STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 2021AP000994 & 2021AP001186

In re the finding of contempt in:
In re the marriage of:
JULIE C. VALADEZ,
Appellant,
v.

THE HONORABLE MICHAEL J. APRAHAMIAN,
Respondent.

On Notice of Appeal from Orders for Contempt
Entered on March 19, 2021 and June 15, 2021,
and an Order entered on April 15, 2021,
in the Waukesha County Circuit Court, the
Honorable Michael J. Aprahamian, Presiding

BRIEF OF APPELLANT

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender
State Bar No. 1085045

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
groteluesch enk@opd.wi.gov

Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

ISSUES PRESENTED

1. Did the circuit court properly use the contempt procedure when, after it received emails from Ms. Valadez contrary to an order that she not email the court, it set a contempt hearing sua sponte and found her in contempt?

The circuit court found Ms. Valadez in contempt of court and denied her motion for reconsideration, finding that it had inherent authority to find her in contempt for sending the emails.

2. As a pro se litigant, did Ms. Valadez's continued objections during the hearing constitute contempt of court, and if so, did the circuit court follow the proper contempt procedure?

The circuit court summarily found Ms. Valadez to be in contempt of court and denied her motion for reconsideration.

3. Did Ms. Valadez's choice not to sign a release of confidential Department of Health and Human Services records, when ordered to do so, constitute contempt of court, and if so, did the circuit court properly use the summary contempt procedure?

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

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The briefs should adequately set forth the arguments and publication will likely be unwarranted as the issues presented can be decided on the basis of well-established law.

STATEMENT OF THE FACTS AND CASE

On March 2, 2018, Julie C. Valadez filed for divorce from her husband, Ricardo Valadez. (3).[1] A court trial was held and a judgment of divorce was entered on April 9, 2020. (182). Post-judgment proceedings were initiated shortly thereafter and have continued to date. As relevant to the issue before this court, on December 23, 2020, the circuit court, the Honorable Michael J. Aprahamian, issued a decision and order on post-judgment motions for attorney's fees. (400). In it, the circuit court ordered the following: "Ms. Valadez is prohibited from sending emails to the judge. Any further contact with the judge by email will violate this Order and subject Ms. Valadez to a finding of contempt." (400:49).

Subsequently, on February 12 and 16, 2021, Ms. Valadez emailed Judge Aprahamian about a

[1] This court granted Ms. Valadez's motion to consolidate her cases for appeal. Citations are to the record in 2021AP001186, in which the court of appeals' document number matches the circuit court document number.

dispute she had with a court reporter, asking him if he supervised that court reporter. (425:1-2; 464:4; App. 14). According to a note on the Wisconsin Circuit Court Access Program (CCAP)[2], these emails prompted the circuit court to schedule an order to show cause hearing and a notice of hearing was filed on February 19, 2021. (424; 442:1; App. 3). No actual order to show cause was filed.

Before that contempt hearing was held, the Guardian ad Litem (GAL) in this case filed letters with the circuit court expressing concern for one of the children and requesting that the circuit court immediately modify placement of that child to place him in Mr. Valadez's care. (431;434). In response, three days prior to the contempt hearing, the circuit court entered a note on CCAP stating that the letter would be addressed at the contempt hearing. No written notice was provided to the parties.

---

[2] In relevant part, the CCAP entry for February 19, 2019, states:

> The Court has received two ex parte emails from Ms. Valadez, which the Court is filing in the record. The Court is ordering that Ms. Valadez show cause as to why she should not be held in contempt of the Courts prior orders prohibiting her from sending ex parte emails to the Court, as reflected in the Courts Decision and Order of 12/23/2020. A hearing on the order to show cause is set for March 18, 2021, at 9:30 by Zoom. The Zoom meeting number is 996 6739 5700. Passcode 8675309. A notice of that hearing will be sent as well.

Ms. Valadez appeared at the contempt hearing with counsel. The circuit court began the hearing by addressing the contempt and asked counsel if Ms. Valadez denied sending the emails. (464:3; App. 13). When counsel responded that she did not deny sending them, the court stated, "I'm going to find her in contempt. I think that was willful and intentional violation of my prior court order." (464:3; App. 13). It then allowed counsel and Ms. Valadez to make a statement "in mitigation or explanation" of the violation. (464:3; App. 13). Counsel explained that Ms. Valadez had reached out to the District Court Administrator about an issue she was having with a court reporter with respect to transcripts and was told that she should be contacting the circuit court regarding that issue. (464:4; App. 14).

The circuit court then made the following findings and order:

> All right. I do not believe she was confused. I think she is very sophisticated when it comes to this. She's been handling matters in this case for a long time.
>
> My order was crystal clear she should not be emailing me. She willfully and intentionally did violate my order.
>
> I am finding her in contempt. I'm sentencing her to five days jail. I'm staying that for 30 days until April 19th for her to purge the contempt. She can purge the contempt by paying $250 or her choice performing 15 hours of community service that's approved, organized and monitored by Wisconsin Community Services.

(464:5; App. 15). The circuit court reiterated that if Ms. Valadez did not pay, or did not perform the community service work, the stay would be lifted and she would be required to serve five days in jail. (464:6; App. 16).

After finding Ms. Valadez in contempt, the circuit court excused her counsel and turned to the remaining issues in the family case that it felt needed to be addressed. (464:6; App. 16). Ms. Valadez, now pro se, immediately asked for clarification, "Your Honor, can you clarify? Can you please clarify what notice was given for any other issues being addressed in the hearing?" (464:6; App. 16). The circuit court did not directly respond to the issue of notice and instead simply bypassed the first issue it was going to address and then turned to the what it perceived as the GAL's "request for some emergency relief." (464:7; App. 17). Ms. Valadez again asked whether there was notice given for such a hearing and she and the circuit court engaged in back and forth in which it became clear that, aside from a note on CCAP, no notice was given. (464:7-9; App. 17-19).

Despite the lack of notice, and over Ms. Valadez's objections, the circuit court indicated that it intended to proceed with the hearing to determine if one or more of the children should be removed from Ms. Valadez's care. (464:7-10; App. 17-20). The following is part of the exchange between the circuit court and Ms. Valadez leading to a second finding of contempt:

THE PETITIONER: Is this a motion hearing, Your Honor, you haven't clarified.

THE COURT: I'm interpreting these letters as a motion, an emergency motion to deal with E[] because he seems to be --

THE PETITIONER: And is there a notice of this being a motion hearing?

THE COURT: I told you what the motion is. We're moving forward, Ms. Valadez. If you interrupt me one more time, I'll hold you in contempt again and I will not stay it. Stop interrupting me.

I told you I'm going forward. If you want to participate you are here. I would think as a mother you would be interested in what's in the best interests of E[].

THE PETITIONER: Your Honor, as the judicial code I request there be respectful communication in the hearing.

THE COURT: This is respectful communication Ms. Valadez. You're interrupting me.

THE PETITIONER: I -- made my objection.

THE COURT: You made your objection. I overruled the objection. I said I'm moving forward.

THE PETITIONER: I hadn't made an objection yet because I was asking for clarification. I don't even have a notice of what this hearing is.

THE COURT: You have both of the letters from Ms. Jasmer.

THE PETITIONER: Those are letters -- I -- I have received no motions.

THE COURT: I'm presenting them as a motion given the emergency circumstances regarding E[]. Ms. Jasmer, let me hear from you.

MS. JASMER: Just, just for clarity, too --

THE PETITIONER: Your Honor, I object to the Guardian ad Litem speaking in this case.

THE COURT: Okay.

THE PETITIONER: As the statement is for clarification of her role.

THE COURT: Her role, she was appointed Guardian ad Litem September 25th of 2020. As part of that appointment, she was going to be involved in the appeal as well as any issues on-going during the pendency of the case. I said that specifically –

THE PETITIONER: Your Honor, can you please clarify what was presently before the Court when you entered that into the clarification.

THE COURT: -- issues regarding the two of you and your children. That have essentially special needs. And I knew there would be issues coming up and I appointed -- I appointed Ms. Jasmer at that time. And I made it clear what was her role, Ms. Valadez. If you interrupt me one more time I'm holding you in contempt and every hearing we're having after this is going to be in person. Ms. Jasmer, give me an update.

MS. JASMER: Judge --

THE PETITIONER: I object, Your Honor, to --

THE COURT: Ms. Valadez, I'm holding you in contempt. We're having a hearing now. I've given you two warnings. I've already held you in

> contempt for violating my prior order sending me emails –
>
> THE PETITIONER: Your Honor --
>
> THE COURT: -- and you keep interrupting. I've interpreted your question as an objection. I overruled the objection specifically --
>
> THE PETITIONER: Your Honor --
>
> THE COURT: -- and now you continue to interrupt. I'm holding you in contempt.
>
> THE PETITIONER: I am --
>
> THE COURT: I'm going to sanction --
>
> THE PETITIONER: I am --
>
> THE COURT: Quit interrupting me, Ms. Valadez. I'm holding you in contempt again another five days. Do you have anything you want to say in mitigation or explanation?

(464:10-13; App. 20-23).

The circuit court then provided Ms. Valadez her right to allocution during which Ms. Valadez explained that she had a right to object, ask for clarification, and preserve the record. (464:13-14; App. 23-24). In response, the court explained that it had found Ms. Valadez in contempt "for willful, intentional violation of [it's] directive to stop talking while I conduct this hearing," and that it would stay the five day jail sanction and allow her to purge that by paying $500 or completing an additional 15 hours of community service work. (464:13-14; App. 23-24).

An order for contempt of court was filed the next day. (442; App. 3-4). Thereafter, Ms. Valadez, through counsel, filed a motion to reconsider and vacate the first finding of contempt, noting that the circuit court had not followed the correct statutory procedure. (444). She also filed a pro se motion to reconsider and vacate the second finding of contempt. (457). The circuit court denied both in a decision and order on April 15, 2021. (479; App. 5-8). The notice of appeal resulting in 2021AP000994 followed. (541).

Subsequently, at a status hearing held on June 2, 2021, the circuit court again summarily found Ms. Valadez in contempt. (559; App. 9-10). When the circuit court asked the worker appointed to do a custody study about the status of her investigation, that worker informed the court that she had not met with Ms. Valadez and that she needed Ms. Valadez to sign a release for Human Services records. (562:16-17; App. 27-28). The circuit court questioned Ms. Valadez about that and she explained her position that a custody study was not appropriate at that point in the proceedings. (562:17-18; App. 28-29). Thereafter, the circuit court stated, "I'm going to have you sign those releases today." (562:18; App. 29). Ms. Valadez stated she didn't feel a release was necessary and again questioned why the custody study was ordered. (562:18-19; App. 29-30). The following exchange occurred:

> THE COURT: I'm ordering you to sign the release and I'm ordering you to schedule an appointment. So let's go off the record a second while you can discuss a date for your appointment.

> MS. VALADEZ: But I don't believe I have a legal obligation to. I don't think I have - - I think I have a legal right I can decline and ask for an evidentiary hearing.

(562:19-20; App. 30-31). There was further discussion and the following exchange occurred:

> THE COURT:I'm ordering you to sign it right now If you are not going to sign it the bailiff is going to take you into custody until you do.
>
> MS. VALADEZ: I don't have an opportunity to get legal counsel?
>
> THE COURT: Here is your legal counsel right there.
>
> MS. VALADEZ: Not on this matter, Your Honor.
>
> THE COURT: He is because you're about to be held in contempt and brought into custody for failure to follow my order to sign that waiver.
>
> MS. VALADEZ: I don't even know what this waiver is for.
>
> MR. HUGHES: One second, Your Honor.
>
> THE COURT: Go ahead.
>
> MS. VALADEZ: Can you cite a law for me, Your Honor, that I have to sign something that I don't know what it is regarding?

(562:20-23; App. 30-34). The circuit court then asked for clarification about the release it had just ordered Ms. Valadez to sign. (562:23; App. 34).

After the worker and GAL explained that the release was a release for Health and Human Services records so that the worker could get them without redaction of Ms. Valadez's information, the circuit court again ordered Ms. Valadez to sign the form and then found her in contempt for her refusal:

> Okay. It's June 2nd, 2021. We've had a hearing here in Branch 9 in regular session Court for a status in the Valadez action. Ms. Valadez did then and there, in open Court, in immediate view of and in the presence of the Court, engage in disorderly, contemptuous, and insolent behavior, directly tending to interrupt the Court's proceedings and to impair the authority and dignity of this Court.
>
> In saying that what Ms. Valadez did was violate my direct order to have her sign the waiver that she was requested to sign several times and after finding that the order was reasonable and appropriate, I made the order for her to sign it. She refused to sign the order.
>
> The disorderly, contemptuous and insolent behavior of Ms. Valadez has, beyond a reasonable doubt, seriously destroyed the order, authority and dignity of this Court and must be dealt with under the Court's inherent statutory powers to summarily punish such conduct.
>
> I am finding you in contempt of Court…

(562:23-32; App. 34-43). Ms. Valadez then signed the release and the circuit court found that in doing so she "purged the contempt" so she would not be taken into custody. (562:33-34; App. 44-45).

A signed order on the contempt was subsequently filed and the notice of appeal resulting in 2021AP001186 followed. (559; 583; App. 9-10). This

court then granted Ms. Valadez's motion to consolidate the appeals.

ARGUMENT

The circuit court's actions in all three of the findings of contempt described above show a complete misunderstanding of the law surrounding contempt of court. As the circuit court acted outside of its authority, failed to follow proper procedures, imposed improper penalties, and erroneously concluded that Ms. Valadez's conduct constituted misconduct, each finding of contempt must be vacated.

I. Legal Standards and Standard of Review.

While stemming from the court's inherent authority, the circuit court's contempt power has been regulated by the legislature as set forth in Chapter 785, Wis. Stats. *Firsch v. Henrichs*, 2007 WI 102, ¶32, 304 Wis. 2d 1, 736 N.W.2d 85.

Specifically, § 785.01(1) provides the definition of "contempt of court." As relevant to this case, contempt of court includes intentional "[m]isconduct 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," as well as intentional "[d]isobedience, resistance or obstruction

of the authority, process or order of a court." Wis. Stat. § 785.01(1)(a)-(b).[3]

The statutes provide for summary and 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. A punitive sanction is "a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court," while a remedial sanction is one "imposed for the purpose of terminating a continuing contempt of court." Wis. Stat. § 785.01(2)-(3).

Nonsummary contempt proceedings may be brought in one of two ways. First, by motion of an aggrieved person, someone other than the court, seeking imposition of a remedial sanction. Wis. Stat. § 785.03(1)(a); *Evans v. Luebke*, 2003 WI App 207, ¶23, 267 Wis. 2d 596, 671 N.W.2d 304. Or second, the district attorney, attorney general, or special prosecutor, on his own initiative or at the request of a party or judge, may seek a punitive sanction "by issuing a complaint charging a person with contempt

---

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

> …
> (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.

of court and reciting the sanction sought to be imposed." Wis. Stat. § 785.03(1)(b). A due process right to notice and a hearing attaches to both procedures, as does a right to counsel when a person's liberty is at stake. *State v. Pultz*, 206 Wis. 2d 112, 129, 556 N.W.2d 708 (1996).

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 punitive sanction imposed for summary contempt may include "a fine of not more than $500 or imprisonment in the county jail for not more than 30 days or both." Wis. Stat. § 785.04(2)(b).

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)). Further, due process requires that the court comply with all of the following: 1) make a statement indicating the decision "to hold a person in contempt as well as the factual basis for the holding;" make a statement "informing the contemnor of the right of allocution and a further statement inviting the contemnor to exercise that right prior to imposition of the sanction;" and, 3) make a statement on the "final decision to impose sanction and the sanction, if any, is imposed." *Id.* at 435-436.

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).

II. The circuit court acted without authority when, sua sponte, it scheduled a contempt hearing and found Ms. Valadez in contempt for sending emails.

After receiving emails from Ms. Valadez, Judge Aprahamian entered a note on CCAP and filed a notice of hearing indicating that an order to show cause hearing had been scheduled. At that hearing, the circuit court found Ms. Valadez in contempt and ordered that she serve five days in jail but stayed that sentence for her to "purge" her contempt by completing

community service work or paying $250.00. (464:5-6; App. 15-16). In doing so, Judge Aprahamian failed to comply with the statutory contempt procedures and imposed a punitive sanction without affording Ms. Valadez the constitutional protections required. Consequently, the order of contempt must be vacated.

The March 18, 2021, contempt hearing complied with neither the nonsummary nor summary contempt procedures and, contrary to Judge Aprahamian's assertions, he did not have inherent authority to find her in contempt absent compliance with those procedures. *See Luebke*, 2003 WI App 207, ¶17.

Nonsummary contempt may be initiated by either the filing of a motion by an aggrieved party, or the filing of a criminal complaint by a prosecutor. Wis. Stat. § 785.03(1)(a)-(b). It may not be initiated by the circuit court. *See Luebke*, 2003 WI App 207, ¶23; *See also B.L.P. v. Circuit Court for Racine County*, 118 Wis. 2d 33, 44, 345 N.W.2d 510 (Ct. App. 1984). Further, regardless of whether the action is for remedial or punitive contempt, the subject of the contempt must be provided notice of the action and the opportunity to defend against the proponent of the contempt. Wis. Stat. § 785.03(1); *Luebke*, 2003 WI App 207, ¶25. Here, no motion for contempt nor criminal contempt complaint was filed against Ms. Valadez and, aside from a note on CCAP, she was given no notice of the allegations against her. Rather, the circuit court, on its own, scheduled a contempt hearing, found Ms. Valadez in contempt, and then imposed a punitive sanction. These proceedings

clearly failed to meet the statutory requirements for nonsummary contempt.

Nor can the finding of contempt be justified under the summary contempt procedure. The alleged contemptuous conduct consisted of the sending of emails which was done in February and the hearing and finding of contempt was not made until March 18, 2021. The contempt was not committed in the actual presence of the court, nor was the finding of contempt and imposition of sanctions done immediately thereafter. *See Kruse*, 194 Wis. 2d 418, 429-30.

Finally, the sanction imposed – service of jail, payment of a fine, or completion of community service work – demonstrates that the circuit court's intent was to punish Ms. Valadez for her violation of the court order. The sanction was not meant to gain compliance with the court's order or to enforce the rights of an aggrieved party, nor was it purgeable through compliance with the court order. *See In re Paternity of Cy C.J.*, 196 Wis. 2d 964, 968-969, 539 N.W.2d 703. As a punitive sanction was imposed, and these were not summary contempt proceedings, Ms. Valadez was entitled to, among other things, an unbiased judge, a presumption of innocence, the right against self-incrimination, notice of the charges, and the right to call witnesses. *State v. King*, 82 Wis. 2d 124, 131, 262 N.W.2d 80 (1978). She received none of those protections here.

Judge Aprahamian acted contrary to statute when, sua sponte, he scheduled an order to show cause hearing on whether Ms. Valadez should be held in contempt for violating the order not to send him emails. "Had the [circuit] court's action been a remedial sanction pursuant to ch. 785, there would have been a motion for that purpose. There is none on record. Had this been a punitive sanction, a complaint would have been filed. None was filed…A contempt procedure was used which is wholly outside of ch. 785.". *B.L.P.*, 118 Wis. 2d at 36. The order for contempt must be vacated.

III. The circuit court's use of the summary contempt procedure to hold Ms. Valadez in contempt for making an objection during the March 18th hearing was improper; consequently, the finding of contempt must be vacated.

Contrary to the first finding of contempt, Judge Aprahamian's second finding of contempt against Ms. Valadez during the March 18, 2021, hearing falls within the summary contempt procedure. Judge Aprahamian's finding that Ms. Valadez's actions warranted a finding of summary contempt, however, was clearly erroneous. Further, Judge Aprahamian failed to follow the required procedure by failing to provide Ms. Valadez with her right of allocution prior to imposing a sanction. As a result, this second finding of contempt must also be vacated.

A. Ms. Valadez's conduct did not warrant use of the summary contempt procedure.

Ms. Valadez was found in contempt of court based on her failure to comply with the circuit court's "warnings" that she stop "interrupting" the proceedings. (442:2; App. 4). Specifically, the finding of contempt came after Ms. Valadez stated, "I object." (464:12; App. 22). While Ms. Valadez's continued objections and requests for clarification may have been viewed as unwanted interruptions by the court, such conduct falls far short of that necessary to justify a summary finding of contempt and imposition of a punitive sanction.

The circuit court violated Ms. Valadez's due process rights when it concluded the contempt hearing and went on to consider what it viewed to be an emergency motion to change placement. There can be no dispute that Ms. Valadez was provided no notice for such a hearing being held that day. And, although the court's improper actions would not justify misconduct by a litigant, it does explain Ms. Valadez's actions in this case. As this court is aware, in order to preserve an issue for appeal, a litigant must object or she risks a finding of waiver or forfeiture. That is what Ms. Valadez did – she preserved the issue for appeal by objecting and she did so in a manner that was neither rude nor disrespectful to the court.

As relevant here, to sustain the court's contempt ruling, the record must show that Ms. Valadez engaged in "intentional misconduct" in the presence of

the court which "interfere[d] with a court proceeding or with the administration of justice, or impair[ed] the respect due the court," or engaged in "intentional disobedience" of "an order of a court." Wis. Stat. § 785.01(1)(a)&(b). For summary contempt, "there must be a compelling reason for immediate punishment related to 'vindication of the court's dignity and authority.'" *State v. Van Laarhoven*, 90 Wis. 2d 67, 70-71, 279 N.W.2d 488 (Ct. App. 1979) (quoting *Harris v. United States*, 382 U.S. 162, 164 (1965)). In other words, the misconduct must be of sufficient magnitude or severity such that the court was compelled to impose an immediate punitive sanction. *See Kruse*, 194 Wis. 2d at 437.

Ms. Valadez's actions during the hearing – asking for clarification as to what was being heard, noting that she received no notice for such a hearing, and making objections, did not present a compelling circumstance requiring immediate punishment. Ms. Valadez had just been found in contempt and her attorney left the proceedings, leaving her to represent herself on matters she had no notice were going to be heard that day. She understandably was trying to inform the court of her lack of notice and make a record that she was not in agreement with the hearing moving forward. In response, Judge Aprahamian belittled her and suggested she did not have concern for the best interests of her child. (464:10; App. 20).

Ms. Valadez was rightfully concerned that she would lose placement of her child at a hearing that she had no notice of and no opportunity to prepare for. She

did not engage in intentional misconduct or intentional disobedience of a court order; rather, Ms. Valadez was seeking clarification and making objections to the improper procedure in order to notify the circuit court of her concerns and preserve the record for appeal. Her conduct did not warrant immediate punishment.

Finally, the sanction imposed – jail stayed for payment of a fine or completion of community service – shows the court's confusion surrounding the contempt proceedings. Community service is not an authorized punitive sanction. Wis. Stat. § 785.04(2)(b). Further, imposing this quasi-punitive sanction undermines any assertion that Ms. Valadez's actions required immediate punishment. Rather than imposing a jail sentence or fine, the circuit court ordered jail and then stated that Ms. Valadez could "purge" her contempt by paying a fine or completing community service. Ms. Valadez's conduct either warranted immediate punishment or it did not. If it did not, as the court's sanction implied, summary contempt was not appropriate.

As the record fails to support the circuit court's finding that summary contempt was warranted, the finding of contempt and sanction must be vacated.

B. The circuit court failed to follow the proper procedure.

Should this court find that Ms. Valadez's conduct did warrant imposition of the summary contempt proceedings, the order of contempt must still

be vacated as the circuit court failed to follow the necessary procedure – Ms. Valadez was not provided with an opportunity to exercise her right of allocution before a sanction was imposed.

It is well-established that due process in summary contempt proceedings requires that the contemnor be afforded the right of allocution. *Kruse*, 194 Wis. 2d at 435. This right "is so basic that it will not be inferred from the record," and it "must be exercised after the court has made its finding of contempt *but before* punishment is imposed, thereby permitting the judge to vacate the contempt order entirely or to give a more lenient sanction, after considering any mitigating factors revealed in the allocution." *Id*. (emphasis added). "[T]he allocution requirement provides a check on the heightened potential for abuse posed by the summary contempt power." *State v. Dewerth*, 139 Wis. 2d 544, 565, 407 N.W.2d 862 (1987). Denial of this right is reversible error. *Kruse*, 194 Wis. 2d at 437.

Ms. Valadez was not provided with an opportunity for allocution before a sanction was imposed. Rather, the circuit court found Ms. Valadez in contempt, stated he was imposing another sanction of five days in jail, and then asked if she had anything she wanted to say "in mitigation or explanation." (464:12-13; App. 22-23). The court had already determined its sanction prior to providing Ms. Valadez an opportunity to explain, denying her of any meaningful right of allocution. Ms. Valadez had no reason to believe anything she said would affect the

circuit court's decision on whether, and what, sanction to impose. This is especially so after the circuit court's earlier finding of contempt and imposition of a five-day jail sentence.

Judge Aprahamian erroneously exercised his discretion when he found that Ms. Valadez's conduct constituted contempt. Further, he failed comply with the procedural requirements for summary contempt. For those reasons, the order finding Ms. Valadez in contempt for objecting during the hearing must be vacated.

IV. Ms. Valadez's decision not to sign the release did not fall within the definition of contempt of court and the circuit court improperly used the summary contempt procedure; consequently, the finding of contempt must be vacated.

The circuit court could not require Ms. Valadez to release confidential records by signing a release form and Ms. Valadez respectfully declined to do so. Her choice did not constitute contempt of court. Moreover, even if the circuit court properly found that Ms. Valadez's decision not to sign the release was contemptuous, it improperly used the summary contempt procedure. Consequently, the circuit court's June 2, 2021, finding of contempt must be vacated.

A. The circuit court's finding that Ms. Valadez committed contempt of court by declining to sign the release was clearly erroneous.

Contrary to the circuit court's assertions, Ms. Valadez could not be required to sign the release of Health and Human Services records in this case. As she was not required to sign the release, her decision not to do so does not constitute contempt of court. Ms. Valadez did not disobey, obstruct, or resist the authority or process of the court; she simply exercised her right not to sign the release form. Moreover, Ms. Valadez's 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. Valadez committed contempt of court when she chose not to sign the release form. (562:31-32; App. 42-43). Specifically, in making this finding, the circuit court stated:

> Okay. It's June 2nd, 2021. We've had a hearing here in Branch 9 in regular session Court for a status in the Valadez action. Ms. Valdez [sic] did then and there, in open Court, in the immediate view of and in the presence of the Court, engage in disorderly, contemptuous, and insolent behavior, directly tending to interrupt

> the Court's proceedings and to impair the authority and dignity of this Court.
>
> In saying that what Ms. Valadez did was violate my direct order to have her sign the waiver that she was requested by Ms. D'Acquisto to sign several times and after finding that the order was reasonable and appropriate and the request for the waiver was reasonable and appropriate, I made the order for her to sign it. She refused to sign the order.
>
> The disorderly, contemptuous and insolent behavior of Ms. Valadez has, beyond a reasonable doubt, seriously destroyed the order, authority and dignity of this Court and must be dealt with under the Court's inherent statutory powers to summarily punish such conduct.

(562:31-32; App. 42-43). While Ms. Valadez did choose not to sign the release form, 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).

The circuit court had no authority to require Ms. Valadez to sign the release and Ms. Valadez's decision not to comply with such an order does not constitute contempt of court. Ms. Valadez had a right to choose not to sign the release of her confidential records. The circuit court could not compel her to agree to "voluntarily" allow access to those records to the custody study worker. The form itself states:

> **Right to Receive a Copy of this Authorization:** I understand that if I agree to sign this authorization, *which I am not required to do*, I must be provided with a signed copy of the form. **Right to Refuse to Sign this**

> **Authorization:** *I understand that I am under no obligation to sign this form* and that WCDHHS may not condition treatment, payment, enrollment in a health plan or eligibility for health care benefits on my decision to sign this authorization
> ..
> **By signing this authorization, I am confirming that I have had an opportunity to review and understand the content of this authorization form and that it *accurately reflects my wishes.* I am also confirming that I have read and understand the rights with respect to this authorization.**

Waukesha County Department of Health and Human Services Authorization for Use & Disclosure of Confidential Information, available online at https://www.waukeshacounty.gov/medicalrecords (*emphasis* added)(App. 46). Certainly the threat of being held in custody undermines any assertion that Ms. Valadez was not required to sign the form and that it "accurately reflects her wishes."

Moreover, the circuit court's order that Ms. Valadez sign the release was neither reasonable nor necessary under the circumstances. There is no statutory authority for the court to order someone to sign a release of confidential Health and Human Services records. There is, however, authority which would allow the court, or parties, to access those records without Ms. Valadez's consent. And, in fact, the record itself reveals that the custody study worker had the signed releases she needed. (562:23, 26-27; App. 34, 37-38).

Pursuant to § 48.78(2), the Department of Health and Human Services records are confidential and may only be made available for inspection or release as provided by statute "or by order of the court." Further, § 48.981(7), applying specifically to reports of child abuse made to the Department, provides that the reports made, and records maintained, "shall be confidential." Wis. Stat. § 48.981(7)(a). It also provides a list of individuals those records and reports may be released to and goes on to state that "either parent of a child may authorize the disclosure of a record for use in a child custody proceeding under s. 767.41 or 767.451 … when the child has been the subject of a report." Wis. Stat. § 48.981(7)(b). Thus, recognizing that a person may not be forced to authorize disclosure of these confidential records, the legislature provided alternative means for their release. Specifically, here, the records could have been released by order of the court, but more importantly, such an order was not necessary because the custody study worker had already obtained a signed release from Mr. Valadez. *See* Wis. Stats. §§ 48.78(2) & 48.981(7)(b).

The circuit court could not require Ms. Valadez to agree to release her confidential records. Nor did it need to under the circumstances. Further, the record reveals nothing about Ms. Valadez's choice not to sign the release that could reasonably be viewed as contempt of court. Ms. Valadez appeared before the circuit court for a status hearing on a post-divorce matter. In the middle of that hearing, the court learned that the custody study worker wanted

Ms. Valadez to sign a release form and she had not done so. The circuit court, before even hearing why the release was necessary, ordered Ms. Valadez to sign it and threatened to hold her in custody until she did. (562:18-19, 22; App. 29-30, 33). Ms. Valadez declined, explaining that she didn't believe she had a legal obligation to sign the release, that she wanted to get legal counsel, and that she didn't know what the form was for. (562:19, 22-23; App. 30, 33-34). Ms. Valadez was neither rude nor disrespectful to the court in her explanations. Further, her decision not to sign the release did not disrupt the court proceedings.

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

B. The circuit court's use of summary contempt procedure was improper.

Assuming without conceding, that Ms. Valadez committed contempt of court by choosing not to sign the release, the finding of contempt must still be vacated as the circuit court proceeded under the wrong provision of the contempt statute. Ms. Valadez's decision not to sign the release 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. Valadez's choice not to sign the release did not create an emergency situation requiring immediate punishment. Although the circuit court found that Ms. Valadez engaged in "disorderly, contemptuous, and insolent behavior, directly tending to interrupt the Court's proceedings and to impair the authority and dignity" of the court, there is nothing in the record that supports these conclusions. (562:32; App. 43). The court made no findings other than that Ms. Valadez declined to sign the release. (562:32; App. 43). That alone is not sufficient to support a finding that Ms. Valadez's choice threatened or impaired the authority and dignity of the court. Further, the record demonstrates that Ms. Valadez did not disrupt any proceedings. She simply informed the court, over its repeated instructions, why she did not want to sign the release. Consequently, the circumstances did not require immediate punishment and the circuit court's use of the summary contempt procedure was improper.

Further, immediate punishment of Ms. Valadez's decision not to sign the release 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. 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. Valadez did not make any remarks which impaired the respect due to the court. Moreover, the circuit court made no findings that demonstrate that Ms. Valadez's choice not to sign the bond was otherwise disruptive.

The record lacks any support for a finding that Ms. Valadez's conduct was disrespectful and that immediate punishment was required. There is nothing in the record to indicate that Ms. Valadez was loud or used a disrespectful tone with the circuit court. Furthermore, Ms. Valadez's interaction with the circuit court was polite. She explained her position – that she did not believe she was legally obligated to sign the form and that she did not know what the form was for and wanted the advice of legal counsel. 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.[4] Ms. Valadez simply asked questions and explained why she did not agree with the court's order that she sign the release.

Ms. Valadez's choice not to sign the release 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 release 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.

---

[4] *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, 279 N.W.2d 488 (Ct. App. 1979) (calling the jurors "stupid" and using an "obscene gesture").

CONCLUSION

For the reasons stated above, the circuit court misused its contempt powers in each of the three findings of contempt it made against Ms. Valadez and she respectfully requests that this court vacate the circuit court's contempt orders and sanctions.

Dated and filed this 8th day of September, 2021.

Respectfully submitted,

Electronically signed by
Kathilynne A. Grotelueschen
KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender
State Bar No. 1085045

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
grotelueschenk@opd.wi.gov

Attorney for Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 7,035 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 rules 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 or 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 and filed this 8th day of September, 2021.

Signed:
Electronically signed by
Kathilynne A. Grotelueschen
KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender