

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

CASE NO. 2016AP0584-CR

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OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

V.

CLE A. GRAY, JR.,

Defendant-Appellant.

On Appeal from an Order Denying Verified
Motion for Contempt of Court Orders,
Entered in the Dane County Circuit Court,
The Honorable Stephen Ehlke Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

Cle A. Gray, Defendant-Appellant,
Pro se

Oakhill Correctional Institution
P.O. Box 938
Oregon, WI 53575-0938

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CASES CITED

Dalton v. Meister, 84 Wis.2d 303, 267 N.W.2d 326 (1978)
Frisch v. Henrichs, 2007 WI 102, 304 Wis.2d 1, 736 N.W.2d 85
State v. Allen, 2004 WI 106, ¶23, 274 Wis.2d 568, 682 N.W.2d 433
State v. Bentley, 201 Wis.2d 303,310, 548 N.W.2d 50 (1996)
State v. King, 82 wis.2d 124, 130, 262 N.W.2d 80 (1978)
State v. Washington, 176 Wis.2d 205, 215, 500 N.W. 2d 331 (Ct. App. 1993)
State ex rel. Kalal v. Circuit Court for Dane County, 271 Wis.2d 633, 681 N.W.2d 110 (2004)

CONSTITUTIONAL CITATIONS

United States Constitution, Amendment XIV

WISCONSIN STATUTES CITED

§785.01(3).
§785.01(1)(b).

§785.03(1)(a)
§785.04(1)(a), (b) and (c).
Rule §809(8)(b) and (c)
§809.30
§939.48(1m)
§973.20 (12)(a)
§974.02

OTHER AUTHORITIES CITED

SCR 60.04 (1) (d), (e) and (hm).

ISSUES PRESENTED

- I. WHETHER A MOTION FOR CONTEMPT OF A JUDGMENT OF CONVICTION SEEKING REMEDIAL SANCTIONS IS PROPERLY FILED IN THE CRIMINAL COURT THAT ISSUED THE ORDER.**

Judge Ehlke decided the matter ex parte, without a hearing, and stated that Mr. Gray's remedy would be to file an appeal within the prison administrative review procedures.

- II. WHETHER THE CIRCUIT COURT HAD A PLAIN DUTY TO ENFORCE MR. GRAY'S RIGHT TO RETAIN 75% OF PRISON WAGES AND 100% OF GIFT MONIES RECEIVED, AS ESTABLISHED THE AMENDED JUDGMENT OF CONVICTION.**

Judge Ehlke concluded that the amended judgment of conviction and order for restitution were to two completely separate orders, in spite of his ruling to the contrary at a sentence modification hearing held March 2, 2015, wherein Mr. Gray waived substantial post-conviction motions in lieu of the two orders being synchronized, allowing the DOC to take separate deductions on a declining balance.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Gray would welcome oral argument if the Court felt it would be beneficial but is not requesting it. This is a fact-specific case, requiring application of established legal principles to the facts of the case, therefore publication is not requested, however, Mr. Gray is also not opposed..

STATEMENT OF CASE AND FACTS

Mr. Gray was arrested and charged with one count of substantial battery, as a repeater. The case was tried before a jury, the Honorable Stephen Ehlke presiding. The jury found Mr. Gray guilty and the court sentenced him to a prison term of three (3) years and six (6) months (See Verified Motion for Contempt of court Orders, at p.1, ¶1, hereinafter VM: 1, 1) (App. 301). As part of the judgment of conviction (JOC 1) (App. 401) the court ordered the sum total¹ of all court financial obligation to be paid at a rate of 25% of prison wages and work release funds (VM: 1, 2) (App. 301-02).

After Mr. Gray's transfer to Kettle Moraine Correctional Institution (KMCI), an Order for Restitution assigning a restitution amount of \$2,757.68 and administrative costs of \$275.77 was signed by Judge Ehlke. This prompted the KMCI business office to author a memorandum informing Mr. Gray that "when pay or receipts [were] posted to [his] account...First the 25% restitution deduction [would] be taken, then the 25% surcharge... on the declining balance²." (VM: 2, 4) (App. 302). Seeking to stop the erroneous deduction Mr. Gray authored various complaints, formally and informally, to various KMCI departments, concluding with KMCI Warden, Robert Humphreys (Warden), rejecting Mr. Gray's complaint. (VM: 2, 5-7) (App. 302).

On January 9, 2015, Mr. Gray, by his then attorneys John Pray, Gabriella Parra and Ben Schwarz, presented his motion for post conviction relief pursuant to **Wis. Stats. §§809.30 and 974.02 (PC)** (Index entry no. 33). His motion alleged,

1. Gray was denied his right to the effective assistance of counsel when his attorney failed to move the court to allow use of Wisconsin's Castle Doctrine pursuant to **Wis. Stat. §939.48(1m) (PC, p.2)**;

¹ JOC 1 reads, in part: "\$268.00 to be collected by the Dept. of Corrections..." This included: \$163.00, court costs; \$92.00, Mandatory Victim/witness Surcharge; \$13.00, other; and TBD, restitution. (See, Appendix p.101).

² 43.75% would be taken for JOC 1.

2. Gray was denied his right to the effective assistance of counsel when his attorney failed to present testimony that a stalker murdered Gray's father (PC, p.7);
3. Gray was denied his right to the effective assistance of counsel at sentencing when his attorney failed to present testimony of Gray's father's murder (PC, p.8);
4. Gray is entitled to a sentence modification because Gray's father being [murdered] constitutes a "new factor" (PC, p.9); and
5. The court's order for restitution must be vacated because Gray did not receive proper notice (PC, 9).

On March 2, 2015 a post conviction hearing was held. Rather than risking the conviction be overturned (See Sentence Modification transcript, at p.7, hereinafter SM: 7) (App. 703). Assistant District Attorney Erin Hanson presented to the court an agreement:

1. The state is willing to agree to a modification of the sentence from a three-and-one-half-year sentence to a three-year sentence (SM: 6-7) (App. 702-03); and
2. The amended judgment of conviction (JOC2) (App. 601) will show that the restitution is part of court-ordered obligations to be deducted at 25% of prison wages and work release funds (SM: 6, 15) (App. 702).
3. In exchange, Mr. Gray would agree to withdraw his substantial post-conviction motions (SM: 7) (App. 703).

After recognizing Mr. Gray's concern about the amounts being taken by the Department of Corrections (SM:5) (App. 701) Judge Ehlke agreed to adopt the recommendation (SM: 11-12) (App. 705-06) setting the amount of costs, fees, and surcharges in conjunction with the amount of restitution and issued a single amended judgment of conviction, pursuant to **§973.20 (12)(a), Wis. Stats.** (SM:14-15) (App. 707-08).

Again, Mr. Gray sought, through numerous requests and complaints, formal and informal, to have the erroneous deductions abated (VM:2-3,8-10) (App. 302-03). After exhausting all administrative remedies, Mr. Gray submitted, on June 18, 2015, his Verified Motion for Contempt of Court Orders Pursuant to **Wis. Stat. §785.03**. On February 17, 2016, Judge Ehlke issued an order, in the form of a letter, denying Mr. Gray's motion citing that the "amended judgment of conviction ordered court financial obligations paid at 25% of your prison wages and work release funds. Separate from the judgment of conviction, your restitution order commanded the DOC to collect restitution at 25% of prison funds..." (Order Denying, ¶ 2) (App. 201).

ARGUMENT

1. A MOTION FOR CONTEMPT OF A JUDGMENT OF CONVICTION SEEKING REMEDIAL SANCTIONS IS PROPERLY FILED IN THE CRIMINAL COURT THAT ISSUED THE ORDER?

A person aggrieved by another person's contempt may file a motion for imposition of a remedial sanction for the contempt. **Section 785.03(1)(a), Wis. Stat.** Contempt of court means the intentional: Disobedience, resistance or obstruction of the authority, process or order of a court. **Wis. Stat. §785.01(1)(b).** A remedial sanction is civil in nature and is "imposed for the purpose of terminating a continuing contempt of court." **Wis. Stat. §785.01(3).** Remedial contempt is concerned with the private interests of the litigant and is "designed to force one party to accede to another's demand." *State v. King*, 82 Wis.2d 124, 130, 262 N.W.2d 80 (1978). Remedial sanctions may include imprisonment, forfeitures, and payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court. **Wis. Stat. §785.04(1)(a), (b) and (c).** *Frisch v. Henrichs*, 2007 WI 102, 304 Wis.2d 1, 736 N.W.2d 85. A contempt action should be initiated by an order to show cause and supporting affidavit in the same court in which the affiant established his rights. *Dalton v. Meister*, 84 Wis.2d 303, 267 N.W.2d 326 (1978).

A hearing should have been held to determine whether contempt of the circuit court's order had occurred. Mr. Gray's request for remedial sanctions was timely filed and in proper form. Further proceedings were necessary in the circuit court.

2. THE CIRCUIT COURT HAD A PLAIN DUTY TO ENFORCE MR. GRAY'S RIGHT TO RETAIN 75% OF PRISON WAGES AND 100% OF GIFT MONIES RECEIVED AS ESTABLISHED BY THE AMENDED JUDGMENT OF CONVICTION.

Judge Ehlke concluded that the amended judgment of conviction and order for restitution were to two completely separate orders, in spite of his ruling to the contrary at a sentence modification hearing held March 2, 2015, wherein Mr. Gray waived "substantial post-conviction motions" in lieu of the two orders being synchronized, allowing the DOC to take separate deductions on a declining balance.

A hearing on a post conviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. State v. Bentley, 201 Wis.2d 303,310, 548 N.W.2d 50 (1996); State v. Washington, 176 Wis.2d 205, 215, 500 N.W. 2d 331 (Ct. App. 1993). Mr. Gray's motion alleges, within the four corners of the document itself, the kind of material factual objectivity- the five "w's" and one "h"- necessary for reviewing courts to meaningfully assess his claim. See State v. Allen, 2004 WI 106, ¶23, 274 Wis.2d 568, 682 N.W.2d 433. The contemnor, the Warden (who) (VM: 1, footnote 2.)(App. 301), KMCI (where), improperly deducting funds from prison wages and gifts for Dane County Case No. 13CF2324 (what, how)(VM: 3-4, ¶¶11-18)(App. 303-04), continuing from October 6, 2014 through the present (when)(VM: 3-4, ¶¶11-18)(App. 303-04), to resist or obstruct the authority, process or order of the circuit court (why)- sufficient material facts that clearly satisfy the Bentley standard, and entitle Mr. Gray to a hearing. Allen, 2004 WI 106, ¶24.

The circuit court must hold a hearing as Mr. Gray has made a legally sufficient post conviction motion. Allen, 2004 WI 106, ¶12. The trial court's action, or inaction, run contrary to the aspirational goals found in the Code of Judicial Conduct, **SCR 60.04 (1) (d), (e) and (hm)**. These provisions direct that:

- (d) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and other with whom the judge deals in an official capacity and shall require similar conduct of lawyers, staff, court officials and others subject to the judge's direction and control...
- (e) A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socio-economic status, and may not knowingly permit staff, court officials and others subject to the judges direction and control to do so.
- (hm) A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially. A judge shall also afford to every person who has a legal interest in a proceeding, or to that persons lawyer, the right to be heard according to the law. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

The trial court's first taking over eight months to render a decision that is contrary to its previous orders (See, JOC 2) (App. 601), then delivering that decision as a

simple letter would appear to be the antithesis of “patient, dignified and courteous”.

Mr. Gray’s request for remedial sanctions was filed in a timely manner and in proper form. Further proceedings were necessary in the circuit court. Therefore, the circuit court was under a plain legal duty to honor that request. It’s refusal to do so warrants the exercise of this court’s supervisory jurisdiction. *State ex rel. Kalal v. Circuit Court for Dane County*, 271 Wis.2d 633, 681 N.W.2d 110 (2004).

CONCLUSION

For the foregoing reasons, Mr. Gray respectfully requests that the Court of Appeals issue a supervisory writ over Dane County Circuit Court Judge Stephen Ehlke, directing him to: (1) issue the order to show cause upon the Warden to answer to allegations that his conduct is willful; part of a pattern of activity to injure; he has engaged in similar illegal conduct; and that he continues to intentionally disobey, resist or obstruct the authority, process or order of the circuit court; (2) Award costs and fees applicable to bringing this action.

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirement of **Rule 809(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 2,168 words.

Dated this ^{24th}~~22nd~~ day of August, 2016.

Signed:



Cle A. Gray, pro se
Defendant-Appellant

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
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STATE OF WISCONSIN,

Plaintiff-Respondent,

V.

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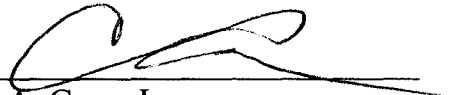
Circuit Court for Case No. 13CF2324	101
Circuit Court Order. Found in Index Entry No. 46	201
Defendant's Verified Motion for Contempt of Court Orders. Found in Index for Entry No. 38	301
Circuit court Judgment of Conviction (JOC 1). Entry No. 30	401
Order for Restitution. Entry No. 32	501
Circuit court Amended Judgment of Conviction (JOC 2). Entry No.37	601
Select Portions of Sentence Modification Hearing Transcript (SM). Entry No. 55	701

APPELLANT'S BRIEF APPENDIX CERTIFICATION

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 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; and (3) 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.

Dated this 24th day of ~~September~~^{August}, 2016.

Signed:



Cle A. Gray, Jr., pro se
Defendant-Appellant