COURT OF APPEALS
DECISION
DATED AND RELEASED

May 6, 1997

NOTICE

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

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

No. 96-3281

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

IN THE MATTER OF THE FINDING OF CONTEMPT IN STATE V. WILLIE RODGERS:

SCOTT F. ANDERSON,

APPELLANT,

V.

CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE ROBERT CRAWFORD PRESIDING,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Reversed and cause remanded with directions.*

CURLEY, J. Attorney Scott F. Anderson appeals from a circuit court order fining him fifty dollars for being eight minutes late to a scheduled court proceeding. In his bench decision, the Hon. Robert C. Crawford stated that

he was ordering the fine pursuant to his "inherent authority." Because the legislature has regulated and limited the circuit court's inherent contempt power under Chapter 785, STATS., and because an attorney being tardy to a scheduled court appearance does not fall under the summary contempt procedure, *see* § 785.03(2), STATS., this court must reverse and remand the matter with directions to vacate the order fining Attorney Anderson.[1]

I. BACKGROUND.

On November 5, 1996, Attorney Anderson, acting as defense counsel in a criminal case scheduled before Judge Crawford at 8:30 a.m., arrived to court eight minutes late. The case was called and Judge Crawford explained, "It's important for me, I'm going to try to try two cases today. Mr. Anderson shows up late." Attorney Anderson was then given an opportunity to explain his tardiness. When he could not give Judge Crawford a reasonable explanation for his failure to appear on time, the judge said, "All right, I'm going to exercise my inherent authority and fine you fifty dollars." Judge Crawford clarified his ruling and stated that he was not finding Attorney Anderson in contempt under Chapter 785, STATS., "because this absence of yours did not occur in my presence and I don't have authority to hold you in summary contempt." Judge Crawford then filed an order memorializing his ruling.

II. ANALYSIS.

Although both parties frame the issue before this court somewhat differently, the essence of the question is whether the circuit court has an inherent

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

power to fine an attorney for being tardy that is independent of the court's statutorily limited contempt power. This is a legal question that this court reviews *de novo.* *See* ***Old Republic Sur. Co. v. Erlien,*** 190 Wis.2d 400, 411, 527 N.W.2d 389, 392 (Ct. App. 1994). Wisconsin case law clearly shows that the circuit court may no longer exercise this independent inherent power to deal with an attorney's contemptuous behavior outside the statutory scheme.

The controversy in this case arises out of confusion surrounding the genesis of the circuit court's contempt power. The State, arguing for Judge Crawford, contends that a circuit court has the inherent power to fine an attorney for being tardy to a scheduled criminal proceeding. Accordingly, it is necessary to discuss the concept of the "inherent power" of a circuit court in Wisconsin.

> [W]hen the people by means of the constitution established courts, they became endowed with all judicial powers essential to carry out the judicial functions delegated to them. The courts established by the constitution have the powers which are incidental to or which inhere in judicial bodies, unless those powers are expressly limited by the constitution. But the constitution makes no attempt to catalogue the powers granted. … These powers are known as incidental, implied, or inherent powers.

State v. Cannon, 199 Wis. 401, 402, 226 N.W. 385, 386 (1929). Courts are imbued with these powers "because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence." ***State v. Cannon,*** 196 Wis. 534, 536, 221 N.W. 603, 603 (1928). Moreover, the power to punish one committing contemptuous acts in legal proceedings is "necessarily inherent … and arises by implication from the very act of creating the court." ***State ex rel. Attorney General v. Circuit Court for Eau Claire County,*** 97 Wis. 1, 8, 72 N.W. 193, 194 (1897). This power, however, "may be regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely

taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which is essential to preserve its character as a judicial tribunal." ***Id.***

The right of the legislature to regulate contempt actions and the inherent power of the court has long been recognized. For instance, in 1879, the supreme court stated that while "the power to punish for contempt was not conferred in the first instance by statute, but inheres in the court, it holds that whenever a statute prescribes the procedure in a prosecution for contempt, or limits the penalty, the statute controls." ***State ex rel. Lanning v. Lonsdale***, 48 Wis. 348, 367, 4 N.W. 390, 396 (1879). Thus, had the legislature not acted by regulating the manner in which a court can exercise its contempt power, in this vacuum, a court could necessarily punish a contemptor under the court's inherent power. A court's inherent or implied power, however, should only be exercised in order to respond to a "necessity," and when the legislature has "relieved" this necessity, a court need no longer exercise its implied power. ***Cannon,*** 196 Wis. at 558, 221 N.W. at 611 (Crownhart, J., concurring in part, dissenting in part). With this background in mind, this court next addresses the specific arguments of the parties.

Attorney Anderson posits that the trial court had the inherent authority to fine him, but could only do so under circumstances where the lawyer's actions unreasonably curtailed the court's powers or materially impaired the court's efficiency. Since the court made no findings demonstrating how counsel's late arrival either curtailed the court's power or materially impaired the court's efficiency, appellant contends neither factor was present as a result of his eight-minute delay. Thus, he submits the court was without the requisite authority to fine him. This court rejects Attorney Anderson's concession that the circuit court

has the inherent power to fine him. *See* ***State v. Gomaz,*** 141 Wis.2d 302, 307, 414 N.W.2d 626, 629 (1987) (appellate court not bound by party's erroneous concession).

The State, arguing for Judge Crawford, counters with an interpretation of inherent authority which attempts to distinguish between the power of a individual judge and the power of the court. Judge Crawford views the current case law interpreting the use of the summary contempt statute as restricting the power of the judge but not the inherent power of the circuit court. As will be seen below, Judge Crawford's argument is incorrect.

Judge Crawford's interpretation conveniently avoids the case law and statutory limitations placed on a court's ability to punish an individual for contemptuous acts. Without such limitations, a court's power to "compel due respect and obedience" is dangerously "despotic" and "arbitrary in its nature." ***State ex rel. Attorney General,*** 97 Wis. at 8, 72 N.W. at 194-95.

It is apparent from Judge Crawford's ruling that, in his view, he was not finding Attorney Anderson in contempt, but rather was exercising the inherent authority of the court to fine Attorney Anderson for being tardy. Judge Crawford acknowledged that under the summary contempt statute, he could not find Attorney Anderson in contempt for being late, but Judge Crawford was under the impression there was another avenue available to him for regulating tardy lawyers. Judge Crawford was correct that he could not find Attorney Anderson summarily in contempt for being late for the court proceeding.

In ***Gower v. Circuit Court for Marinette County,*** 154 Wis.2d 1, 452 N.W.2d 354 (1990), the supreme court held that an attorney being tardy to a court proceeding was not the type of situation that could be dealt with under the

summary contempt procedure because the contemptuous action was not committed in the actual presence of the court, a requirement under § 785.03(2), STATS. ***Id.*** at 16-17, 452 N.W.2d at 360. Given Judge Crawford's acknowledgment that the summary contempt law would not apply to these facts, the court must have believed that its implied power to control contemptuous behavior was not totally subsumed when the legislature passed Chapter 785, STATS., the procedures governing contempt of court. Judge Crawford was incorrect.

Our supreme court has acknowledged that the power of a court to summarily impose punitive sanctions without the normal procedural safeguards is to be used "only under a limited set of circumstances." ***Gower,*** 154 Wis.2d at 10, 452 N.W.2d at 357. Attorney Anderson's conduct here is not one of those limited circumstances. Although Judge Crawford correctly surmises that the circuit court possesses an implied authority to act in certain situations, he incorrectly assumed that this implied authority in the contempt area operates alongside and independent of the contempt statutes. This is wrong because there is no other legal doctrine other than that of contempt that permits a court to bypass the prosecution stage and its attendant constitutional safeguards to swiftly punish one who commits a contemptuous act in front of the court.

Judge Crawford attempts to distinguish the inherent power of the court from the inherent power of a judge in order to escape the summary contempt procedure and the accompanying case law; such a conclusion would lead to an absurd situation. Taking Judge Crawford's argument to its logical conclusion would permit a "court" to invoke its inherent powers and fine a lawyer whereas a "judge" would be forbidden from doing so by our summary contempt statutes. Moreover, the legislative history of the contempt statutes also refutes Judge

Crawford's argument. In explaining the wholesale changes made to the contempt statutory scheme in 1979, the legislative committee commented: "This section recognizes the inherent authority of a court of record to punish for contempt of court. The supreme court has often acknowledged, however, the power of the legislature to regulate and limit how the power is exercised by the courts, so long as the contempt power is not rendered ineffectual." Section 785.02, STATS. (1979 Committee Comment). This committee note makes obvious that the exercise of all of a circuit court's contempt powers is meant to be prescribed exclusively by Chapter 785, STATS. Thus, a judge sitting in a court of record who witnesses a contemptuous act must conform to the statutory requirements when exercising the court's inherent power of contempt. There is no residual of inherent authority which exists outside the contempt statutes permitting the trial court to fine a lawyer for arriving late.

Judge Crawford's alternative argument is that the statutory scheme under Chapter 785, STATS. is too burdensome on trial courts, and thus renders the contempt power ineffectual. He is wrong.

In ***B.L.P. v. Circuit Court for Racine County,*** 118 Wis.2d 33, 345 N.W.2d 510 (Ct. App. 1984), a trial judge argued on appeal that. requiring a juvenile court to follow the contempt procedures under Chapter 785 unduly burdened and substantially interfered "with the proper function of the judicial system." ***Id.*** at 40, 345 N.W.2d at 514. We rejected this argument, concluding that although the legislature could not take away a court's constitutionally inherent power, the legislature could "certainly write reasonable regulations on the means by which courts exercise that power." ***Id.*** We concluded that the prescriptions of Chapter 785 were properly sounded in the protections of procedural due process, and thus should be followed. ***Id.*** at 41, 345 N.W.2d at 514. Here, like the trial

judge in ***B.L.P.***, Judge Crawford has not met his burden of proving the contempt statutes too unwieldy, nor has he presented sufficient evidence that the statutory scheme renders the circuit court's contempt power "ineffectual." ***Id.*** at 41, 345 N.W.2d at 315.

This court is mindful and sympathetic to Judge Crawford's enormous responsibility in managing a burgeoning case load. To accomplish this task a trial court frequently must remind attorneys and other parties of the need for promptness and punctuality. Although a trial judge facing a tardy appearance of an attorney may not exercise the summary contempt procedure to punish the attorney, or punish the attorney through the nebulous and arbitrary inherent power of the circuit court, the judge may still use the nonsummary contempt procedure. *See* § 785.03(1), STATS. This tool could be particularly helpful to procure compliance from attorneys who are chronically tardy for court.

In sum, the order is reversed and the matter is remanded to the trial court with directions to vacate the order fining Attorney Anderson fifty dollars for being tardy to a scheduled court appearance.

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

This opinion will not be published. *See* RULE 809.23(1)(b), STATS.