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COURT OF APPEALS

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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 entered an order compelling Mr. Turrubiates to reveal his private cell phone passcode to police and imprisoning him pending his compliance. The order is invalid because there was no warrant to search the phone and mandatory statutory contempt requirements were not followed.

The State admits it did not have a warrant to search Mr. Turrubiates' cell phone but argues this was not error because the court's order did not authorize a search. (Response at 2). This argument overlooks the fact that police were in the process of trying to break into the phone. The State had enlisted the help of a specialized unit in Madison to crack the phone's encryption. Police were not waiting for judicial authorization for the search. The State does not cite any authority permitting a judge to compel a person to facilitate an unconstitutional search. The State observes that the efforts to break into the phone without a warrant were unsuccessful. However, at issue on appeal is the lawfulness of the June 3, 2019, order, not the lawfulness of any search.

The State's effort to defend the procedure that led to the June 3, 2019, order is likewise unavailing.

It is undisputed that the court ordered a remedial contempt sanction. (Response at 4). A remedial contempt sanction may only be ordered if all of the following steps are followed: (1) the aggrieved party files a motion requesting one, (2) the court gives notice and a hearing, and (3) the court makes a finding of deliberate disobedience. Wis. Stat. §§ 785.03(1)(a) and (b).

As Mr. Turrubiates argued in his opening brief, none of these steps was properly taken. The State filed a motion on February 13, 2019, requesting an order to compel the passcode. The State argues this also sufficed as a motion for remedial contempt sanction. It relies on *Evans v. Luebke*, 2003 WI App 207, 267 Wis. 2d 596, 671 N.W.2d 304, for support. In *Evans*, the motion was not captioned as a contempt motion; however, it was sufficient because it identified an existing court order that had been violated and sought a remedy. *Id.*, ¶23. By contrast, the motion here solely requested an order to compel, and did not put Mr. Turrubiates on notice that the State would be seeking a remedial contempt sanction. *See Dennis v. State*, 117 Wis. 2d 249, 261, 344 N.W.2d 128 (1984) (the statutes and due process require that the defendant be aware of what he must answer to so that he can be prepared to respond).

It was the court, not the State that suggested a remedial contempt sanction. This is contrary to *B.L.P. v. Circuit Court for Racine County*, 118 Wis. 2d 33, 345 N.W.2d 510 (Ct. App. 1984). The State does not address *B.L.P.* and instead argues "it is up to the

circuit court to decide a sanction." (Response at 7). This is true but the contempt must still be properly initiated. *B.L.P.* holds that a remedial contempt must be initiated by an aggrieved party filing a motion and "this contemplates someone other than the trial court." *Id.*, at 44.

The order is furthermore invalid because the May 24, 2019, hearing did not satisfy the Wis. Stat. § 785.03(1)(a) hearing requirement. Due to the failure of notice and a proper motion, the hearing was not focused on adducing evidence relevant to contempt findings. The evidentiary portion of the hearing came before the subject of a contempt finding or sanction was even raised. This does not comport with the statutory requirement for a hearing on a motion for remedial contempt sanction. To be clear, Mr. Turrubiates does not argue that it was error to address the motion to compel during the same hearing as the preliminary examination. (Response at 6). Had the mandatory statutory procedures been followed, this would not be reversible error. But the mandatory statutory procedures were not followed.

CONCLUSION

For the reasons stated above and in his opening brief, Mr. Turrubiates respectfully asks the Court to reverse the June 3, 2019, order.

Dated and filed by U.S. Mail this 17th day of June, 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 703 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 17th day of June, 2020.

Signed:

COLLEEN MARION
Assistant State Public Defender