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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

Case No. 2020AP000233

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

Plaintiff-Respondent,

v.

LAMONDO D. TURRUBIATES,

Defendant-Appellant.

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ON APPEAL FROM AN ORDER ENTERED IN  
DUNN COUNTY CIRCUIT COURT,  
THE HONORABLE ROD W. SMELTZER, PRESIDING

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PLAINTIFF-RESPONDENT’S BRIEF

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## **STATEMENT OF THE ISSUE**

Did the circuit court's order compelling Lamondo Turrubiates to disclose his cell phone passcode to law enforcement violate his rights under the Fourth Amendment?

The circuit court answered "no" by issuing the Order.

Was the circuit court's order finding Lamondo Turrubiates in contempt proper when he refused to comply with the court's order, and were correct contempt procedures followed?

The circuit court answered "yes" by issuing the Order.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal. The State does not request publication of this Court's decision and opinion.

## **STATEMENT OF THE CASE**

As plaintiff-respondent, the State exercises its discretion to not present a full statement of the case. See Wis. Stat. § (Rule) 809.19(3)(a)2. The State cites to relevant facts in the Argument section below.

## **ARGUMENT**

Mr. Turrubiates argues that the order to compel Turrubiates to provide his cell phone pass code to law enforcement was unlawful due to the lack of Fourth Amendment authority supporting the State's motion. The State addresses that issue separate from the contempt issue to provide more clarity. Further, he argues that the contempt sanction was erroneous and that proper contempt procedures

were not followed. As discussed below, the order to compel was properly granted, and the circuit court followed correct procedures in holding Turrubiates in contempt and issuing a sanction. The State addresses each issue in turn below.

**I. THE CIRCUIT COURT'S ORDER TO COMPEL TURRUBIATES TO PROVIDE HIS PASSCODE DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES BECAUSE THE ORDER DID NOT AUTHORIZE A SEARCH AND NO SEARCH RESULTED FROM THE ORDER TO COMPEL.**

Turrubiates first argues that the June 3, 2019 order to compel Turrubiates to turn over his passcode to law enforcement is unlawful because it was granted prior to a search warrant authorizing law enforcement to access the phone was signed. Turrubiates is correct that a search warrant was not authorized prior to the motion to compel; however, the motion to compel only ordered Turrubiates to provide his passcode. The motion to compel did not authorize a search of the cell phone. Therefore, the motion to compel is lawful.

Citizens are protected from unreasonable searches under both the United States Constitution and the Wisconsin Constitution. State v. Smiter, 2011 WI App 15, ¶ 10, 331 Wis. 2d 431, 793 N.W.2d (Ct. App. 2010). A search that occurs without a warrant is per se unreasonable unless an exception to the warrant requirement applies. Smiter, 331 Wis. 3d 431, ¶ 10. Thus, the protections are in place for situations where searches are at issue; however, no search has been conducted in this case.

Turrubiates argues that the order to compel violated his rights under the Fourth Amendment. However, Turrubiates' objection to the motion to compel at the May 24, 2019 hearing was based on Fifth Amendment grounds. (R. 51, 17:10-25—20:1-3.)

Turrubiates correctly states that a warrant was not obtained prior to the State's motion to compel. (Turrubiates' Brief, 4.) However, the motion requested the Court to "compel Turrubiates to provide his passcode to law enforcement." (R.17:3.) Moreover, the order to compel signed by the circuit court only indicated "the defendant shall provide his cell phone passcode to law enforcement." (R.21:1.) Thus, the State was not requesting authority to search the cell phone, and the court was not authorizing law enforcement to search the cell phone.

Further, as Turrubiates' Brief points out, "[a] search of the phone has not occurred." (Turrubiates' Brief, 4.) Turrubiates does not cite any authority to support his contention that his Fourth Amendment rights are violated by the order to compel. Therefore, the order to compel did not violate Turrubiates' rights under the Fourth Amendment as an unlawful search did not occur.<sup>1</sup>

## **II. THE PROPER PROCEDURES WERE FOLLOWED WHEN THE CIRCUIT COURT HELD TURRUBIATES IN CONTEMPT AND IMPOSED A REMEDIAL SANCTION.**

Turrubiates next argues that the incorrect procedure was followed when the circuit court held Turrubiates in contempt. As discussed below, the proper procedures were followed and the circuit court's contempt finding was not clearly erroneous.

### **A. STANDARD OF REVIEW.**

This Court is presented with a question of law in determining whether a Circuit Court followed proper procedures when it imposed contempt sanctions; therefore, this issue is subject to a de novo review. Evans v. Luebke,

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<sup>1</sup> Mr. Turrubiates states in a footnote that this issue also invokes issues under the Fifth Amendment, but that "this Court need not reach it given the clear Fourth Amendment issue." (Turrubiates' Brief, 8.) The State does not provide argument on this issue as this Court "may decline to review issues inadequately briefed." State v. Petit, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (internal citation omitted).



2003 WI App 207, ¶ 16, 267 Wis. 2d 596, 671 N.W.2d 304. Also, this Court reviews a Circuit Court's contempt finding and determination of remedial sanctions to determine whether the Circuit Court "properly exercised its discretion." Benn v. Benn, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999) (internal citation omitted).

**B. CONTEMPT OF COURT PROCEDURES  
ARE SET FORTH BY STATUTES AND  
FURTHER EXPLAINED BY CASE LAW.**

"Contempt of court" is defined as "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;
- (b) Disobedience, resistance or obstruction of the authority, process or order of a court;
- (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.

Wis. Stat. § 785.01(1). A court may impose a sanction for contempt of court. Wis. Stat. § 785.02. Contempt sanctions fall into two categories: punitive sanctions and remedial sanctions. Wis. Stat. § 785.01(2), (3). In the instant case, it appears both parties agree that the contempt sanction at issue is a remedial sanction.

A remedial sanction is "a sanction imposed for the purpose of terminating a continuing contempt of court." Wis. Stat. § 785.01(3). Wis. Stat. § 785.03(1)(a) sets forth the "nonsummary procedure" that is used when imposing a remedial sanction: "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 Court addressed the requirement of a motion filed by an aggrieved person in Evans v. Luebke, 2003 WI App 207, ¶ 23, 267 Wis. 2d 596, 671 N.W.2d 304. In Evans, an aggrieved party filed a motion alleging violations of a court order and included the requested relief. Evans, 267 Wis. 2d 596, ¶ 23. This Court stated, “Although not captioned as motions under WIS. STAT. § 785.03(1)(a), they contain the essentials of a motion seeking remedial sanctions for disobedience of a court order under that paragraph.” Id.

Once the motion is filed, a hearing on the record must be held “for due process purposes” to address whether the evidence supports a finding of contempt. Id., ¶ 24 (internal citation omitted). At the hearing, the parties must either stipulate to the facts or an evidentiary hearing must be conducted to provide the circuit court with sufficient information to make factual findings regarding contempt. Id., ¶¶ 24-25.

If the circuit court makes a finding of contempt, the circuit court then decides which sanction to impose. One remedial sanction that a circuit court may impose following the nonsummary procedure is “Imprisonment if the contempt of court is of a type included in s. 785.01(1)(b), (bm), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.” Wis. Stat. § 785.04(1)(b).

### **C. THE CIRCUIT COURT FOLLOWED PROPER CONTEMPT PROCEDURES.**

In the instant case, the State filed a motion to compel Turrubiates to provide his cell phone passcode to law enforcement. (R. 17.) Although the motion was not captioned as a motion for contempt, the motion outlines the following: (1) that Turrubiates refused to provide his passcode to law enforcement, (2) that the State was requesting the circuit court to order Turrubiates to turn over his passcode to law enforcement, and (3) that the State was requesting a motion

hearing on the issue. (R. 17.) Thus, under Evans, the motion to compel was sufficient to satisfy the filing requirement under Wis. Stat. § 785.03.

Next, the Circuit Court conducted an evidentiary hearing on the State's motion to compel. (R. 51.) Turrubiates argues that combining the preliminary hearing with the motion to compel was not proper because "evidence at a preliminary hearing is solely for the purpose of determining whether probable cause exists to believe the defendant committed a felony." (Turrubiates' Brief, 9); citing Wis. Stat. § 970.03. However, at the combined preliminary hearing and motion to compel hearing, the State and Turrubiates agreed that both issues were before the Circuit Court and that the hearings should be combined. (R. 51, 3:9-15.)

Moreover, Turrubiates' consent to combining the hearings waives this issue. The Wisconsin Supreme Court has stated "issues that are not preserved are deemed waived." State v. Huebner, 2000 WI 59, ¶ 11, 235 Wis. 2d 486, 611 N.W.2d 727 (internal citations omitted.) As such, Turrubiates' argument about the combined hearings should not be considered. See Huebner, 235 Wis. 2d 486, ¶ 11.

Additionally, both parties questioned Officer DeMarcus Zeroth and were given the opportunity to argue both the preliminary hearing and the motion to compel. (R. 51, 4-17.) Moreover, the Circuit Court made findings specifically related to the preliminary hearing before hearing arguments on the motion to compel. (R. 51, 16:18-25, 17:1-3.) Once the Circuit Court heard arguments on the motion to compel, the Court ordered Turrubiates to provide his passcode to law enforcement. (R. 51, 20:12-25, 21:1.) The Court then gave Turrubiates time to confer with his attorney, and following that brief recess, Turrubiates, through his attorney, indicated he would not provide his passcode to law enforcement at that time. (R. 51, 21:7-16.)

Following this exchange, the State requested that Turrubiates be held in contempt and placed on a 30 day sanction. (R. 51, 21:18-25.) The Circuit Court then stated, "I

ordered Mr. Turrubiates to provide that password. You haven't done so so you're in contempt for failing to provide it so you're going to remain in the custody of the Dunn County Jail until it's provided." (R. 51, 22:5-9.) Turrubiates refusal to comply with the circuit court's order constituted contempt of court, and thus the circuit court properly held Turrubiates in contempt. See Wis. Stat. § 785.01(1)(b).

Regarding the sanction imposed by the circuit court, the circuit court properly imposed a jail sanction and provided a purge condition by allowing Turrubiates' release from custody if he were to provide the passcode.<sup>2</sup> Turrubiates argues that the sanction was improper because it was based upon the State's request for a 30 day sanction. However, it is ultimately up to the circuit court to decide on a sanction, and thus, it is the circuit court's order that is subject to review.

For the reasons set forth above, the circuit court followed the proper contempt procedures. Although some steps were dealt with at the same hearing, this does not render the proceedings invalid. Furthermore, the circuit court did not erroneously exercise its authority when it held Turrubiates in contempt because Turrubiates' refusal to comply with the court order violated the contempt statutes.

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<sup>2</sup> It should be noted that the circuit court stayed the sanction pending appeal in an order dated September 30, 2019. (R. 32.) This is also mentioned in Turrubiates' brief. (Turrubiates' Brief, 4.) Also, it was noted at the May 24, 2019 that Turrubiates was "on a PO hold until mid-June." (R. 51, 21:19-20.)

## CONCLUSION

Based on the reasons stated above, the State respectfully requests this Court affirm the circuit court's orders regarding the motion to compel and contempt finding.

Dated this \_\_\_\_ day of June, 2020.

Respectfully submitted,

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**CERTIFICATION AS TO  
FORM AND 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 2,037 words.

Dated this \_\_\_\_ day of June, 2020.

Signed:

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**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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 \_\_\_\_ day of June, 2020.

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### CERTIFICATE OF MAILING

I certify that this brief was deposited into the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expedition, on June 2, 2020.

I further certify that on June 2, 2020, I served three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this \_\_\_\_ day of June, 2020.

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