COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 98-2702 & 98-3142

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

98-2702
IN THE MATTER OF THE SANCTIONS IN
STATE V. JASON TATUM:

MARY GARVIN AND OFFICE OF
STATE PUBLIC DEFENDER,

APPELLANTS,

V.

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

RESPONDENTS.

98-3142
IN THE MATTER OF THE SANCTIONS IN
STATE V. JASON A. BROOKS:

MARK A. SANDERS AND STATE OF WISCONSIN,

APPELLANTS,

V.

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

RESPONDENTS.

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

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Attorney Mary Garvin and the Office of the State Public Defender appeal from an order entered by Judge Robert C. Crawford, sanctioning Garvin for her failure to comply with a scheduling order. Attorney Mark A. Sanders and the State of Wisconsin also appeal from an order entered by Judge Crawford, sanctioning Sanders for his failure to comply with a scheduling order. The appeals have been consolidated for disposition in this court.[1] We reverse the orders for sanctions and remand the cases to the trial court with directions to vacate the orders for sanctions.

[1] Although both Garvin and Sanders were sanctioned in the course of proceedings on misdemeanor cases, this court ordered their appeals to be heard by a three-judge panel. We do not address whether the appeals must be heard by a three-judge panel as a matter of right. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (appellate court need only address dispositive issue).

BACKGROUND

The sanction against Garvin.

¶2 Garvin, a public defender, represented a client who was facing misdemeanor charges for possession of marijuana and possession of cocaine. On the scheduled trial date, August 12, 1998, Garvin and her client appeared before the court. Garvin indicated that, pursuant to a plea bargain, her client intended to plead no contest to one count of possession of cocaine in exchange for the State's dismissal of the charge for possession of marijuana. The court then discussed the plea bargain with the defendant, and the defendant ultimately decided to reject the plea bargain, enter a guilty plea to the charge of possession of marijuana, and proceed to trial on the charge of possession of cocaine. After the trial court took the defendant's plea and the parties discussed the defendant's prior record, the court asked, "I understand there was a custodial statement, and there is no question about it being taken voluntarily or in violation of [the defendant's] Miranda rights; is that right, Ms. Garvin?" Garvin responded, "That's correct, Your Honor." The trial court had entered a scheduling order, which provided that any such motion must be brought, in writing, within five days of the date of the scheduling order. The scheduling order also provided that "[u]nless good cause is shown for failure to comply, the court may impose appropriate sanctions."

¶3 The court then told the parties how the trial was to proceed, after which the State informed the court that there was one additional issue that needed to be addressed. The State informed the court that in addition to the statement that the defendant had given to the police at the police station, the State intended to introduce statements that the defendant had made while he was sitting in a police car. Garvin then said, "We ask for a hearing on those statements before

introduction." The court advised the parties that it intended to consider the admissibility of the statements before they were introduced into evidence, and ordered the State not to mention them in its opening statement to the jury. The parties then began jury selection.

¶4 At a break in the jury-selection process, the State informed the court of the content of the statements the defendant made while he was in the police car. The court asked the State if the defendant's statements had been disclosed to the defense, and the State responded that the statements were given to the defense on March 24, 1998. Garvin agreed that she had received the statements, but asked, "[W]hile I don't have a written motion on file, I would ask the Court to examine the witnesses whether these statements were made while [the defendant] was in custody and as a result of questioning." She asserted that "under 971.24 [*sic*] I believe that myself [*sic*] and my client have a right prior to trial to demand a hearing regarding any statements that were elicited by the State."[2] Although she asserted that the right could not be waived by noncompliance with the court's scheduling order, the trial court disagreed and held that Garvin had waived her right to assert that the defendant's statements were taken in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966), by failing to comply with the scheduling order. The court continued, "I've got 25 veniremen sitting in the jury deliberation room because they need to use the bathroom during voir dire. I am not going to have them sit around while you think on your feet and slow down the work you should have done four months ago." The following colloquy then occurred:

[2] Garvin apparently intended to refer to WIS. STAT. § 971.31(3) (1997-98), which provides: "The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial." (All references to the Wisconsin Statutes are to the 1997-98 version.)

> MS. GARVIN: Regardless of the number of people waiting and the Court's inconvenience, this is [the defendant's] only opportunity at trial. For me not to raise this issue would be ineffective assistance of counsel. He would be granted a new trial on appeal, and we would all come back and start this all over.
>
> I think this is very much too important to just ignore and to just brush aside. I understand there was a scheduling order in place, but I think that at any time prior to trial, I can request that any statements be considered and that a hearing be considered.
>
> THE COURT: I am required to consider the admissibility of the statement under section 971.31(3); and that's why I enter a scheduling order, so we can take this up in a proper way and not waste everyone's time in the middle of a trial. I will sanction you $100 for failing to comply with the scheduling order. I enter the sanction under section 972.11(1) and Rule 805.03 as well as the procedural statutes and the recent decision from our Wisconsin Supreme Court of Scott Anderson against the Milwaukee County Circuit Court.[3]
>
> Your $100 sanction is payable within ten days for your non-compliance with the scheduling order in this case. If you want to appeal, I will draft a written order which sets out my finding[s] of fact and conclusions of law.

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[3] WISCONSIN STAT. § 972.11(1) provides:

> Except as provided in subs. (2) to (5), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction. No guardian ad litem need be appointed for a defendant in a criminal action. Chapters 885 to 895, except ss. 804.02 to 804.07 and 887.23 to 887.26, shall apply in all criminal proceedings.

WISCONSIN STAT. § 805.03 provides, in relevant part:

> For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12 (2) (a).

(Footnote added.) The court then concluded that although the ***Miranda*** challenge was waived, the statements were inadmissible on other grounds. The trial proceeded without further discussion of the sanction.

¶5 The trial court subsequently reduced its sanction against Garvin into a written order. The order set out the background related above, then further explained the basis for the sanction. The trial court noted that it had a very heavy docket, and that there was a need to use court time efficiently. The trial court further noted that, in order to complete a trial within one day, the evidentiary presentation of the case needed to be completed by 3:30 p.m.

¶6 The trial court continued:

> Attorney Garvin's failure to honor the scheduling order had consequences for the twenty-five veniremen who were held in the jury deliberation room while using the restrooms and the litigants in the seventy-five cases that are scheduled before me tomorrow. If the jury reaches a verdict today, the jurors will be excused from further service and may return to work tomorrow. Many jurors lose income, whether self-employed or not; parents must make alternate arrangements for child care when sitting as jurors; all veniremen are inconvenienced. In addition, if Jason Tatum's trial is delayed today by an evidentiary hearing that could have been done on a motion day before everyone assembled for trial, any delay will obstruct my ability to decide the seventy-five cases pending tomorrow, all cases that have been scheduled for weeks and months. As the judge who is responsible for managing the public resources involved in a jury trial, I cannot tolerate wasteful inefficiency because of an unprepared attorney who ignores the scheduling order.
>
> ….
>
> A judge cannot be compelled to force veniremen to wait while the judge conducts an evidentiary hearing because a lawyer failed to comply with the scheduling order, ignoring the order and leaving until the jury trial tasks which should be done before trial. People are expected to meet schedules, whether the schedule is the departure time at the airport, curtain time at the opera, or

> the expiration time on a parking meter. Lawyers enjoy a monopoly on an expensive public asset; judges must manage the asset. Attorney Garvin's failure is unacceptable and sanctionable.

The sanction against Sanders.

¶7 Sanders, an assistant district attorney, represented the State in the prosecution of a defendant charged with a misdemeanor graffiti offense. On June 26, 1998, a pretrial conference was held, and the trial court entered its standard scheduling order, which provided, in relevant part: "All witnesses are to be served with a subpoena at least 24 hours prior to the Final Pre-Trial." Like the scheduling order entered in Garvin's case, the order provided that "[u]nless good cause is shown for failure to comply, the court may impose appropriate sanctions." A final pretrial conference occurred on August 24, 1998, preceding the initial trial date, September 2, 1998.

¶8 On September 2, the trial court asked the parties if they were prepared to try the case. Sanders responded that he was not ready because "critical witnesses [were] not present in court, and were sent subpoenas." The trial court asked if the witnesses had been personally served with subpoenas pursuant to WIS. STAT. § 885.03, so that the court could issue body attachments under WIS. STAT. § 885.11.[4] Sanders responded that the subpoenas had not been personally served upon the witnesses, but were instead mailed. The court then said, "I've already had to sanction Mr. Sanders once this week to the tune of $100 for being

[4] WISCONSIN STAT. § 885.03 provides: "Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode."

WISCONSIN STAT. § 885.11(2) provides: "Every court, in case of unexcused failure to appear before it, may issue an attachment to bring such witness before it for the contempt, and also to testify."

unprepared on this case. I don't understand, Mr. Sanders, why you would fail to have your witnesses lined up for a case which has been so critical on the docket."

¶9 The court next asked Sanders whether he had spoken to the missing witnesses. Sanders responded that he had spoken to one of the witnesses and that she had indicated that she would come to court to testify. Sanders also said that although he had spoken to another witness, who admitted receiving the mailed subpoena, he did not have a current address or phone number for that witness. The following colloquy then occurred:

> THE COURT: I have 3,300 cases assigned to me. Just I and the other ten misdemeanor judges hear 70,000 cases. Mr. Brooks' case has been the subject of repeated meetings, conferences, and hearings because of the issues raised by the case. This case has even required me to spend some of my time writing a six-page order explaining the reason for sanctioning the prosecutor for the lack of preparation. I don't understand how you could show up today, Mr. Sanders, with the case in this status.
>
> Have you talked to your superiors about the status of this prosecution?
>
> MR. SANDERS: At length, Judge.
>
> THE COURT: Have you discussed with them the absence of your witnesses, and the failure to subpoena any witnesses as required by Section 885.03?
>
> MR. SANDERS: I have spoken with them concerning this, concerning witnesses in this case. I have spoken with them concerning what the Court describes as a failure to subpoena these witnesses consistent with statute.
>
> THE COURT: Why would you take such a casual approach in getting your witnesses to court when you think [the defendant] should go to the Wisconsin State Penitentiary for up to nine years for the conduct at the 100 East Wisconsin Avenue Building?
>
> MR. SANDERS: I don't think that is the best way, or a fair way to describe this, nor accurate either. I think our office does in this case, as in the all cases regardless of who the defendant is and regardless of the taxpayers who are involved, take care in obtaining witnesses and getting them to court with the limited resources we have.

> We don't have the ability to personally serve all witnesses in even the 3,300 cases in this court, much less the other 70,000 cases in the system and allocate those resources. We've had contact with the witnesses. We had last-known addresses for them and were able to inform them of the court dates. We know, because Mr. Zwicke contacted us that he knew of the court date, and apparently intended [to] appear today.
>
> The fact that he isn't here is something that I can't explain. I will make a minimum reasonable effort to obtain their appearance, inform them of today's court date, and explain that they are necessary to our case.
>
> THE COURT: Well, if I give you a continuance, what assurance can you make that you are going to have better luck putting the case together to prosecute?
>
> MR. SANDERS: In the event that you grant a continuance in this case, Judge, I will ensure that additional resources are allocated to personally serve these witnesses. Our investigators will personally go out and do that to make sure it is done, and will get them to court if the officers have to go and arrest them.
>
> This is a serious case, as all graffiti cases are. [The defendant] is even a famous graffiti artist in town. The State views this case very seriously, and I'll do everything in my power to make sure those witnesses are here.

¶10 Thereafter, the trial court rejected the defendant's motion to dismiss the case, and granted the State's motion for a continuance. The court explained:

> I am going to grant the prosecutor's request to continue the trial. I do it with reluctance. Already, I issued a six-page written order, that is available in my order book, criticizing the lack of preparation in the case by the district attorney's office and imposing a sanction against Mr. Sanders.
>
> We have limited resources. I can try misdemeanor cases in one day if I get started at 8:30. By getting started at 8:30, we finish the cases in one day, and I have jurors go back to work the next day and they don't lose wages.
>
> All jurors are inconvenienced by jury service. Almost all of them loose [*sic*] money. Unlike the government employees and municipal employees who regularly appear in court on these misdemeanor cases, the jurors are the only ones who lose money and don't get paid to participate in the jury trial.

> In order to try the case in one day, I have to get started at 8:30. That means people have to show up, including the lawyers and the defendants. We have to be ready to go. I manage this docket so I can accomplish these things, and that is why I tried twenty percent of the cases last year in misdemeanor courts, for a total of fifty-three cases.
>
> I am going to continue this case for one week, so the prosecutor can get his ducks in a row.

¶11 The parties next discussed the new trial date and some evidentiary issues relating to the trial. The court then moved on to a different case. Although the trial court did not, during the course of the proceedings on September 2, impose a personal sanction against Sanders for his failure to have the subpoenas served personally upon his witnesses, the court, on September 15, 1998, issued an order fining Sanders $50.

¶12 In the order, the trial court explained that it was sanctioning Sanders for his failure to subpoena witnesses as required by the scheduling order. The trial court emphasized that it had a heavy docket, that it made great efforts to efficiently manage that docket, and that it had spent a significant amount of time on various issues in the graffiti case. The trial court then noted that the graffiti case had priority over all of the other cases that were set to be tried on September 2, and that, in order to complete a trial in one day, "the evidentiary presentation must be completed by 3:30 p.m."

¶13 The trial court continued:

> The prosecutor's neglectful failure to subpoena witnesses is inexcusable. A trial subpoena must be served as provided by WIS. STAT. § 885.03, a point the assistant district attorney glossed over when he claimed that the U.S. Mail met the stringent requirements of section 885.03. The prosecutor's failure to serve the two security guards and the property manager precluded issuance of body attachments for disobedient witnesses. WIS. STAT. § 885.11. Indeed, because bail may not be ordered for witnesses in

misdemeanor cases, WIS. STAT. § 969.01(3), the best a trial judge can do when faced with a disobedient witness is (1) to issue a body attachment, (2) begin the voir dire, and (3) hope the Sheriff will locate the disobedient witness before the trial ends.[5] Our misdemeanor courts rely upon cooperative witnesses. But just as the longest journey begins with the first step, a prosecutor must appear for jury trial with witness subpoenas in hand.

Attorney Sanders' request for a continuance, based upon his failure to subpoena witnesses, was granted and the jury trial bumped back two months after I balanced the public interest in protecting real property from vandalism against the defendant's right to finality.

….

Misdemeanor cases are resolved by a guilty plea or a jury verdict. Justice delayed is justice denied, and a judge must ensure that a docket moves efficiently. A judge cannot be compelled to postpone a jury trial because the prosecutor failed to subpoena witnesses.

Lawyers enjoy a monopoly on an expensive public asset: the court system. Lawyers must not waste this public asset; judges must manage the asset. Attorney Sanders' failure is unacceptable and sanctionable.

The people of Wisconsin expect zealous representation from the District Attorney. In contrast to checks and balances that ensure quality legal work in the private sector or on behalf of criminal defendants, the public is largely unable to react to deficient legal work by a prosecutor.

In sanctioning the assistant district attorney, I rely upon a judge's statutory authority to manage a docket with

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[5] WISCONSIN STAT. § 969.01(3) provides:

> BAIL FOR WITNESS. If it appears by affidavit that the testimony of a person is material in any felony criminal proceeding and that it may become impracticable to secure the person's presence by subpoena, the judge may require such person to give bail for the person's appearance as a witness. If the witness is not in court, a warrant for the person's arrest may be issued and upon return thereof the court may require the person to give bail as provided in s. 969.03 for the person's appearance as a witness. If the person fails to give bail, the person may be committed to the custody of the sheriff for a period not to exceed 15 days within which time the person's deposition shall be taken as provided in s. 967.04.

> a scheduling order. WIS. STAT. §§ 972.11(1), 802.10(7), 805.03; *see In the Matter of Sanctions re: Attorney Scott F. Anderson v. Circuit Court for Milwaukee County*, 219 Wis. 2d 1, 578 N.W.2d 633 (Wis. 1998).[6]

(Footnotes added.)

DISCUSSION

¶14 As noted, WIS. STAT. § 805.03 provides that when a party fails to obey an order of the court, the court "may make such orders in regard to the failure as are just." Section 805.03 thus "grants a circuit court discretion in determining the appropriate sanction and imposes a duty on the circuit court to make such orders as are just." ***Anderson v. Circuit Court***, 219 Wis. 2d 1, 9, 578 N.W.2d 633, 636 (1998).

¶15 We will sustain a circuit court's order imposing sanctions under WIS. STAT. § 805.03 unless the circuit court erroneously exercised its discretion. *See* ***id.*** "A discretionary decision will not be disturbed if a circuit court has examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** Nonetheless, "[a] court should use caution in imposing sanctions against attorneys," because "[a]rbitrary action by a circuit court undermines attorney and public confidence that they will receive fair treatment by the circuit court." ***Id.***, 219 Wis. 2d at 9–10, 578 N.W.2d at 636–637.

¶16 "For a reviewing court to determine whether the sanctions imposed in a particular case are just, the circuit court must make a record of the reasons for imposing sanctions in that case." ***Id.***, 219 Wis. 2d at 10, 578 N.W.2d at 637. The

[6] WISCONSIN STAT. § 802.10(7) provides: "Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12 and 805.03."

circuit court should give the attorney an opportunity to explain his or her violation of the scheduling order. *See* ***id.*** The circuit court must then address the disruptive impact on the court's calendar resulting from the attorney's violation of the scheduling order, the reasonableness of the attorney's explanation and the severity of the sanction to be imposed. *See* ***id.*** "[C]ircuit courts should tailor sanctions to the severity of the misconduct." ***Id.***, 219 Wis. 2d at 10, 578 N.W.2d at 636. "A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion." ***Id.***, 219 Wis. 2d at 11, 578 N.W.2d at 637.

¶17 In ***Anderson***, the trial court fined defense attorney Scott F. Anderson for violating a pretrial scheduling order by arriving at court eight minutes late on the morning his case was scheduled for trial. *See* ***id.***, 219 Wis. 2d at 3, 578 N.W.2d at 634. The trial court first noted that Anderson was late, that it had two cases to try that day, and that it was important to the court to begin jury trials at 8:30. *See* ***id.***, 219 Wis. 2d at 5, 578 N.W.2d at 634–635. The court next asked Anderson why he was late, and Anderson responded that he did not have a reasonable explanation. *See* ***id.***, 219 Wis. 2d at 5, 578 N.W.2d at 635. The court then fined Anderson fifty dollars. *See* ***id.***

¶18 The supreme court held that the trial court had erroneously exercised its discretion in sanctioning Anderson, reasoning:

> In this case the circuit court merely stated that Attorney Anderson was eight minutes late, that it had two jury cases to try that day and that "I start my trials at 8:30. It's important for me." The circuit court did not state how the eight-minute delay would affect the court's ability to try the two cases that day or other calendared matters or why those eight minutes warranted a 50 dollar sanction. The record does not show whether the eight-minute delay caused any problems for jurors, victims, witnesses, law enforcement

> officers, or court staff. The record does not show whether the attorney was frequently tardy. Thus, the record does not demonstrate that the circuit court examined the relevant facts, applied a proper standard of law or used a demonstrated rational process to reach a conclusion that a reasonable judge could reach.

Id., 219 Wis. 2d at 11, 578 N.W.2d at 637. The supreme court therefore directed the trial court to vacate the order imposing the sanction. *See* ***id.***, 219 Wis. 2d at 12, 578 N.W.2d at 637.

¶19 As in ***Anderson*** and as we explain below, the trial court failed to adequately address the factors relevant to its decision to impose sanctions on attorneys Garvin and Sanders. We therefore reverse the orders for sanctions and remand the cases with directions to vacate the orders imposing the sanctions.

¶20 With respect to the sanction imposed on Garvin, the trial court did not give Garvin the opportunity to explain why she did not file a ***Miranda*** motion pursuant to the scheduling order. Although the trial, thought to be settled, was required by the defendant's rejection of the State's proffered plea bargain, and Garvin zealously argued that the motion was not waived by her failure to comply with the scheduling order, her argument on behalf of her client did not address specifically the reason for her failure to comply with the scheduling order. Nonetheless, the trial court imposed the sanction without requesting such explanation.

¶21 Further, the trial court did not hold a hearing on the motion, and the record does not demonstrate that merely making the motion affected the court's ability to try the case or other cases. Indeed, the trial court's written order reasoned that its ability to try cases would be obstructed *if* the court held an evidentiary hearing on Garvin's motion; however, as noted, the trial court did not

hold an evidentiary hearing. Thus, the record does not sufficiently demonstrate the disruptive impact of Garvin's violation of the scheduling order.[7]

¶22 Moreover, because the trial court did not properly consider Garvin's explanation or the disruptive impact of her failure to comply with the scheduling order, the trial court was unable to assess the reasonableness of Garvin's explanation or to tailor an appropriate sanction for the violation. We therefore conclude that the trial court erroneously exercised its discretion in sanctioning Garvin.

¶23 Similarly, the trial court did not afford Sanders an opportunity to address the propriety of a sanction for his failure to have the subpoenas personally served on his witnesses. *See* ***B&B Investments v. Mirro Corp.***, 147 Wis. 2d 675, 683, 434 N.W.2d 104, 108 (Ct. App. 1988) (a party being sanctioned for an overt violation of a court order or rule must be given an opportunity to respond); *see also* ***Oliveto v. Circuit Court***, 194 Wis. 2d 418, 433–434, 533 N.W.2d 819, 825 (1995) (a party has a due-process right to allocution before a punitive sanction is imposed).

¶24 The record reveals that the discussion of the subpoenas related solely to Sanders's request for a continuance. There was no mention of a potential

[7] Although the trial court took great pains to explain the need to efficiently manage its heavy docket, the trial court failed to specifically explain how Garvin's actions affected its ability to do so. The trial court's generalized statement of the need to function efficiently is inadequate to support its imposition of sanctions. *See* ***Anderson v. Circuit Court***, 219 Wis. 2d 1, 10–11, 578 N.W.2d 633, 637 (1999) (rejecting the argument that "circuit courts have the power to sanction an attorney for being late, regardless of whether the attorney's tardiness had an actual disruptive effect, in order to create a particular courtroom atmosphere or 'culture,'" and concluding that "a circuit court's interest in creating a particular courtroom 'culture' does not outweigh the need for fairness or the need for the circuit court to make a record when imposing sanctions for an attorney's tardiness").

sanction during the course of the proceedings. Sanders was not notified of the trial court's intent to impose a sanction until he received the written order imposing the sanction, at which point he was no longer able to mitigate the impact of his conduct. *Cf.* ***Oliveto***, 194 Wis. 2d at 435, 533 N.W.2d at 826 ("The right [of allocution] must be exercised after the court has made its finding of contempt but before punishment is imposed, thereby permitting the judge to vacate the contempt order entirely or to give a more lenient sanction, after considering any mitigating factors revealed in the allocution."); *cf. also* ***id.***, 194 Wis. 2d at 436, 533 N.W.2d at 826 ("[T]he allocution requirement is not satisfied when the judge, as here, requests the alleged contemnor to clarify, repeat or explain the contumacious act or remark."). The trial court erroneously exercised its discretion in sanctioning Sanders without affording him notice of the contemplated sanction and an opportunity to be heard. *See* ***Larsen v. City of Beloit***, 130 F.3d 1278, 1286–1287 (7th Cir. 1997) (holding that "the imposition of sanctions requires that the party to be sanctioned receive notice of the possible sanction and an opportunity to be heard" and vacating the district court's written order for sanctions, which was entered without affording the sanctioned party "notice or an opportunity to respond before imposing the sanctions").[8]

[8] The trial court, relying on ***Schinner v. Schinner***, 143 Wis. 2d 81, 420 N.W.2d 381 (Ct. App. 1988), argues that Sanders waived his due process argument by failing to file a motion in the trial court raising the issue. ***Schinner*** held that a "self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation" is a "manifest error," ***id.***, 143 Wis. 2d at 92, 420 N.W.2d at 385, and that "[f]ailure to bring a motion to correct such manifest errors properly constitutes a waiver of the right to have such an issue considered on appeal," ***id.***, 143 Wis. 2d at 93, 420 N.W.2d at 386. Sanders's due process argument does not involve the ministerial type of "manifest error" discussed in ***Schinner***. ***Schinner*** is thus inapposite. We conclude that Sanders did not waive his due process argument by seeking review in this court without filing a motion in the trial court challenging the trial court's imposition of a sanction.

CONCLUSION

¶25 The trial court erroneously exercised its discretion in imposing sanctions against attorneys Garvin and Sanders. The trial court failed to consider the factors relevant to the imposition of sanctions, and failed to give the lawyers adequate notice of the sanctions and an opportunity to respond. We therefore reverse the orders for sanctions and remand the causes to the trial court with directions to vacate the orders for sanctions.[9]

By the Court.—Orders reversed and causes remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[9] In light of our conclusion, we do not reach the additional arguments raised by attorneys Garvin and Sanders. *See* ***Gross***, 227 Wis. at 300, 277 N.W. at 665 (appellate court need only address dispositive issue).