STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 2023AP809-FT & 2023AP810-FT

In re the finding of contempt in:

In the interest of A.G., a person under the age of 17, and

In the interest of A.B., a person under the age of 17:

DAVID PATTON,

Appellant,

v.

CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE CHAD G. KERKMAN, PRESIDING

Respondent.

On Appeal from an Order for Contempt entered on March 22, 2023, in the Kenosha County Circuit Court, the Honorable Chad G. Kerkman, Presiding.

REPLY BRIEF OF THE APPELLANT

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ARGUMENT

The circuit court erroneously found Attorney Patton's request to make a record and his attempt to make a record were conduct constituting contempt under Wisconsin Statute § 785.03(2).[1]

Assuming without conceding the conduct was contempt under § 785.01(1), the circuit court failed to satisfy Due Process and concepts of fundamental fairness, rendering the sanction unenforceable.

Therefore, the sanction should be vacated and the finding of contempt vacated.

II. THE CIRCUIT COURT ERRONEOUSLY FOUND ATTORNEY PATTON'S CONDUCT CONTEMPTIBLE[2]

Attorney Patton's conduct was an attempt to protect the record, but it was not intentional misconduct, disobedience, resistance, or obstructing aimed at interfering with the circuit court or otherwise undermining the court's authority. Wis. Stat. § 785.01(1)(a) and (b).

Attorney Patton did only what the Supreme Court of Wisconsin has encouraged him to do, which was to protect the record with "patient firmness" before a circuit court that believed above being asked about its decision. *Oliveto v. Circuit Ct. for Crawford Cnty.*, 194 Wis. 2d 418, 429, 533 N.W.2d 819 (1995). (R. 67:5-6 (it is unclear if the circuit court believed the question about reviewing the record or the question about whether it was willing to answer was the question Attorney Patton didn't "get to ask.").)

He inquired of the circuit court, he acknowledged its position without comment multiple times, and following that gentle deference, was held in

[1] All references to statutes within this brief are made to Wisconsin Statutes 2021-22.
[2] Numbering consistent with the Appellant's Brief filed July 20, 2023.

contempt of court for summarizing its decision on the record. (R. 67:6.) *See* Rules of Professional Conduct for Attorneys (Annotated), SCR 20:3.5(d) ABA Comment ("A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate.").

The order found he "argued" and "demanded" answers, contrary to the record. (R. 66:1.) *Contra* (R. 67:5-6 ("I asked you a question. Are you willing to answer it?"; "Okay" as the only response to five statements from the circuit court in a row).) The order found it caused a disruption, not otherwise reflected in the record or described. *Id.*

" 'An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.' " *Oliveto*, 194 Wis. 2d at 429 (quoting SCR 20:3.5(c) ABA Comment, subsequently renumbered SCR 20:3.5(d)).

Attorney Patton's conduct was not contempt of court and a finding it was under Wisconsin Statutes § 785.03(2) was clearly erroneous, thus that finding should be vacated.

III. THE CIRCUIT COURT DENIED ATTORNEY PATTON HIS NECESSARY RIGHT TO ALLOCUTION RENDERING THE FINE UNENFORCEABLE

The circuit court failed to satisfy "Due Process and concepts of fundamental fairness" when it sanctioned Attorney Patton. *Oliveto*, 194 Wis. 2d at 435-36. It did so by failing to "inform[] the contemnor of the right of allocution," and by failing to "invite[] the contemnor to exercise that right prior to imposition of sanction." *Id. See Contempt in State v. Dewerth*,

139 Wis. 2d 544, 560, 407 N.W.2d 862 (1987) ("a contemnor should have the opportunity . . . for allocution before punitive sanctions are imposed.").

The circuit court never informed Attorney Patton of his right to allocution. (R. 66:1; R. 67:6-7.) The circuit court's judicial assistant offered dates to schedule a hearing on the issue; however, it is unclear if the circuit court viewed the requested hearing as the opportunity for allocution, itself, or as the opportunity to address whether there was a right to allocution. (R. 69:1; 70:1.) Nevertheless, even an implicit acknowledgement by a judicial assistant would not qualify as the required "statement from the judge." *Oliveto*, 194 Wis.2d at 436.

Furthermore, the record demonstrates the circuit court never made "a further statement inviting the contemnor [Attorney Patton] to exercise that right prior to imposition of sanction." *Contra Oliveto*, 194 Wis.2d at 436.

On March 22, 2023, the circuit court held the sanction was payable within five days, on March 29, 2023. (R. 66:1; R. 67: 6.). *See* Wis. Stat. § 801.15(1)(b). The order specified that if the sanction was not paid "a civil judgment shall be entered." (R. 66:1.)

Only after Attorney Patton contacted the circuit court was he provided the dates for an opportunity to exercise his right of allocution, yet the offered dates were only after the sanction was to be imposed. (R. 70). *Contra Oliveto*, 194 Wis.2d at 436. The circuit court made no effort to hold a hearing prior to imposition of sanction.

Nevertheless, the State argues Attorney Patton declined the opportunity of allocution because on March 29th, at 4:23 p.m., he withdrew his request and the judgment was not filed until June 5th. (State's Br. 8.; R. 69:1.)

The circuit court never indicated the March 29th deadline would be extended prior to its expiration, so the request-withdrawal was only done

when it was no longer possible for Attorney Patton to exercise the right of allocution prior to imposition of sanction.

The filing of the judgment on June 5th does not indicate the circuit court intended to extend the deadline—the request had already been withdrawn and it could have filed the judgment on March 30th to the same effect. It does not indicate that if the request was not withdrawn the circuit court would not have filed the judgment on March 29th at 5:00 p.m. It does not serve as evidence for anything other than the judgment was ultimately filed on June 5, 2023.

The State's assertion that the late-filing of the judgment is even relevant undermines completely any argument the circuit court's obligations under summary contempt process were satisfied—when the circuit court is required to make explicit statements and invite allocution, the State instead asks this Court to interpret tea leaves. *See Oliveto*, 194 Wis.2d at 435-36 ("the right is so basic that it will not be inferred from the record.").

Attorney Patton was not required or expected to infer that the time prior to the imposition of sanction was extended—any modification to the order would need to be explicit.

Notably, the State's argument ignores entirely the obligation of the circuit court in summary contempt proceedings, instead repeatedly couching the issue as "Attorney Patton declined the opportunity." *See* (State's Br. 1-10.) In doing so, the State ignores the purpose of the right of allocution, which "essentially provides a check on the heightened potential for abuse posed by the summary contempt power." *Id.* at 436.

That purpose is so strong that a genuine contemnor will have their contempt vacated for a failure to honor the right of allocution, as it was in *Oliveto* when the Court held, "the right of allocution is so fundamental that the whole summary procedure must be set aside for failure to afford

allocution." *Id.* The State offers no argument as to why that reasoning does not apply in the present case.

The circuit court entirely ignored Attorney Patton's right of allocution prior to the imposition of sanction, it made no record that acknowledged its obligation to invite the exercise of the right, and thus, 'the whole summary procedure must be set aside for failure to afford allocution." *Id.*

CONCLUSION

The record demonstrates the circuit court was clearly erroneous when it found Attorney Patton's conduct constituted contempt of court, thus the contempt finding should be vacated.

Additionally, the record shows the circuit court denied Attorney Patton his Due Process and violated concepts of fundamental fairness, which rendered the contempt order unenforceable, therefore it should be vacated.

For those reasons, Attorney Patton respectfully moves this Court to vacate the circuit court's finding of contempt and the resultant order.

Dated and filed this 16th day of August, 2023.

electronically signed by Grant I. Henderson

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CERTIFICATION OF BRIEF'S FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c), and as modified by s. 809.17 and the rules promulgated by the Wisconsin Court of Appeals and updated in October 2021 for a brief.

The length of this brief is 1428 words in a serif, non-monospaced font.

Dated and filed this 16th day of August, 2023.

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