COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3564

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

IN RE THE FINDING OF CONTEMPT IN
STATE OF WISCONSIN V. EDWARD N. GRANGE:

ALAN D. EISENBERG,

APPELLANT,

V.

CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE RONALD S. GOLDBERGER, PRESIDING,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RONALD S. GOLDBERGER, Judge. *Affirmed.*

CURLEY, J. Attorney Alan D. Eisenberg appeals from an order of the trial court finding him in summary contempt and fining him $100. The trial court, following a previous warning, found Eisenberg in contempt after a toy police car in Eisenberg's pocket made a disruptive siren sound for a second time.

Eisenberg claims that the trial court erred by finding him in contempt because: (1) he did not intentionally activate the car's siren; and (2) he was not allowed to exercise his right of allocution prior to imposition of the $100 fine. We disagree with Eisenberg and conclude that the trial court's order was proper because: (1) the intentional act for which Eisenberg was found in contempt was his purposeful retention of the car, following a previous warning, in a manner that allowed the car to make the disruptive noise a second time; and (2) Eisenberg was allowed to exercise his right of allocution prior to imposition of the $100 fine. Therefore, we affirm the trial court's order.

I. BACKGROUND.

On September 2, 1997, Eisenberg was sitting next to the bailiff in the circuit court courtroom waiting for his client's case to be called. Eisenberg had a small toy police car in his pants pocket which his wife had given him as a gag gift. The toy car, when squeezed, emitted a siren sound which lasted approximately five to ten seconds. When Eisenberg leaned over to ask the bailiff a question, the siren was activated and disrupted the trial court. Eisenberg apologized to the court, and said that he accidentally triggered the car's siren. The court accepted Eisenberg's apology, but warned him that "it would not be an accident again."

Later, Eisenberg's case was called and a hearing on his client's suppression motion began. During the direct examination of the arresting officer, Eisenberg's client began whispering to him. Eisenberg leaned over to hear what his client was saying, and triggered the toy car's siren for a second time. As Eisenberg took the car out of his pocket and began to apologize again, the trial court stated, "that will cost you a hundred dollars costs." Eisenberg then asked the

court for a chance to be heard, and the trial court stated that he would be able to be heard following the officer's testimony.

At the close of the suppression hearing, the trial court noted its observations of Eisenberg's behavior and gave Eisenberg an opportunity to exercise his right of allocution. Eisenberg again apologized to the court and stated that he had not triggered the car's siren "on purpose." The trial court noted that it had warned Eisenberg about the noise, and that Eisenberg had not "removed [the toy car] from the courtroom or … secured [it] in such a way it would not again replicate [the siren sound]." The trial court also stated, "If I thought you had done it on purpose, as you use the term, this exchange would be somewhat different." The trial court then imposed a $100 fine, and eventually prepared a written order of summary contempt. Eisenberg now appeals.

II. ANALYSIS.

Pursuant to § 785.03(2), STATS., a trial court has the power to summarily impose a punitive sanction after finding that a person has committed a contempt of court in the court's actual presence. This court will not reverse a trial court's finding that a person has committed a contempt of court unless the finding is clearly erroneous. ***Oliveto v. Circuit Court***, 194 Wis.2d 418, 428, 533 N.W.2d 819, 823 (1995).

A. Whether Eisenberg acted "intentionally."

Eisenberg argues that the trial court erred by finding him in contempt because he did not intentionally activate the toy car's siren. According to § 785.01(1)(a), STATS., "'Contempt of court' means intentional: (a) Misconduct

in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court." Eisenberg argues that the trial court did not believe that he intentionally activated the siren because the court stated "I'll be frank with you Counsel. If I thought you had done it on purpose, as you use the term, this exchange would be somewhat different." Eisenberg is correct that this statement shows that the trial court did not believe he intentionally activated the siren by purposefully squeezing the toy car. Clearly, if the trial court believed Eisenberg had purposefully activated the siren, in all likelihood, the court would have imposed a far greater punitive sanction. These facts are immaterial, however, because it is clear from the record that the trial court did not base its finding of contempt on a belief that Eisenberg intentionally activated the car's siren. Instead, the trial court found that Eisenberg committed a contempt of court by intentionally retaining the toy car, following the court's warning, in a manner which allowed it to disrupt the court a second time.

A number of the trial court's statements indicate that it was concerned with Eisenberg's intentional failure to remove the car from the courtroom or to properly secure it in a manner to prevent the siren from being activated. For example, immediately following the second disruption, the trial court stated, "Your toys stay out of this courtroom." Similarly, after the suppression hearing, in the court's discussion with Eisenberg, the court stated, "I'd warned you once. You were aware of it. It should have been either taken out of this courtroom, put somewhere." The court also stated, "I would expect you to have more sense than that, and that whatever that thing was at the time would have been removed from the courtroom or certainly secured in such a way it would not again replicate that incident." Therefore, the intentional misconduct which concerned the trial court was the fact that, after Eisenberg's toy car had disrupted

the court's proceedings, and he had been warned by the court, Eisenberg intentionally kept the toy in his pocket, eventually resulting in a second disruption.

Although Eisenberg attempts to portray his failure to remove the toy from his pocket as an "error of judgment" or a "mistake," the trial court's finding that it amounted to intentional misconduct which interfered with the court's proceeding is not clearly erroneous. Knowing that his toy had disrupted the court's proceeding, Eisenberg intentionally did nothing to prevent a second disruption. This intentional misconduct on Eisenberg's part resulted in an interference with the court's proceeding and an impairment of the respect due the court. Therefore, the trial court properly found that Eisenberg committed a contempt of court.

B. Whether Eisenberg was afforded his right of allocution.

Eisenberg also claims that the trial court erred by imposing the $100 fine before allowing him to exercise his right of allocution. Because the summary contempt procedure involves imposition of a punitive sanction, a contemnor should have the opportunity, similar to a criminal defendant, for allocution before sanctions are imposed. ***Oliveto***, 194 Wis.2d at 433-34, 533 N.W.2d at 825. "The allocution requirement essentially provides a check on the heightened potential for abuse posed by the summary contempt power by providing an opportunity for the contemnor to apologize, defend or explain the contumacious behavior." ***Id.*** at 434, 533 N.W.2d at 825 (citing ***State v. Dewerth***, 139 Wis.2d 544, 407 N.W.2d 862 (1987)).

> Due process and concepts of fundamental fairness are satisfied when the record following a summary contempt proceeding demonstrates all of the following: (1) a statement indicating the judge's decision to hold a person in contempt as well as the factual basis for the holding; (2)

> a statement from the judge informing the contemnor of the right of allocution and a further statement inviting the contemnor to exercise that right prior to imposition of sanction; and (3) the judge's *final decision* to impose sanction and the sanction, if any, imposed.

Oliveto, 194 Wis.2d at 435-36, 533 N.W.2d at 826 (emphasis added).

Eisenberg argues that, although he was provided an opportunity to exercise his right of allocution, he was not afforded that right until after the court had already imposed the $100 fine. Eisenberg bases this claim on the fact that, immediately following the second disruption of the court by Eisenberg's toy car, the court stated, "That will cost you a hundred dollars costs." Eisenberg is incorrect. By making that statement, the trial court clearly was not making a "final decision" to impose a sanction. *See* ***id.*** Following the statement, the trial court stated that Eisenberg would "certainly … be able to" exercise his right of allocution, and at the end of the suppression hearing, the court invited Eisenberg to exercise that right. Eisenberg was obviously given an opportunity "to apologize, defend or explain [his] contumacious behavior," and it was only after Eisenberg exercised his right of allocution that the trial court finally decided to impose a $100 fine. Therefore, this court concludes that the trial court acted properly and affirms the trial court's order.

By the Court.—Order affirmed.

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