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STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT III

Case No. 2020AP000233

In re the finding of contempt in:
STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAMONDO D. TURRUBIATES,

Defendant-Appellant.

On Appeal from an Order Entered in the Dunn
County Circuit Court, the Honorable Rod W.
Smeltzer Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Whether the circuit court's June 3, 2019, order compelling Mr. Turrubiates to disclose his cell phone passcode to police and imprisoning him as a remedial contempt sanction is erroneous and must be vacated.

The circuit court answered: The court entered the order.

This Court should answer: The order is erroneous and must be vacated.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The briefs should adequately address the issue presented, and the appeal involves application of established legal principles to the facts of the case.

STATEMENT OF THE CASE AND FACTS

Police interviewed Mr. Turrubiates about an alleged assault, and then arrested him and seized his cell phone. The State subsequently filed a criminal complaint against Mr. Turrubiates. The circuit court ordered a signature bond in January 2019.

On February 13, 2019, the State filed a motion in the circuit court requesting an order compelling

Mr. Turrubiates to disclose the passcode to his cell phone. (17; App. 101-104). The State conceded that the order would implicate Mr. Turrubiates' Fifth Amendment rights; however, it relied on foreign case law to argue that compulsion was warranted. (17:1-4; App. 101-104). The State did not apply for, or obtain, a search warrant for the cell phone prior to filing the motion to compel Mr. Turrubiates to disclose the cell phone's passcode.

On May 24, 2019, the circuit court held a hearing. It was a joint preliminary hearing and hearing on the State's motion to compel. Officer Zeroth testified about the alleged victim H.E.'s complaint and his interview of Mr. Turrubiates. (51:5-9; App. 109-113). According to Off. Zeroth, Mr. Turrubiates maintained he was in fact the victim and showed Off. Zeroth a video on his cell phone he indicated supported his side of the story. Off. Zeroth testified that the video showed H.E. unclothed in the back seat of a car, trying to grab the phone. (51:9; App. 113). No sexual contact was depicted. (51:13; App. 117). Off. Zeroth testified that Mr. Turrubiates told him there were other videos on the phone of H.E. acting crazy. H.E. told Off. Zeroth Mr. Turrubiates took videos of her after "incidents" to make her look crazy. (51:15; App. 119). Off. Zeroth did not have an expectation of what those videos would show. (*Id.*). Off. Zeroth arrested Mr. Turrubiates and seized his cell phone. However, police were unable to get back into the phone because it was passcode protected. (51:9-10; App. 113-114).

After the court granted bindover, it turned its attention to the State's motion to compel. (51:16; App. 120). Mr. Turrubiates opposed the motion. (51:17-19; App. 121-123). The court ruled:

Here is what the Court sees. Based on what the inference could be drawn what's on that phone and nobody is disputing it at least at this time -- or at this point your client has it. The victim certainly hasn't. We've got a lady that's sitting around nude in the middle of winter in a car and there's a sexual assault from the same time frame, I think part of that could be circumstantial evidence that's tied to criminal behavior. So I'm going to order that he turn the password over to the State so that they can access that phone.

(51:20-21; App. 124-25).

The court ordered Mr. Turrubiates to turn over the passcode immediately. After a brief recess, Mr. Turrubiates advised he "will not be providing the password to law enforcement today." The State asked the court to hold Mr. Turrubiates in contempt and asked for a 30-day sanction. The court granted the State's request to hold Mr. Turrubiates in contempt, but instead of a 30-day sanction, ordered: "you're going to remain in the custody of the Dunn County Jail until it's provided." (51:22; App. 126). The State indicated it had sent the phone to Madison so a "forensic team" could attempt to enter the phone. The court also ordered Mr. Turrubiates to pay the cost of that attempt. (*Id.*).

On June 3, 2019, the court entered a written order compelling Mr. Turrubiates to turn over his passcode to police, holding him in contempt, and ordering him incarcerated until he complied with the order to compel the passcode. (21; App. 131).

Mr. Turrubiates filed a timely notice of intent to pursue postdisposition relief from the June 3, 2019, order. (23). *See* Wis. Stat. § 785.03(3). On August 28, 2019, the State finally obtained a search warrant for Mr. Turrubiates' cell phone. (27). A search of the phone has not occurred. On September 20, 2019, the circuit court stayed the order pending appeal. (32). *See* Wis. Stat. § 808.07(2).

This appeal follows.

STANDARD OF REVIEW

While a circuit court's finding of contempt is reviewed for an erroneous exercise of discretion, *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995), whether the court had the authority to enter a contempt sanction and followed proper procedures in exercising that authority are questions of law, reviewed de novo. *Frisch v. Henrichs*, 2007 WI 102, ¶29, 304 Wis. 2d 1, 736 N.W.2d 8; *Evans v. Luebke*, 2003 WI App 207, ¶16, 267 Wis. 2d 596, 671 N.W.2d 304.

ARGUMENT

I. The June 3, 2019, order compelling Mr. Turrubiates to disclose his cell phone passcode to police and imprisoning him as a remedial contempt sanction is erroneous and must be vacated.

The circuit court's June 3, 2019, order directing Mr. Turrubiates to disclose his cell phone passcode to police and holding him in jail on a remedial contempt sanction is erroneous and must be vacated. There was no warrant to search the phone, and mandatory statutory contempt requirements were not followed.

A circuit court may find a party in contempt of court and order a sanction as a consequence for failure to follow a court order. Contempt is defined by statute and includes "intentional . . . [d]isobedience, resistance or obstruction of the authority, process or order of a court." Wis. Stat. § 785.01(1)(b). There are two kinds of contempt sanction: punitive and remedial. Wis. Stat. § 785.01(2), (3).¹ A punitive sanction is imposed for the purpose of punishing a past contempt. A remedial sanction is imposed for the purpose of terminating a continuing contempt. Wis. Stat. §§ 785.01(2), (3). Imprisonment is available as a remedial sanction. Wis. Stat. § 785.04(b). In the

¹ This statute was enacted to abrogate the historical distinction between civil and criminal contempt. The present statute distinguishes on the basis of the sanction sought. Committee Comment to Chapter 785.

correct sequence of events for a lawful remedial contempt sanction,

- A party files a motion for a court order.
- The court hears the motion and if warranted, issues the order.
- The court affords the subject of the order an opportunity to comply.
- If the order is not complied with, the court may hold the subject in contempt.
- If the party aggrieved by the contempt seeks a remedial sanction, the party may file a motion seeking a remedial sanction.
- Finally, the court must hold an evidentiary hearing on the request for a remedial contempt sanction and make factual findings to support a conclusion that the defendant deliberately disobeyed the court.

Wis. Stat. § 785.03(1)(a)²; *Evans v. Luebke*, 267 Wis. 2d 596, ¶¶21-24.

² This provision states: “A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, after notice and hearing, may impose a remedial sanction authorized by this chapter.”

This case was on the wrong track from the outset. First, police failed to apply for a search warrant for Mr. Turrubiates' phone, violating the Fourth Amendment's warrant requirement. A warrant is required to search a cell phone, even if the person is under arrest. The search incident to arrest exception does not apply. *Riley v. California*, 573 U.S. 373, 401, (2014). A person's cell phone carries "a cache of sensitive personal information" amounting to "a digital record of nearly every aspect of their lives," such that a cell phone search "would typically expose to the government far more than the most exhaustive search of a house." *Id.* at 395-96. If police wish to search a cell phone without the owner's consent, they must obtain a warrant.

Instead of identifying this critical omission, the State continued the error by moving the court to impose an unlawful order to compel the cell phone passcode. The State's motion did not offer lawful Fourth Amendment authority to search the phone without Mr. Turrubiates' consent.

In turn, the circuit court granted the unlawful motion to compel. The court concluded that there "could be circumstantial evidence that's tied to criminal behavior. So I'm going to order that he turn the password over to the State so that they can access that phone." (51:20-21; App. 124-25). The court's conclusion that there was potentially relevant

information on the phone does not overcome the Fourth Amendment's warrant requirement.³

Not only was the order to compel unlawful, mandatory statutory contempt procedures were disregarded. *See, e.g., Evans*, 267 Wis. 2d 596, ¶16. (vacating remedial contempt order for failure to follow procedural requirements). Under Wis. Stat. § 785.03(1)(a), a person aggrieved by a contempt of court must file a motion seeking imposition of a remedial sanction. The court then must provide notice and hold an evidentiary hearing on the motion seeking imposition of a remedial sanction. *Id.*

The State failed to file a motion seeking a remedial sanction. A remedial sanction may not be ordered unless the aggrieved party files a motion requesting one. Wis. Stat. § 785.03(1)(a). The February 13, 2019, motion requested an order to compel Mr. Turrubiates to turn over his passcode. (17; App. 101-104). It did not seek a contempt order, let alone seek imposition of a remedial contempt sanction.

In fact, the State did not request a remedial contempt sanction; it requested a definite 30-day sanction, which is a punitive sanction. (51:22; App. 124). *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338,

³ In addition, the parties agreed that compelling the cell phone passcode implicated Mr. Turrubiates' Fifth Amendment right against self-incrimination. There is no Wisconsin case law on this issue, but this Court need not reach it given the clear Fourth Amendment issue.

456 N.W.2d 867 (Ct. App. 1990) (“imprisonment for a definite period is permitted only in a punitive sanction proceeding.”). When the State seeks a punitive contempt sanction, it must file a complaint. Wis. Stat. § 785.03(1)(b). No punitive contempt complaint was filed here.

The court itself proposed and ordered the remedial sanction, but a court cannot order a remedial sanction unless an aggrieved party requests one. “[F]or a remedial sanction to be entertained, there must be a motion to the court by an ‘aggrieved person.’ This contemplates someone other than the trial court.” *B.L.P. v. Circuit Court for Racine County*, 118 Wis. 2d 33, 44, 345 N.W.2d 510 (Ct. App. 1984).

Nor was the statutory hearing requirement followed. *See* Wis. Stat. § 785.03(1)(a). Although the court took evidence at the May 24, 2019, hearing, this was in the context of a preliminary hearing and the State’s motion to compel the passcode. Evidence at a preliminary hearing is solely for the purpose of determining whether probable cause exists to believe the defendant committed a felony. Wis. Stat. § 970.03. And evidence that is relevant to an order to compel production of information is different from evidence necessary to support a remedial contempt order. The former involves an inquiry into whether the order should be granted, whereas the latter involves an inquiry into whether the order has been deliberately disobeyed. It was only after evidence was adduced for other purposes that the State asked the court to hold Mr. Turrubiates in contempt and to

imprison him. This did not comply with the Wis. Stat. § 785.03(1)(a) requirement that the court hold a hearing on a request for a remedial sanction.

Finally, the court did not apply the substantive contempt standard or make factual findings to support it. *See* Wis. Stat. § 785.01(1)(b).

In sum, what should have been a careful multi-step process was collapsed into a single inadequate proceeding. The resulting errors render the June 3, 2019, order invalid. This Court should reverse.

CONCLUSION

For the reasons stated above, Mr. Turrubiates respectfully asks the Court to reverse and remand with directions to vacate the June 3, 2019, order.

Dated and filed by U.S. mail this 30th day of April, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,060 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 and filed by U.S. mail this 30th day of April, 2020.

Signed:

COLLEEN MARION
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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 § 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.

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