceptions, “a defendant arrested for a criminal offense is eligible for release under reasonable conditions designed to assure his or her appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses.” Wis. Stat. § 969.01(1). Specifically, in felony cases, the court may release a defendant in one of three ways: 1) without bail; 2) upon the execution of an unsecured appearance bond; or 3) in addition to the execution of an appearance bond, or in lieu thereof, upon the imposition of specific conditions, such as a cash deposit. Wis. Stat. § 969.03(1); *See State v. Dawson*, 195 Wis. 2d 161, 169, 536 N.W.2d 119 (Ct. App. 1995)(discussing the methods which the Legislature provided to courts to release misdemeanants).

A defendant may be released, or under some circumstances held, without bail or bond. “Bond” is defined as “an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein.” Wis. Stat. § 967.02(1h). This court has recognized that in this context, “undertaking” means a “promise, engagement, or stipulation.” *Dawson*, 195 Wis. 2d at 169. Thus, a signature bond, such as the one the circuit court ordered in this case, if signed by Ms. Jones, would represent her promise to comply with the conditions set forth therein.

There is no legal requirement that a defendant sign a bond if, under Wis. Stat. § 969.03(1), the court decides to grant the defendant release upon execution of an unsecured appearance bond. Signing a bond has significant implications

for a defendant. A defendant is deemed released from custody upon the “posting” of a bond, whether signature or cash. *State v. Dewitt*, 2008 WI App 134, ¶14, 313 Wis. 2d 794, 748 N.W.2d 201. By signing the bond, therefore, Ms. Jones would have been binding herself to its conditions, regardless of whether she was physically released from custody. *Id.* This, in turn, would subject Ms. Jones to potential bail jumping charges and deprive her of any sentence credit she may otherwise be eligible for. *See* Wis. Stats. §§ 946.49, 973.155. The circuit court cannot force defendants to subject themselves to those potential consequences.

In *State v. Dewitt*, this court held that a defendant who signed his signature bond was subject to the provisions of the bail jumping statute even though he remained in custody on other charges. *Dewitt*, 2008 WI App 134. The defendant in that case had a misdemeanor and two felony cases pending at the same time. *Id.* ¶2. The circuit court held a bond hearing on all three cases, ordering a signature bond on the misdemeanor case and cash bonds on each of the felony cases. *Id.* ¶3. The defendant signed the signature bond, but remained in custody as he was unable to post the cash on the felony cases. *Id.* While in the jail, the defendant made phone calls to an individual he was prohibited from contacting under the conditions of the signature bond, resulting in nine counts of bail jumping. *Id.* ¶4.

This court found that the bail jumping charges in *Dewitt* were proper because the defendant had been released for purposes of the bail jumping statute when he signed the signature bond. *Id.* ¶¶14, 17. Specifically, this court stated:

Here, Dewitt had three bonds. He was able to make bond on the misdemeanor simply by signing it, and he therefore committed himself to its conditions. *Dewitt*

was not obligated to sign the bond, especially if he knew he would not be posting cash bond.

Id. ¶17 (*emphasis added*).

Similarly, in ***State v. Wilcenski***, this court stated that the defendant “had *the right* to decline [the conditions of release] and await his trial in the confines of the county jail.” ***Wilcenski***, 2013 WI App 21, ¶18 (*emphasis added*). In that case, the defendant challenged the constitutionality of the circuit court’s pretrial treatment court and the conditions of release that were ordered. ***Id.*** ¶¶1-3. The circuit court had ordered the defendant “to participate in treatment or report to the jail.” ***Id.*** ¶1. The defendant declined to agree with that condition of release and reported to the jail, which this court found he had a right to do. ***Id.*** ¶1, 18.

As this court has found that a defendant has a right to refuse to agree to conditions of release and await trial in custody, such a defendant cannot be held in contempt of court for not following a court’s order to sign a bond form. Ms. Jones had a right to choose not to sign the bond form in this case. The circuit court could not force Ms. Jones to enter into a promise to comply with the conditions of release and subject her to bail jumping charges if she failed to so.

The record reveals nothing about Ms. Jones’ choice not to sign the bond that could reasonably be viewed as contempt of court. Ms. Jones appeared before the circuit court for a preliminary hearing. Before the preliminary hearing began, however, the court had the clerk provide Ms. Jones with a bond form stating “she needs to sign it.” (33:3; App. 102). Ms. Jones then declined to sign it. (33:4; App. 103). When asked why, Ms. Jones simply explained to the judge that she felt a signature bond did her “no justice,” and that she was requesting a cash bail. (33:5; App. 104).

Ms. Jones was neither rude nor disrespectful to the court in her explanation. Further, her decision not to sign the bond did not disrupt the court proceedings as the state's witness for the preliminary hearing was not yet present and did not arrive for another 18 minutes. (33:4-7; App. 103-106).

The circuit court's finding of contempt of court was clearly erroneous and, accordingly, the contempt order and 30 day sentence must be vacated.

- B. Ms. Jones' decision not to sign the bond did not present compelling circumstances which required immediate punishment in order to preserve order and protect the court's authority and dignity. Accordingly, the circuit court's use of summary contempt proceedings was improper.

Assuming without conceding, that Ms. Jones committed contempt of court by choosing not to sign the bond form, the finding of contempt must still be vacated as the circuit court proceeded under the wrong provision of the contempt statute. Ms. Jones' decision not to sign the signature bond did not present a compelling circumstance requiring immediate punishment.

Summary contempt is a drastic procedure to be used in limited circumstances. *See Appeal of Cichon*, 227 Wis. 62, 68, 278 N.W. 1, 4 (1938). It is intended to address "substantial and not trivial offenses." *Id.* Summary contempt is to be used "only when compelling circumstances require immediate punishment" in order to preserve order and protect the authority and dignity of the court. *Kruse*, 194 Wis. 2d at 429-30, 437.

Ms. Jones' choice not to sign the bond form did not create an emergency situation requiring immediate punishment. Although the circuit court found that Ms. Jones' actions "impeded the authority and the decorum of the court," and "impunged the decorum and the dignity and good order of the Court," there is nothing in the record that supports these conclusions. (13; 33:6; App. 101, 105). The court made no findings other than that Ms. Jones declined to sign the bond form. That alone is not sufficient to support a finding that Ms. Jones' choice threatened or impaired the authority and dignity of the court. Further, the record demonstrates that Ms. Jones did not disrupt any proceedings. The State was not prepared to proceed with the preliminary hearing at the time the court convened and, in fact, the hearing did not begin for another 18 minutes after Ms. Jones was found in contempt. (33:7; App. 106). Consequently, the circumstances did not require immediate punishment and the circuit court's use of the summary contempt procedure was improper.

Immediate punishment of Ms. Jones' decision not to sign the bond form was not necessary to preserve order in the courtroom. The Wisconsin Supreme Court has "construed the 'preserving order' requirement to include even a single contumacious act or remark, which, irrespective of its content or purpose, is disruptive of courtroom order." *Kruse*, 194 Wis. 2d at 432. There need not be an "ongoing state of disorder," rather, "[i]t is the intent, content, and effect of the contumacious behavior, not its frequency, that is relevant." *Id.* (quoting *State v. Dewerth*, 139 Wis. 2d 544, 555, 407 N.W.2d 862 (1987)).

In *Matter of Finding of Contempt in State v. Kruse*, the Wisconsin Supreme Court upheld the circuit court's summary finding of contempt against an attorney who uttered the word "ridiculous" to her client after the court imposed its

sentence and while court was still in session. *Kruse*, 194 Wis. 2d 418, 533 N.W.2d 819 (1995). The Supreme Court relied upon the circuit court’s findings to conclude that, in the circuit court’s view, “the remark was disruptive and that it impaired the respect due the court.” *Id.* at 433. The *Kruse* court held,

that a disruptive remark which denigrates and impairs the respect due the court, and which is uttered, as here, in the presence of the court, satisfies the “preserving order” requirement, which, as we have previously held, requires no ongoing disturbance per se.

Id. at 433. Unlike the attorney in *Kruse*, Ms. Jones did not make any remarks which impaired the respect due to the court. Moreover, the circuit court made no findings that demonstrate that Ms. Jones’ choice not to sign the bond was otherwise disruptive.

The record lacks any support for a finding that Ms. Jones’ conduct was disrespectful and that immediate punishment was required. There is nothing in the record to indicate that Ms. Jones was loud or used a disrespectful tone with the circuit court. Furthermore, Ms. Jones’ interaction with the circuit court was polite. She succinctly explained her position – that she was not going to sign the signature bond because it would not benefit her and that she was requesting a cash bail. (33:5; App. 104). She did not swear or use demeaning language. The usual triggers for summary contempt – verbal outbursts and disparaging non-verbal gestures – were not present here.² Ms. Jones simply explained why she did not agree with the signature bond.

² See *State v. Lemmons*, 148 Wis. 2d 740, 743, 437 N.W.2d 224 (1989)(standing and exclaiming, “oh shit,” to the jury during the state’s closing argument); *State v. Van Laarhoven*, 90 Wis. 2d 67, 69,

Furthermore, in contrast to other cases in which summary contempt was deemed appropriate to preserve order in the courtroom, the preliminary hearing in this case was not postponed or even delayed due to Ms. Jones' choice not to sign her bond. *See Matter of Findings of Contempt in State v. Shepard*, 189 Wis. 2d 279, 289, 525 N.W.2d 764 (Ct. App. 1994)(defendant's voluntary intoxication at plea hearing was disruptive. "It required the proceeding to be rescheduled, thereby interfering with a court proceeding and with the administration of justice."); *See also Currie v. Schwalbach*, 139 Wis. 2d 544, 407 N.W.2d 862 (1987)(summary contempt was proper when member of voir dire panel stated, "I hope they hang you," to the defendant after being excused. As a result of the statement, the jury panel was dismissed and the trial was rescheduled). Rather, after the court's finding of contempt, a recess was taken so that the state could find its witness. (33:4, 7; App. 103, 106). The preliminary hearing then proceeded as scheduled. (33:7; App. 106).

Ms. Jones' choice not to sign the bond form in this case was not disruptive, and her explanation for her decision was not rude, disrespectful or demeaning to the circuit court. Accordingly, immediate punishment of her decision not to sign the bond form was not necessary to preserve order in the court. As that requirement was not met, the circuit court's use of the summary contempt procedure was improper and the finding of contempt and sentence must be vacated.

279 N.W.2d 488 (Ct. App. 1979)(calling the jurors "stupid" and using an "obscene gesture").

CONCLUSION

Ms. Jones could not be required to sign the bond in this case and she politely declined to do so. Her choice did not constitute contempt of court. Moreover, even if the circuit court properly found that Ms. Jones' decision not to sign the bond from was contemptuous, it improperly used the summary contempt procedure. For those reasons, Ms. Jones respectfully requests that this court vacate the circuit court's contempt order and sanction.

Dated this 28th day of February, 2018.

Respectfully submitted,

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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 3,769 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 28th day of February, 2018.

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of February, 2018.

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