COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1922 **Cir. Ct. No. 2012FO449**

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

CITY OF APPLETON,

PLAINTIFF-RESPONDENT,

V.

KYLIE M. JOHNSON,

DEFENDANT-APPELLANT.

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

¶1 MANGERSON, J.[1] Kylie Johnson appeals a contempt order that imposed thirty days of jail as a remedial sanction for failing to attend school.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Johnson argues the judgment underlying the court's contempt order was void and therefore the order cannot stand. She also asserts the court was objectively biased, the court did not have authority to impose jail as a remedial sanction, and the court's contempt decision amounted to an erroneous exercise of discretion. We conclude the judgment underlying the contempt order was not void. However, we agree with Johnson that the court was objectively biased and therefore reverse.[2]

BACKGROUND

¶2 On March 2, 2012, the City of Appleton cited seventeen-year-old Johnson for habitual truancy, in violation of Appleton City Ordinance § 10-42(b). *See* APPLETON, WIS. ORDINANCES § 10-42(b). Johnson failed to appear at the March 23, 2012 hearing on the citation. Based on her nonappearance, the court entered a default judgment against her. The judgment required Johnson to attend school, comply with the school's truancy reduction assessment center and pay a forfeiture. Johnson was also summoned to appear at a future hearing.

¶3 Johnson appeared at the next hearing on April 20, 2012. The court advised Johnson of its previous judgment and also ordered her to complete eight hours of community service by May 11, 2012, in lieu of the forfeiture. The court told Johnson that, "if you violate any of those orders that I just gave, you could be found, and will be found if the City makes a motion, in contempt of Court."

[2] Although we would typically remand for a new proceeding in front of an impartial judge, our reversal in this case is outright. Johnson served the full thirty days of jail for failing to attend school. Moreover, we decline to dismiss this case as moot even though our decision will have no practical effect on this case because we are disturbed that a seventeen-year-old improperly served thirty days in jail.

¶4 At the next hearing, on May 11, the City informed the court that it would be filing a contempt motion against Johnson. Johnson, who was now represented by counsel, asked the court to not consider any contempt motion and give Johnson time to comply. The court, however, reviewed Johnson's attendance records with her and compelled[3] her to explain why she had failed to attend school. It then scheduled a contempt hearing for May 23.

¶5 Johnson did not appear at the contempt hearing, and her attorney advised the court that Johnson had run away. On May 31, the City filed its contempt motion based on the attendance records the court had reviewed with Johnson at the May 11 hearing.

¶6 On June 15, the court presided over a second contempt hearing, where Johnson appeared. It found Johnson in contempt of court for failing to attend school, complete her community service hours, and pay her forfeiture. It ordered she serve thirty days in jail as a sanction for her contempt. The court advised Johnson that as soon as she provided proof she was registered for summer school, the court would convert her jail sentence to home detention with electronic monitoring. Under home detention, Johnson would need to be at home at all times except when in summer school or when completing twenty-five hours of community service.

[3] When Johnson failed to answer certain questions, the court advised Johnson that, if she did not answer, it would have the officer take her down to the courthouse and they would have their conversation when the court returned to the courthouse later that day. The May 11 hearing was held at Johnson's high school.

DISCUSSION

I. Underlying judgment

¶7 Johnson first argues that the circuit court lacked authority to hold her in contempt because the judgment underlying the court's contempt order was void for lack of personal jurisdiction and competency. "A person may be held in contempt if he or she refuses to abide by an order made by a competent court having personal and subject matter jurisdiction." ***State v. Rose***, 171 Wis. 2d 617, 622, 492 N.W.2d 350 (Ct. App. 1992). Johnson asserts that certain defects in the truancy citation rendered the court incompetent to hear the truancy case and prevented the court from obtaining personal jurisdiction over her before it entered its default judgment.

¶8 The City responds that Johnson failed to raise the issues of personal jurisdiction and competency in the circuit court and therefore has forfeited the right to raise them on appeal. As to the merits, the City argues that the court had personal jurisdiction and competency because the citation in the record is different from the one Johnson received and the one Johnson received was not defective.

¶9 Although we agree with the City that Johnson forfeited her right to challenge the court's competency for the first time on appeal, *see* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶38, 273 Wis. 2d 76, 681 N.W.2d 190, a judgment entered without personal jurisdiction remains void, ***Johnson v. Cintas Corp. No. 2***, 2012 WI 31, ¶4, 339 Wis. 2d 493, 811 N.W.2d 756. "A void judgment cannot be validated by consent, ratification, waiver, or estoppel." ***Neylan v. Vorwald***, 124 Wis. 2d 85, 97, 368 N.W.2d 648 (1985) (internal quotation marks omitted).

¶10 Nevertheless, we conclude that, irrespective of any defects in the citation,[4] Johnson submitted to the court's jurisdiction by appearing in person without objection at the next hearing. *See* ***Artis-Wergin v. Artis-Wergin***, 151 Wis. 2d 445, 452, 444 N.W.2d 750 (Ct. App. 1989). Although we recognize that personal jurisdiction must exist at the time of entry of judgment, *see* ***Heaston v. Austin***, 47 Wis. 2d 67, 74-75, 176 N.W.2d 309 (1970), the court appears to have modified its judgment at the hearing where Johnson did appear. Specifically, the court added a community service requirement in lieu of the forfeiture, and, at subsequent hearings, the court faulted Johnson for failing to complete these required hours. Because the court had personal jurisdiction over Johnson, the court's judgment is not void.

¶11 However, we pause to comment on the court's process. WISCONSIN STAT. § 66.0113, which the parties agree applied to the citation in this case, states that if a defendant fails to appear in response to a citation, the court may *either* enter default judgment or summon the defendant to answer to the citation. *See* WIS. STAT. § 66.0113(3)(d). Here, it appears the court mistakenly did both. *See* ***id.***

II. Judicial Bias

¶12 "The right to an impartial judge is fundamental to our notion of due process." ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Although we presume a judge has acted fairly, impartially, and without bias, a defendant can rebut that presumption by proving that the court was either

[4] *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981) (An appellate court will not consider materials outside the record.).

subjectively or objectively biased. ***Id.*** Johnson argues the court was objectively biased. "Objective bias can exist where there is an appearance of partiality—that is, where a reasonable person could question the court's impartiality based on the court's statements—and the appearance of partiality reveals a great risk of actual bias." ***State v. Dylan S.***, 2012 WI App 25, ¶30, 339 Wis. 2d 442, 813 N.W.2d 229.

¶13 Johnson argues the circuit court judge was objectively biased because the record shows that the judge prejudged the contempt hearing. She points out that, at the first hearing she attended on April 25, the court told her that if she violated any of its orders she "could be found, *and will be found if the City makes a motion*, in contempt of Court." (Emphasis added.) She argues that the judge's promise that she would be found in contempt for any violation of its order constitutes prejudgment because the mere violation of a court order is an insufficient basis for contempt—the violation must be intentional and contemptuous. *See* ***Benn v. Benn***, 230 Wis. 2d 309, 309-10, 602 N.W.2d 65 (Ct. App. 1999).

¶14 Johnson also points out that, at the next hearing on May 11, after the City informed the court that it would be filing a contempt motion, the court, despite the fact that no contempt motion had yet been filed, reviewed Johnson's school records and engaged Johnson in a colloquy about why she had missed school. These school records then formed the basis of the contempt motion that the City filed twenty days later.

¶15 The City responds that Johnson prompted the court to review her attendance records because, after the City told the court it would be filing a contempt motion, Johnson asked the court to hold any motion in abeyance to give

her time to comply. The City argues that the court only reviewed Johnson's attendance records to determine whether it should grant Johnson's request and continue the contempt hearing.

¶16 We disagree. Culpability of the alleged contemnor does not typically drive the decision to grant a continuance. The grant of a continuance is usually driven by procedural considerations, such as inability of a party to be prepared for the hearing. The court's focus entirely on compliance by Johnson in considering her request for a continuance is, therefore, inherently suspect, at least.

¶17 Regardless of its purpose, the court considered Johnson's attendance records and demanded to know why she failed to attend school before any contempt motion was even filed. We conclude a reasonable person would interpret the court's actions and statements to mean that the court had already decided Johnson violated its order before the contempt hearing. This appearance of partiality reveals a great risk that the court actually did prejudge the contempt hearing; therefore, we conclude the court was objectively biased and the contempt order must be vacated. *See* ***Dylan S.***, 339 Wis. 2d 442, ¶30.

III. Remaining arguments

¶18 Because we conclude the circuit court was objectively biased, we need not address Johnson's remaining arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938). However, we exercise our discretion to reach one of them: that the court's remedial sanction amounted to an erroneous exercise of discretion.

¶19 The purpose of a remedial sanction is to force the contemnor into compliance with the court's order. ***Christensen v. Sullivan***, 2009 WI 87, ¶55, 320

Wis. 2d 76, 768 N.W.2d 798. Remedial sanctions are "not designed to punish the contemnor, vindicate the court's authority, or benefit the public." ***Id.*** Consequently, a remedial "sanction must be purgeable through compliance." ***State ex rel. N.A. v. G.S.***, 156 Wis. 2d 338, 342, 456 N.W.2d 867 (Ct. App. 1990). "The purge provision must clearly spell out what the contemnor must do to be purged, and that action must be within the power of the person." ***Id.*** In cases where a court imposes imprisonment as a remedial sanction for contempt, it is often said that contemnors "hold the keys to their own jails" because "the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do." ***Id.*** at 341-42 (internal quotations and citations omitted).

¶20 Here, we are troubled by the court's imposition of imprisonment as a remedial sanction. First, after Johnson apologized to the court for not abiding by its order, the court told Johnson to "apologize to yourself, because you are the one who is going to suffer the consequences. We are all going home this weekend, we are going to enjoy the beautiful weather." Based on the court's statements, it appears there may have been a punitive intent to the court's imprisonment sanction. If so, that would be entirely improper. *See* ***Christensen***, 320 Wis. 2d 76, ¶55.

¶21 Second, the court imposed imprisonment with a summer school registration purge condition without ensuring that Johnson would in fact be able to register for summer school. After all, Johnson advised the court that she did not have a job, that she believed it cost money to register for summer school classes, and that she had no way of contacting her father. In response, the court simply told Johnson that her attorney may be able to help her get registered and that "quite frankly, that's something that should have been done before today."

¶22 Irrespective of whether Johnson should have signed up for summer school before the contempt hearing or whether the court believed Johnson's attorney could help her register, the fact remains that a purge condition must be *solely* within the contemnor's control. *See* ***N.A.***, 156 Wis. 2d at 343 (purge condition that relied on the affirmative action of another was improper). Here, the court failed to determine that Johnson herself would be able to complete the purge condition, and Johnson unfortunately ended up serving thirty days of jail.

By the Court.—Order reversed.

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