

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1984-CR

Cir. Ct. No. 01-CM-167

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DANITA M. SCHARENBRUCH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ The State appeals an order dismissing its complaint against Danita Scharenbroch. The State charged Scharenbroch with violating a court order, as a party to a crime, pursuant to WIS. STAT. §§ 940.47 and 939.05.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.1(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

The trial court dismissed the action because it concluded that violating a § 940.47 order was not a “crime.” Therefore, Scharenbroch could not be charged as a party to the crime of violating § 940.47.

¶2 The State argues that a violation of WIS. STAT. § 940.47 is a crime because (1) § 940.47 falls within the criminal code, (2) criminal procedure applies to the processing of a case for a violation of § 940.47, and (3) this court, in *State v. Chinavare*, 185 Wis. 2d 528, 518 N.W.2d 772 (Ct. App. 1994), recognized that someone aware of a court order who assists in violating the order is subject to contempt of court.

¶3 This court concludes that violating a court order granted under WIS. STAT. § 940.47 is not a crime and that the remedy for such violations is proceedings under WIS. STAT. ch. 785 for contempt of court. Therefore, Scharenbroch could not be charged as a party to a crime of violating a court order. The trial court properly dismissed the action and we affirm the order.

BACKGROUND

¶4 Kenneth Hudson was charged with a crime in Outagamie County. The trial court issued a “no contact” order pursuant to WIS. STAT. § 940.47,²

² WISCONSIN STAT. § 940.47 provides:

Any court with jurisdiction over any criminal matter, upon substantial evidence, which may include hearsay or the declaration of the prosecutor, that knowing and malicious prevention or dissuasion of any person who is a victim or who is a witness has occurred or is reasonably likely to occur, may issue orders including but not limited to any of the following:

- (1) An order that a defendant not violate ss. 940.42 to 940.45.

(continued)

precluding Hudson from having contact with any person mentioned in the criminal complaint. Scharenbroch was one of those people, and she was notified of the court order. Nevertheless, Hudson, who remained in jail, was repeatedly allowed to telephone Scharenbroch from jail. She accepted the collect calls.

¶5 The State charged Scharenbroch with nine counts of violating WIS. STAT. § 940.47 as a party to the crime under WIS. STAT. § 939.05(1). The trial court granted Scharenbroch’s motion to dismiss the complaint, stating “this is not a crime and Ms. Scharenbroch cannot be prosecuted as a party to the crime” It further determined that Scharenbroch could not be prosecuted for contempt of court because the § 940.47 order applied not to Scharenbroch, but to Hudson. The State now appeals.

STANDARD OF REVIEW

¶6 Resolution of this issue involves the interpretation of WIS. STAT. § 940.47 and its application to undisputed facts. Therefore, the issue presents a question of law we review de novo. *State v. Carpenter*, 179 Wis. 2d 838, 841, 508 N.W.2d 69 (Ct. App. 1993).

(2) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, not violate ss. 940.42 to 940.45.

....

(4) An order that any person described in sub. (1) or (2) have no communication with any specified witness or any victim, except through an attorney under such reasonable restrictions as the court may impose.

DISCUSSION

¶7 The State argues that a violation of an order issued under WIS. STAT. § 940.47 is a crime and that it therefore can charge an individual as a party to the crime of violating an order. To support its contentions, the State asserts that violation of a § 940.47 order is a crime because (1) § 940.47 is contained within the criminal code, (2) criminal procedure applies to its enforcement and (3) *Chinavare* allows it to charge individuals as a party to a crime if they are aware of a court order and assist others in violating it.

¶8 Although WIS. STAT. § 940.47 is in the criminal code, WIS. STAT. § 939.01 advises that, “Chapters 939 to 951 may be referred to as the criminal code but shall not be interpreted as a unit.” Also, Scharenbroch was not “concerned in the commission of a crime,” which is an element of being a party to a crime under WIS. STAT. § 939.05(1). Rather, she was part of another person’s alleged disobedience of a court order granted under WIS. STAT. § 940.47.

¶9 Under WIS. STAT. § 940.48, an alleged violator of a WIS. STAT. § 940.47 order faces potential punitive sanctions under WIS. STAT. ch. 785;³ the statute does not provide for criminal penalties under WIS. STAT. ch. 940. Thus, ch. 785 contempt of court, not criminal, procedure applies to § 940.47 violations.

¶10 The State argues that because punitive sanctions include fines and or imprisonment, a punitive contempt violation is a crime. It notes that a crime is

³ WISCONSIN STAT. § 940.48 provides in part: “Violation of court orders. Whoever violates an order issued under s. 940.47 may be punished as follows: (2) As a contempt of court under ch. 785.”

defined in WIS. STAT. § 939.12 as conduct punishable by fine or imprisonment or both.

¶11 Although the State's argument is logical, *Carpenter*, 179 Wis. 2d at 840, confirmed that contempt of court is not a crime. *Carpenter* quoted *McGee v. Racine County Circuit Court*, 150 Wis. 2d 178, 184, 441 N.W.2d 308 (Ct. App. 1989): "Chapter 785, Stats., specifically does not draw civil and criminal contempt designations. Contempt proceedings are *sui generis* and are neither civil actions nor criminal prosecutions within the ordinary meaning of those terms." *Carpenter*, 179 Wis. 2d at 842. This court elaborated:

McGee was decided long after the contempt laws were revised in 1979. Despite the revisions, we concluded that a contempt of court subject to punitive sanctions is not a crime. As published decisions rendered by the court of appeals have statewide precedential effect, we are bound by *McGee*'s holding that contempt of court is not a crime. See sec. 752.41(2), Stats.

Id. at 842.

¶12 The State nevertheless argues that *Chinavare* allows it to charge individuals with violations of orders under WIS. STAT. § 940.47, as a party to the crime, pursuant to WIS. STAT. § 939.05. *Chinavare* holds that a person under a court order who instigates someone else to violate the order can be subject to contempt proceedings. *Chinavare*, 185 Wis. 2d at 535-36. However, *Chinavare* does not apply to this case. *Chinavare*, however, did not overrule *Carpenter*'s and *McGee*'s conclusions that punitive contempt is not a crime. *Chinavare* is inapplicable to the issue before this court.

¶13 This court is bound by *Carpenter* and *McGee*.⁴ Because there was no crime, Scharenbroch could not be a party to it. The State's criminal complaint against her was properly dismissed. This court will not consider whether the State could have brought contempt of court proceedings against Scharenbroch for violating the order.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁴ Moreover, if the legislature had intended a violation of WIS. STAT. § 940.47 to be punishable as a crime, it could have demonstrated that intent in the same manner it does throughout the criminal code and it would not have directed other means of recourse in WIS. STAT. § 940.48.

