



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

April 20, 2023

To:

Hon. James C. Babler
Circuit Court Judge
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
Electronic Notice

Brian Keenan
Electronic Notice

Hon. Randy R. Koschnick
Director of State Courts
P.O. Box 1688
Madison, WI 53701-1688

Devere Jon Popple
1354-B 19 1/2 Street
Cameron, WI 54822

You are hereby notified that the Court has entered the following opinion and order:

2021AP588

Devere Jon Popple v. Circuit Court for Barron County
(L. C. No. 2021GF1400)

Before Stark, P.J.¹

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Devere Jon Popple, pro se, appeals both an order of contempt under WIS. STAT. § 756.30(1m)(cm) and the imposition of a \$200 fine as a sanction for his refusal to comply with a condition of his jury service that he wear a face covering in the Barron County Courthouse.²

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² Throughout this summary disposition order, we refer to “face coverings,” “masks,” or “face masks” interchangeably. The Barron County Circuit Court refers to them as face coverings. Popple refers to them as face masks and masks.

Popple argues that the mandate that he wear a face mask was not a law and therefore he cannot be found in contempt for violating it. He also argues that the mask mandate violates his constitutional rights and various statutory provisions and that the circuit court should have granted him an accommodation due to a disability.

Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition. Popple has forfeited his claims regarding constitutional and statutory violations, and he has failed to provide any evidence of a disability requiring accommodation. We conclude that the circuit court did not err in finding Popple in contempt and imposing the fine as a sanction. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The facts in this case are undisputed. In March 2021, the circuit court entered an order requiring that Popple attend a hearing and “show cause why [he] should not be found in Contempt of Court under Sec. 756.30(1m)(cm) of the Wisconsin Statutes for failure to properly attend Court and obey the Wisconsin Supreme Court Order ... and the Barron Circuit Court order ... that all persons wear a face covering to attend Court.” At the March 16, 2021 contempt hearing held via Zoom, Popple confirmed the following facts.

In February 2021, Popple was summoned to serve as a juror for a trial. The summons advised that all people entering the courthouse were required to wear a face covering. Prior to his arrival for jury service, Popple called the courthouse and asked about the requirement that he wear a face mask. The clerk of the circuit court told Popple that everyone was required to wear a face covering in the courthouse. Additionally, the clerk told Popple that if he did not show up for jury duty, he could be found in contempt.

The following day, Popple came to the courthouse without wearing a face covering. The Honorable James C. Babler met with Popple outside the courtroom and informed Popple that wearing a face covering was required by law and mandated by Wisconsin Supreme Court and Barron County Circuit Court orders. Popple stated he would not wear a face mask, and he was then asked to leave.

During the contempt hearing, Judge Babler offered to Popple that if he agreed to come back to the courthouse and wear a face covering for jury duty, the court would not find him in contempt. Popple denied Judge Babler's offer, stating that he "can't breathe" when he wears face masks and that "it's a challenge for me to wear a mask." After Judge Babler discussed the basis for the face-covering requirement, Popple acknowledged that wearing a face mask was the law, but he nevertheless stated that wearing a face mask "should be an individual[']s choice." Popple offered no explanation as to why he did not want to wear a face covering other than as a matter of preference, and he did not state that he had a medical limitation, disability, or a religious basis for his refusal to wear a face covering.

Judge Babler again offered to allow Popple to return to the courthouse and serve as a juror wearing a face covering, and if Popple agreed to do so the court would not find him in contempt. Popple refused. Judge Babler then found Popple in contempt for failing to serve as a juror because, under the then-current orders of the Wisconsin Supreme Court and the Barron County Circuit Court, a juror could only serve in the courthouse while wearing a face covering.

As a sanction for his contempt, Popple was fined \$200. Popple agreed that he could pay that amount, and he was given thirty days to do so. Popple now appeals.³

Popple argues that he was willing to serve as a juror and that the circuit court erred by finding him in contempt and imposing a \$200 fine for his refusal to wear a face mask in the courthouse. He asks that we reverse the contempt order and require the court to refund his court costs.

“Wisconsin defines contempt as ‘intentional ... [d]isobedience’ to an ‘order of a court.’” *Carney v. CNH Health & Welfare Plan*, 2007 WI App 205, ¶20, 305 Wis. 2d 443, 740 N.W.2d 625 (alterations in original; citation omitted); *see also* WIS. STAT. § 785.01(1)(b). “[T]he intent behind the contempt statute ... is to provide the court with a mechanism, or toolbox, to effect compliance with court orders.” *Frisch v. Henrichs*, 2007 WI 102, ¶82, 304 Wis. 2d 1, 736 N.W.2d 85.

A judge is allowed to make a finding of contempt and impose a punitive sanction upon a person who commits a contempt of court in the actual presence of the court. *See* WIS. STAT. § 785.03(2). Specifically, a juror can be found in contempt and be “subject to sanctions for contempt of court” if they “[f]ail[] to attend court after being lawfully summoned without being excused by the court.” WIS. STAT. § 756.30(1m)(cm). “[A]fter a finding of contempt of court in

³ We note that Popple’s appellate brief fails to comply with our Rules of Appellate Procedure. Popple fails to cite to the record and fails to include pinpoint citations to any relevant legal authority. *See* WIS. STAT. RULE 809.19(1)(d)-(e) (an appellate brief must contain “appropriate references to the record” and “citations to the authorities, statutes and parts of the record relied on”). In addition, all of Popple’s arguments on appeal are underdeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *see also* RULE 809.19(1)(e). We could affirm the judgment on these grounds alone, *see* WIS. STAT. RULE 809.83(2) (a party’s failure to comply with the Rules of Appellate Procedure may result in sanctions, including “dismissal of the appeal”), but we choose to address Popple’s principal arguments.

a summary procedure under [§] 785.03(2), [the court] may impose ... a fine of not more than \$500.” WIS. STAT. § 785.04(2)(b). “A person may be held in contempt of court if he or she has the ability, but refuses, to comply with a circuit court order.” *Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999).⁴

Here, Popple violated WIS. STAT. § 756.30(1m)(cm) by failing to appear before the circuit court after being lawfully summoned to serve as a juror and without being excused. While Popple did appear as summoned, he failed to comply with a mandatory condition of his service as a juror—i.e., that he wear a face covering in the courthouse. The court did not excuse Popple from compliance with the face-covering condition, nor did it excuse Popple from jury service. When Popple remained steadfast in his refusal to wear a face covering, the court properly found him in contempt, as Popple had “the ability, but refuse[d], to comply” with the Barron County Circuit Court order and the Wisconsin Supreme Court Order mandating jurors to wear a face covering. *See Benn*, 230 Wis. 2d at 309.

On appeal, as in the circuit court, Popple questions the circuit court’s authority to require that he wear a face mask in the courthouse. He argues that the requirement to wear a mask is “not a law” and asserts that “[o]nly the legislature, Federal or State, may create law. No President, Governor, Health Department, nor court may create a law, not even the Supreme Court.” However, Popple’s argument misses the mark, as he was held in contempt for violating

⁴ As the State correctly observes, there appears to be no case law in Wisconsin addressing our standard of review of a contempt finding for a juror under WIS. STAT. § 756.30. We therefore rely upon the standard of review for contempt findings in general under WIS. STAT. ch. 785. Under that standard, a circuit court’s findings of fact are upheld unless clearly erroneous, and questions of law are reviewed de novo. *See Oliveto v. Circuit Ct. for Crawford Cnty.*, 194 Wis. 2d 418, 428-29, 533 N.W.2d 819 (1995).

supreme court and Barron County Circuit Court orders, which resulted in his inability to serve as a juror. He presents no argument that he was not obligated to follow court orders.

The Wisconsin Supreme Court has “a general superintending control over all inferior courts.” *In re Kading*, 70 Wis. 2d 508, 519, 235 N.W.2d 409 (1975) (citation omitted); *see also* WIS. CONST. art. VII, § 3. This “superintending power is as broad and as flexible as necessary to insure the due administration of justice in the courts of this state.” *In re Kading*, 70 Wis. 2d at 520. This power “contemplates ongoing, continuing supervision in response to changing needs and circumstances.” *Id.*

On May 22, 2020, our supreme court entered an order instructing Wisconsin courts on how to safely handle court proceedings in light of the COVID-19 pandemic by adopting recommendations contained in a report created by the Wisconsin Courts COVID-19 Task Force. S. CT. ORDER IN RE THE MATTER OF THE FINAL REPORT OF THE WIS. CTS. COVID-19 TASK FORCE, at 2 (eff. May 22, 2020) <https://www.wicourts.gov/news/docs/taskforcefinalreport.pdf>. That order instructed presiding circuit court judges to prepare an operational “plan that outlines the safety procedures that will be implemented for the county.” *Id.* at 9. The order recommended that “each county initially mandate the use of face masks by all participants and spectators in a court proceeding.” *Id.* at 22. The order further stated “that this mandate may only be eliminated when the county health department determines such mandate is no longer necessary for the safety and protection of jurors and all other participants in court proceedings.” *Id.* Our supreme court entered an additional order that same day stating that each county’s operational plan had to include a requirement that anyone present in the courthouse was required to wear a face covering. S. CT. ORDER IN RE THE MATTER OF THE EXTENSION OF ORDERS AND THE INTERIM RULE CONCERNING CONTINUATION OF JURY TRIALS, SUSPENSION OF DEADLINES

FOR NON-CRIMINAL JURY TRIALS, AND REMOTE HEARINGS, at 5 (eff. May 22, 2020)
<https://www.wicourts.gov/news/docs/jurytrials2.pdf>.

On May 28, 2020, the Barron County Circuit Court created an operational plan that followed the Wisconsin Supreme Court's orders. In June 2020, Judge Babler entered an emergency order for the Barron County Circuit Court adopting that plan and the supreme court's order. CIR. CT. ORDER REVISED COVID-19 COURT OPERATING PLAN FOR BARRON COUNTY, at 6 (May 26, 2021), <https://www.wicourts.gov/news/docs/barronreopen.pdf?v=2>. The emergency order required that all people in the Barron County Courthouse, including jurors, wear face coverings. *Id.* at 7. Thus, pursuant to the supreme court and Barron County Circuit Court orders, at the time Popple was ordered to appear for jury service, he was required to wear a face covering while in the courthouse. Judge Babler properly found Popple in contempt for his refusal to do so and his resulting inability to serve as a juror.

Popple next argues that several of his rights under the United States and Wisconsin Constitutions were violated by the face-covering mandate, including his rights to life, liberty, and the pursuit of happiness; his inherent right to equality under the law; and his right to religious freedom. However, as the Barron County Circuit Court correctly argues, Popple failed to assert any constitutional violation when objecting to the mask mandate in the circuit court. We will not address issues raised for the first time on appeal, and we therefore deem this argument forfeited. *Associated Bank, N.A. v. Brogli*, 2018 WI App 47, ¶26, 383 Wis. 2d 756, 917 N.W.2d 37 (“Generally, we do not decide issues raised for the first time on appeal.”).

Popple also argues that the face-covering mandate violates WIS. STAT. § 106.52, a public place of accommodation law. He asserts that the Barron County Courthouse “is legally defined

as a place of public accommodation” and “[a]s such ... may not prohibit entry by discriminating against someone for their medical condition, disability, or religious views.” Even if we were to assume that the Barron County Courthouse is a place of public accommodation subject to the statute, Popple did not allege before the circuit court that he has a medical condition, disability, or religious view that would prevent him from wearing a face covering. Again, we will not address issues raised for the first time on appeal. *Associated Bank*, 383 Wis. 2d 756, ¶26.

Finally, Popple argues that when he informed Judge Babler that he “could not wear a mask,” he was offered no accommodation for a medical condition or disability as required of the circuit court according to information on the Wisconsin State Courts website. As noted above, however, Popple provided no information to the court regarding any medical condition or disability that prevented him from wearing a face covering. We therefore affirm Judge Babler’s order finding Popple in contempt and his imposition of a \$200 fine as a sanction for Popple’s contempt.⁵

Therefore,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

⁵ We note that Popple failed to file a reply brief. As such, we could choose to deem that Popple conceded the arguments raised in the Barron County Circuit Court’s response brief. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (failure to respond in a reply brief to an argument made in a response brief may be taken as a concession).

IT IS FURTHER ORDERED that this summary disposition order will not published.

Sheila T. Reiff
Clerk of Court of Appeals