

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 25, 2011**

A. John Voelker  
Acting 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. 2010AP2208**

**Cir. Ct. No. 2009FO2456**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**HONORABLE MARK J. MCGINNIS,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARIO JIMENEZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Outagamie County:  
MITCHELL J. METROPULOS, Judge. *Reversed.*

¶1 PETERSON, J.<sup>1</sup> Mario Jimenez appeals an order sanctioning him for failing to comply with conditions imposed after he was found to have violated a municipal truancy ordinance. See WIS. STAT. § 938.55(6m)(ag). Jimenez argues

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the circuit court did not have authority to sanction him under § 938.355(6m)(ag) because that statute does not apply to persons who are seventeen years of age or older, and he was seventeen. The Honorable Mark J. McGinnis concedes that Jimenez is correct. However, Judge McGinnis argues the sanctions can be upheld based on the court's inherent contempt authority. We disagree and reverse.

## **BACKGROUND**

¶2 Jimenez was cited for violating a municipal ordinance that prohibits a person under age eighteen from being a truant. *See* APPLETON, WIS., ORDINANCES § 10-42(b) (Mar. 1992), *available at* <http://www.appleton.org/i/p/municode.pdf>. Jimenez was seventeen years old at the time. Judge McGinnis adjudicated Jimenez truant. A judgment of conviction was entered, and Judge McGinnis ordered Jimenez to comply with various conditions, including attending school.

¶3 Judge McGinnis subsequently filed a motion for sanctions, alleging Jimenez had violated the order to attend school. The circuit court, the Honorable Mitchell J. Metropulos presiding, heard Judge McGinnis's motion against Jimenez. Jimenez's counsel objected to the court's jurisdiction, arguing the court did not have authority to sanction Jimenez, a seventeen-year-old, under WIS. STAT. ch. 938. The court rejected Jimenez's argument, stating, "[T]he ordinance specifically talks about children under the age of 18 who are found to be truant ...." The court noted that, while seventeen-year-olds are adults for purposes of the criminal code, "numerous other provisions of the Wisconsin [Juvenile] Code say a child is defined as a person under the age of 18." The court determined Jimenez had violated Judge McGinnis's order to attend school and, as

a sanction, ordered him to serve thirty days' home detention with electronic monitoring. Jimenez now appeals.

## DISCUSSION

¶4 WISCONSIN STAT. § 938.355(6m)(ag) permits a court to sanction a “juvenile” who has violated a dispositional order involving a municipal truancy ordinance. However, in WIS. STAT. ch. 938, “for purposes of investigating or prosecuting a person who is alleged to have violated ... any civil law or municipal ordinance,” the term “juvenile” does not include a person who has attained seventeen years of age. WIS. STAT. § 938.02(10m). At the time the initial truancy citation was issued, Jimenez was seventeen years old. Thus, Jimenez was not a “juvenile,” and the court had no authority to sanction him pursuant to § 938.355(6m)(ag).

¶5 Judge McGinnis concedes on appeal that the court could not sanction Jimenez under WIS. STAT. ch. 938, but he argues the court could nevertheless impose sanctions pursuant to its inherent contempt power. We agree with Judge McGinnis that a court has inherent power to hold in contempt a person who disobeys its lawful orders. *See D.L.D. v. Circuit Court*, 110 Wis. 2d 168, 178, 327 N.W.2d 682 (1983). However, we do not agree that the court was acting pursuant to its inherent contempt power when it sanctioned Jimenez. At the circuit court level, no one ever claimed the sanctions proceeding against Jimenez was a contempt proceeding. Neither the court nor Judge McGinnis ever suggested that Judge McGinnis's motion was anything other than a motion for sanctions under WIS. STAT. § 938.355(6m)(b). In fact, they proceeded under the explicit understanding that the motion was filed pursuant to that subsection.

¶6 More importantly, even if it were possible to characterize the sanctions proceeding against Jimenez as a contempt proceeding, the circuit court did not follow the statutory procedures governing contempt. WISCONSIN STAT. ch. 785 sets forth procedures that a court must follow in a contempt proceeding. “Despite the fact that the [contempt] power exists independently of statute, ... when the procedures and penalties of contempt are prescribed by statute, the statute controls.” *Frisch v. Henrichs*, 2007 WI 102, ¶32, 304 Wis. 2d 1, 736 N.W.2d 85 (quoting *Douglas Cnty. v. Edwards*, 137 Wis. 2d 65, 88, 403 N.W.2d 438 (1987)).

¶7 There are two types of contempt: punitive and remedial.<sup>2</sup> See WIS. STAT. §§ 785.01(2), (3). Punitive sanctions are imposed “to punish a past contempt of court for the purpose of upholding the authority of the court,” § 785.01(2), and punishing the contemnor. *Christensen v. Sullivan*, 2009 WI 87, ¶53, 320 Wis. 2d 76, 768 N.W.2d 798. Punitive contempt proceedings are initiated by issuance of a criminal complaint. WIS. STAT. § 785.03(1)(b). Only “the district attorney of a county, the attorney general or a special prosecutor appointed by the court” may initiate punitive contempt proceedings. *Id.*; see also *Christensen*, 320 Wis. 2d 76, ¶53. Further, punitive contempt proceedings must comply with the heightened procedural requirements of the criminal code. WIS. STAT. § 785.03(1)(b).

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<sup>2</sup> There is actually a third type: summary contempt. This procedure allows a presiding judge to impose a sanction upon a person who commits a contempt of court in the actual presence of the court. See WIS. STAT. § 785.03(2). Neither party contends this summary procedure is applicable in Jimenez’s case.

¶8 The sanctions proceeding against Jimenez was initiated by a motion for sanctions, not a criminal complaint. The motion was filed by a judge, not a district attorney, attorney general, or special prosecutor. The motion hearing was not conducted according to the rules of criminal procedure. For instance, Jimenez did not enter a plea, he had no right to a jury trial, and no formal order of proof was made. Thus, even if construed as a contempt proceeding, the sanctions proceeding against Jimenez did not comply with the statutory requirements for punitive contempt.

¶9 Nor did the sanctions proceeding comply with the requirements for remedial contempt. A remedial sanction is imposed “for the purpose of terminating a continuing contempt of court.” WIS. STAT. § 785.01(3). Because a remedial contempt order is designed to terminate ongoing contempt, the sanction must be purgeable by the contemnor. *Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999). In other words, the contemnor must be able to end the sanction, either by complying with the original court order or by fulfilling some other purge condition. *Diane K.J. v. James L.J.*, 196 Wis. 2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995). The objective is “to force the contemnor into compliance with a court order for the benefit of a private party—the litigant.” *Christensen*, 320 Wis. 2d 76, ¶55. Accordingly, only a “person aggrieved by a contempt of court” may file a motion initiating a remedial contempt proceeding. WIS. STAT. § 785.03(1)(a). “This contemplates someone other than the trial court.” *B.L.P. v. Circuit Court*, 118 Wis. 2d 33, 44, 345 N.W.2d 510 (Ct. App. 1984).

¶10 Here, the sanctions proceeding against Jimenez was not initiated by an aggrieved person, as required by WIS. STAT. § 785.03(1)(a). Instead, it was initiated by the circuit court judge who imposed the original order Jimenez

allegedly violated. Moreover, the sanction order did not contain a purge condition. The court ordered Jimenez to serve thirty days in home detention with electronic monitoring, but it did not provide a way for him to avoid or reduce the sanction by complying with the original order or fulfilling some other condition. Thus, even if characterized as a remedial contempt proceeding, the sanction proceeding against Jimenez would fall short.

¶11 Judge McGinnis cites *D.L.D.*, where our supreme court held that a circuit court may hold a juvenile in contempt for violating a court order regarding truancy. See *D.L.D.*, 110 Wis. 2d at 169-71, 182. However, *D.L.D.* did not hold that a circuit court may do so without following the statutory contempt procedures. In fact, this court has explicitly held that “juvenile courts must follow the procedures set forth in [WIS. STAT. ch. 785] when exercising contempt powers.” *B.L.P.*, 118 Wis. 2d at 41.

¶12 Jimenez’s case is quite similar to *B.L.P.* There, the circuit court commenced contempt proceedings on its own motion against a juvenile who had allegedly violated a dispositional order requiring her to attend school. *Id.* at 35. The court held an informal hearing at which “[t]here was no order of proof or sworn testimony” and no prosecuting authority was present. *Id.* At the end of the hearing, the court found the juvenile in contempt and ordered her to spend thirty days in secure detention. *Id.* We reversed the order, concluding the court’s procedure was “wholly outside of [WIS. STAT.] ch. 785,” “totally unacceptable,” and “contrary to due process.” *Id.* at 36, 39. We rejected the notion that “because [a] case is a juvenile case it requires less ‘process’ than an equivalent adult proceeding.” *Id.* at 38 (citing *In re Gault*, 387 U.S. 1 (1967)). *B.L.P.* held that, even in a juvenile case, a circuit court may not exercise its inherent contempt power without following the procedures prescribed by WIS. STAT. ch. 785. *Id.* at

41. Just as in *B.L.P.*, the circuit court in this case could not use its contempt power to sanction Jimenez without adhering to the statutory procedures.

*By the Court.*—Order reversed.

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

