COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1659

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN THE MATTER OF ASSESSMENT OF JURY FEES AGAINST OFFICE OF STATE PUBLIC DEFENDER, IN STATE V. CREASER:

OFFICE OF STATE PUBLIC DEFENDERS,

APPELLANT,

V.

CIRCUIT COURT FOR DUNN COUNTY AND THE HONORABLE EUGENE D. HARRINGTON, PRESIDING,

RESPONDENTS.

APPEAL from an order of the circuit court for Dunn County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

HOOVER, J. The State Public Defender's Office appeals an order assessing jury fees against it for defense counsel's failure to formally request an adjournment of trial until immediately prior to the commencement of voir dire and for being unprepared to proceed to trial. The SPD argues that: (1) the trial court's order represents an erroneous exercise of discretion; (2) the sovereign immunity doctrine deprived the circuit court of authority to assess jury costs against the SPD; and (3) the order was void because the SPD had neither notice nor an opportunity to be heard. Because the SPD was deprived of notice and an opportunity to be heard, we vacate the trial court's order and remand with instructions to hold a hearing so that the SPD may be heard as to whether a sanction should be imposed and, if so, as to an appropriate sanction.

This case arises out of a circuit court action, ***State v. Creaser***, No. 97-CF-119, in which Creaser was represented by Bradley Keith of the SPD. Creaser was charged with interference with custody of a child in violation of § 948.31(1)(c), STATS. Creaser was arraigned on January 23, 1998, and requested a speedy trial within ninety days. The jury trial was scheduled for February 25, 1998, before Judge Donna Muza. Judge Muza disqualified herself on February 16. On February 19, Judge Eugene Harrington was assigned to the case.

In a phone conference on February 24, 1998, Keith expressed his concerns regarding the case being scheduled for a one-day trial. He emphasized that they originally had two days set aside and, after receiving further discovery materials, he believed the trial could actually last three days. Keith further stressed that after receiving the discovery materials, he did not know if he was fully prepared for trial at that point:

> I received the discovery materials in the last couple of weeks and I was in a jury trial and I was at a seminar. And

> the time I had to review them, it appears that there is an issue with respect to, well, State vs. Felton, the battered wife syndrome issues that need to be raised. And also in the discovery materials that were sent to me last week, there is information concerning considerable pretrial publicity. …
>
> … [And] I discussed this with my client … and she would not object to an adjournment for an additional time to get psychological evaluations and to investigate further the pretrial publicity and to prepare [a] jury questionnaire or possibly a motion for change of venue.

The court responded:

> Unless you folks tell me that you are just not prepared under any circumstances for whatever reason, and you are going to say it on the record, we're going to try this case tomorrow. This defendant's entitled to have her case tried. That's, she made the speedy trial demand …. I'm going to look at State vs. Felton and if it's imperative that the defendant be permitted to introduce evidence to that effect, then I'll reconsider whether we ought to try the case tomorrow or not ….

Keith again emphasized that he had spoken to his client and she had requested that he ask for an adjournment to be rescheduled within the ninety-day time period. The State did not oppose an adjournment. The court stated that it did not have any other openings on its calendar and that "[t]he best time to try this case is starting tomorrow." Later telephone conference, Keith once more requested to postpone the trial:

> MR. KEITH: There isn't a possibility of selecting the jury tomorrow and starting the trial next week, is there?
>
> THE COURT: No, there isn't.
>
> MR. KEITH: That's going to be tough for me.
>
> ….
>
> THE COURT: We've got to do it starting tomorrow and then try the case. That's just the way that the calendar is structured here.

> ….
>
> MR. KEITH: I did not expect that Judge Muza was going to disqualify herself. I was not aware of that. I knew that even though we had a speedy trial demand, Judge Muza would have given a week or two adjournment. I know she would have done that. That's just the nature --.
>
> ….
>
> MR. KEITH: I understand, Judge, if you are going to do it, you are going to do it and I bow my head. I want you to know that I'm not trying to jerk the court around by bringing this up at the last minute. Okay?
>
> ….
>
> MR. KEITH: You understand Mr. Maki doesn't oppose an adjournment.

The trial court again responded that Keith was not going to get an adjournment.

The day of trial, Keith renewed his motion to adjourn. Keith emphasized to the trial court that he had a busy schedule for the past two months, and the short notice he had been given due to a new judge being assigned to the case had left him unprepared. Keith explained that he had requested an adjournment "to allow me to obtain an evaluation and a determination whether we wish to introduce expert witnesses in this case on the issue of battered wife syndrome." Keith further apologized to the court for not being adequately prepared to proceed to trial; however, he did stress that he felt competent to proceed with jury selection. The court scolded Keith for compromising his client's constitutional rights as a result of his ineffective time management. "You knew a month ago[1] you had to try this case today and you didn't prepare." The court asked the defendant if she wanted to go ahead with trial, and she agreed that

[1] The arraignment was on January 23, 1998, at which time a speedy trial was demanded. Trial was then set for February 25, 1998.

if her attorney was not prepared she did not want to go forward. The court adjourned the trial.

On March 13, 1998, without notice, the trial court issued an ex parte order assessing jury fees against the SPD. The order stated that defense counsel did not formally request an adjournment until immediately prior to the commencement of the voir dire and was not prepared to proceed with the trial. The SPD filed a motion to vacate the assessment of jury fees, which was denied by the trial court, and this appeal ensued.

The circuit court has the inherent power to impose jury costs as a "power necessarily related to the existence of the courts and to the orderly and efficient exercise of its jurisdiction." ***Jacobson v. Avestruz***, 81 Wis.2d 240, 247, 260 N.W.2d 267, 270 (1977). The court's inherent power possesses two primary features: (1) the power relates to the court's orderly and efficient exercise of jurisdiction, and (2) the power must not extend the court's jurisdiction or abridge or negate those constitutional rights reserved to individuals. ***Id***.

> The purpose of imposing jury costs is to deter disruptive practices that contribute to inefficiency in the court system. As such, an assessment of cost or expense to a county in calling a jury under sec. 814.51 is akin to a penalty for conduct disruptive to the administration of justice.

House v. Circuit Court, 112 Wis.2d 14, 17, 331 N.W.2d 859, 860 (Ct. App. 1983).

The SPD first argues[2] that imposition of jury costs against it violates the sovereign immunity doctrine. The defense of sovereign immunity depends upon proof that the matter in controversy constitutes a suit brought against the state. ***Polk County v. SPD***, 188 Wis.2d 665, 675, 524 N.W.2d 389, 393 (1994). The SPD contends that the circuit court's act of sanctioning it brought into existence a "suit." It argues that the trial court "acted as a proxy for the county" by seeking "to redress an injury on behalf of Dunn County, namely *recovery* for the exact costs of the jury …."

The term "suit" in sovereign immunity cases refers to "legal actions which seek resolution in a court of law." ***Id***. (quoting ***P.G. Miron Const. Co.***, 181 Wis.2d 1045, 1053, 512 N.W.2d 499, 503 (1994)). We conclude that the imposition of jury costs is incompatible with the notion of a legal action seeking resolution in court. Rather it is calculated "to deter disruptive practices that contribute to inefficiency in the court system," ***House***, 112 Wis.2d at 17, 331 N.W.2d at 860, and, as such, is collateral to the legal action in which it arises. That the county benefits by receiving jury costs reimbursement is similarly an ancillary consequence. The act is done for the benefit of court operations, not the county. We therefore hold that the SPD is not immune from the imposition of jury costs.

The SPD contends that forcing it to pay jury costs in connection with the alleged misconduct of one of its employees cannot possibly further the orderly and efficient exercise of a court's jurisdiction. It suggests that punishing does not

[2] The SPD first offers several fact-intensive erroneous exercise of discretion arguments directed to the propriety of issuing the jury cost order. Our remand for a hearing on the appropriateness of imposing jury costs and potentially the nature of order for costs, render these arguments moot. Any further review by this court will be of the hearing had upon remand.

create an incentive for the agent to avoid future offending behavior. The SPD further questions, emphatically, why *it* should be liable for its employee's conduct.

The SPD's arguments are without merit. The first argument, regarding the inefficacy of the order, is unsupported by any authorities and is therefore evidently advanced as self-evident. This court will not consider arguments unsupported by legal authority. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). Nor does the SPD's contention constitute reasonable, much less compelling, speculation[3] concerning the consequences likely to ensue when an expense is levied against a principal as the result of its employee's malfeasance. In response to its rhetorical question: why should "the *office* be liable," (emphasis in original), the case law is replete with examples of employers being held responsible for their agents' acts. *See, e.g.,* cases collected at 14 WISCONSIN KEY NUMBER DIGEST *Master & Servant*, at 131-520 (West 1964 & Supp. 1998). In addition we note that § 895.46, STATS., may apply in this instance and require reimbursement of any costs imposed against an individual attorney, although we do not so decide.

The SPD finally argues that the trial court erred by failing to provide notice of the sanction and failing to allow the office to be heard concerning the sanction. Whether the trial court violated the SPD's right to notice and to be heard is a question of law this court determines independently of the trial court. *See* ***Ball v. District No. 4***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

[3] We do not address speculative arguments. ***State v. Tarantino***, 157 Wis.2d 199, 217, 458 N.W.2d 582, 589 (Ct. App. 1990).

In ***Anderson v. Circuit Court***, 219 Wis.2d 1, 578 N.W.2d 633 (1998), the Wisconsin Supreme Court addressed the trial court's award of sanctions against an attorney who arrived late for a scheduled court appearance. The court concluded that the trial court erred by failing to adequately set forth on the record its reasons for imposing sanctions. The court emphasized that for a reviewing court to determine whether the sanctions were just, it must make a record of its reasoning. ***Id***. at 10, 578 N.W.2d at 637. The trial court should (1) give the attorney an opportunity to explain his or her actions, (2) address the disruptive impact on the court's calendar, (3) address the reasonableness of the attorney's explanation, and (4) address the severity of the sanctions to be imposed. ***Id***. The court reasoned that "[a]rbitrary action by the circuit court undermines attorney and public confidence that they will receive fair treatment by the circuit court." ***Id***. at 10, 578 N.W.2d at 636-37. The court stressed that "characterizing a power as an inherent power does not excuse a court from developing a record to support its decision. ***Id***. at 12, 578 N.W.2d at 637.

With ***Anderson*** as guidance, we first conclude that the SPD or its agent is entitled to notice that the court is considering imposing a form of costs "akin to a penalty." In addition, although the record contains Keith's reasoning for requesting an adjournment and the trial court's reluctance to grant a continuance, the trial court failed to give the SPD an opportunity to address the relevant factors under ***Anderson***. Specifically, it failed to give either Keith or the SPD an opportunity to address whether sanctions were appropriate and, if so, in what form. Although the trial court has the inherent power to impose jury costs, characterizing its power as inherent does not excuse it from developing a record necessary to support its decision. ***Id***. at 12, 578 N.W.2d at 637. Because the trial court failed to allow the SPD to respond to the sanction, we are unable to conclude

whether the award was just. *See* ***id***. at 10, 578 N.W.2d at 637. Therefore, we reverse and remand to the trial court with directions to vacate its order imposing jury costs and to hold a hearing so that the SPD may respond.

By the Court.—Order reversed and cause remanded with directions.

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