

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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.

**Appeal Nos. 2011AP442
2011AP674**

**Cir. Ct. Nos. 2008CV6701
2010CV2582**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICTS I & IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

**ONE 1993 TOYOTA LAND CRUISER,
ONE 1998 DODGE INTREPID,
ONE 1994 HONDA MOTORCYCLE
AND JOEL DELEON NIEVES,**

DEFENDANTS-APPELLANTS,

WISCONSIN DEPARTMENT OF WORKFORCE AND DEVELOPMENT,

DEFENDANT.

JOEL DELEON NIEVES,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN,

DEFENDANT-RESPONDENT,

U.S. BANCORP,

GARNISHEE.

APPEAL from an order of the circuit court for Milwaukee County:
MAXINE A. WHITE, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

APPEAL from an order of the circuit court for Dane County:
PETER C. ANDERSON, Judge. *Dismissed.*

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

¶1 PER CURIAM. Joel DeLeon Nieves appeals from a Milwaukee County Circuit Court order that declined to consider the merits of Nieves's request that the State be found in contempt and ordered to pay costs and attorney fees associated with Nieves's attempt to collect a previously entered judgment against the State.¹ We conclude that the trial court erroneously exercised its discretion

¹ Nieves also filed a notice of appeal from a Dane County Circuit Court order dismissing Nieves's garnishment action against the State on mootness grounds. *See Joel DeLeon Nieves v. State of Wisconsin*, Case No. 2010CV2582 (Dane County Circuit Court, Feb. 22, 2011). The appeal of that case, No. 2011AP674, was subsequently consolidated with appeal No. 2011AP442, which is the appeal of the order issued in *Joel DeLeon Nieves v. State of Wisconsin*, Case No. 2008CV6701 (Milwaukee County Circuit Court, Jan. 6, 2011). On appeal, Nieves states that he is no longer seeking review of the Dane County order and, therefore, we dismiss that appeal.

The Honorable Maxine A. White presided over the Milwaukee County forfeiture action. The Honorable Peter C. Anderson presided over the Dane County garnishment action after the Honorable John J. DiMotto signed an order transferring venue of the garnishment action to Dane County.

when it declined to consider those issues. Therefore, we reverse that portion of the Milwaukee County order and remand for consideration of those issues.²

BACKGROUND

¶2 In April 2008, the State filed a forfeiture action against Nieves. The action, which was filed on the State's behalf by the Milwaukee County Office of Corporation Counsel,³ sought the forfeiture of three vehicles and other property seized during the execution of a search warrant. The State alleged that the seized vehicles were used for illegal drug sales or purchased with the proceeds of illegal drug sales. *See* WIS. STAT. § 961.55.

¶3 Nieves retained counsel and contested the forfeiture action. The case proceeded to trial and, after a police detective testified, the State moved to dismiss the case with prejudice. The trial court granted the State's motion.

¶4 Nieves, who had filed a motion for costs and fees before the trial started, renewed his motion and sought over \$21,000 in attorney fees and over \$500 in costs for the one-year litigation. Nieves argued that the State had violated WIS. STAT. § 802.05(2)(c)⁴ by pursuing the litigation after the detective was

² Those parts of the Milwaukee County Circuit Court order that are not challenged on appeal are affirmed.

³ WISCONSIN STAT. § 961.555(2)(c) (2009-10) provides that “[i]n counties having a population of 500,000 or more, the district attorney or corporation counsel may” bring forfeiture actions on behalf of the State. *See also* WIS. STAT. § 961.55 (forfeitures).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

⁴ WISCONSIN STAT. § 802.05 provides in relevant part:

(continued)

deposed in August 2008 and “conceded that he had no knowledge that ... the [seized] items ... were purchased with drug proceeds or were used to facilitate the transport of drugs.” The State argued that the motion should be denied because part of the motion was filed late and “because the request is unreasonable and the bill is grossly inflated.” The trial court found that the State had violated § 802.05(2)(c) as of the date that it chose not to depose Nieves’s girlfriend, the only person on its witness list who might have provided testimony in support of the forfeiture. From that date on, the trial court found, “the State lacked an evidentiary basis to proceed with the case.” On June 11, 2009, the trial court granted Nieves’s motion in part, awarding Nieves \$8668 in attorney fees and \$121.29 in costs.

¶5 Neither Nieves nor the State appealed from the order granting Nieves a portion of the attorney costs and fees he had sought. Five months later, in November 2009, Nieves filed a garnishment action against the State in Milwaukee County. Filings in the garnishment action indicate that Nieves attempted to collect the judgment from the State and filed the garnishment action only after payment was not forthcoming.

(2) REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

....

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

¶6 The State, now represented by the Attorney General, moved to change venue to Dane County pursuant to WIS. STAT. § 801.50(3) and also moved to dismiss the garnishment action on sovereign immunity grounds. Nieves opposed the motions and also moved for sanctions pursuant to WIS. STAT. § 802.05(3). He argued that the State had never previously raised sovereign immunity as a defense and it was therefore waived.

¶7 In January 2010, the Milwaukee County trial court granted the motion to change venue. The Dane County trial court thereafter began consideration of the State's motion to dismiss and Nieves's motion for sanctions. At an August 2010 hearing, the Dane County trial court suggested that the garnishment case be stayed so that Nieves could pursue relief from the Milwaukee County trial court that presided over the forfeiture action. The parties discussed whether the original judgment could be modified so that the State could pay the judgment, such as by incorporating WIS. STAT. § 814.245.

¶8 In September 2010, Nieves filed an order to show cause for contempt in Milwaukee County, which the trial court signed. In a memorandum in support of the order to show cause, Nieves asked the trial court to find the State in contempt for failure to pay the judgment and interest that it was ordered to pay in June 2009. He asked the trial court to award him costs and fees that he incurred attempting to collect the judgment, including fees for filing the order to show cause.

¶9 In response, the State asserted that “[t]he sovereign State of Wisconsin should not be found in contempt because the court's order is not unequivocal and compliance is not possible.” (Some capitalization omitted.) It explained that it was not clear against whom the judgment for costs and fees was

directed: the State of Wisconsin, the Milwaukee County Office of Corporation Counsel (the entity that prosecuted the forfeiture action on behalf of the State), or the City of Cudahy (which seized the items). The State also asserted that compliance with the judgment was impossible because the State enjoys sovereign immunity.

¶10 The Milwaukee County trial court held a hearing in October 2010. Attorneys from both the Attorney General's office and the Milwaukee County Office of Corporation Counsel appeared, as did counsel for Nieves.

¶11 Counsel for Nieves indicated that he was asking the trial court to do several things: (1) conclude that the State waived its sovereign immunity defense by not raising it in the forfeiture action in June 2009 when Nieves first sought costs and fees, and by not appealing from the 2009 judgment; (2) order the State to pay the judgment plus interest, as originally ordered; and (3) order the State to pay Nieves's costs and fees expended to prosecute the garnishment action. The trial court and the parties also discussed whether the Milwaukee County Office of Corporation Counsel should be ordered to pay the previously imposed costs and fees and whether it would agree to do so. At the end of the hearing, the trial court indicated that it would issue a decision in writing unless it was notified by a date certain that a stipulation between the parties and the Milwaukee County Office of Corporation Counsel was reached.

¶12 After the hearing, counsel for Nieves sent the trial court a letter urging it to decide whether the State was in contempt, regardless of whether a stipulation was reached. The letter explained that Nieves had spent nearly \$11,500 in attorney fees and over \$300 in costs attempting to enforce the judgment, including preparing the garnishment action and the order to show cause.

¶13 About two weeks later, the State notified the trial court that although the State was not waiving its sovereign immunity defense, the State would pay the judgment. The letter explained that “the Department of Justice and Milwaukee County Office of Corporation Counsel reached an agreement.” The letter further said that “the State still opposes payment of any post-judgment interest based on sovereign immunity.” The letter also indicated that “the State does not expect or ask the court to issue a written decision on [Nieves’s] Order to Show Cause for Contempt and Motion for Sanctions.”

¶14 In response, counsel for Nieves, in a letter to the trial court, once again urged the trial court to issue a written decision, noting that over \$1500 in interest still had not been paid and that Nieves was still seeking costs and fees associated with the State’s decision to withhold payment of the judgment for over seventeen months, including the fees incurred most recently to negotiate with the State and communicate with the trial court. Finally, counsel urged the trial court to find that the State had waived its sovereign immunity defense.

¶15 In January 2011, the trial court issued a written decision and order. The written decision indicated that the trial court “treats the parties’ requests and arguments related to [Nieves’s] requests for post-judgment interest and additional costs and fees as a Motion for Reconsideration.” The trial court found that the State had waived its right to assert sovereign immunity as a defense “early in the [forfeiture] case.” It also noted that the State “did not formally dispute the judgment” by filing any post-judgment motions and did not appeal. The trial court concluded that the State was not entitled to relief from the judgment—including its liability for post-judgment interest—pursuant to WIS. STAT. §§ 805.17(3) or 806.07.

¶16 The trial court explicitly declined to address Nieves’s request for costs and fees, explaining: “That request relates to the Defendant’s garnishment action, which was never before this Court but in fact is still pending in Dane County Circuit Court.”

¶17 After the Milwaukee County trial court issued its decision, the State paid the post-judgment interest, consistent with the trial court’s order. Then the parties turned to the Dane County trial court for consideration of the motions pending in the garnishment action. The State argued that it had not waived sovereign immunity in the Dane County action, a separate action from the Milwaukee County forfeiture case. It further asserted that Nieves was not entitled to costs and fees associated with the garnishment action because “he need not have filed it at all” because he “had proper remedies in the forfeiture action.”

¶18 In response, Nieves urged the Dane County trial court to address his request for costs and fees related to collection of the 2009 judgment, noting that the Milwaukee County trial court “declined to address Nieves’ request for his costs and fees expended in attempting to collect the underlying judgment” because “the request was related to this Garnishment Action.” Nieves asserted that the Milwaukee County trial court “elected to leave it for [the Dane County trial court] to decide whether to award Nieves the costs and fees he is seeking.”

¶19 The Dane County trial court held a hearing on the outstanding motions—including the State’s request for \$500 in costs pursuant to WIS. STAT. § 814.49—and issued an oral ruling. Although the State at first urged the trial court to decide the sovereign immunity issue, when the trial court suggested that it was inclined to dismiss the garnishment action as moot because the judgment and post-judgment interest had recently been paid, the State said it would not object.

The trial court dismissed the garnishment action on mootness grounds and also denied Nieves's motion for sanctions, explaining:

I thought throughout these proceedings that the [S]tate was being unduly resistant to paying a judgment that had been lawfully entered against it.... And ultimately it did get paid and in fact interest even was charged. But I also viewed it as principally a matter that should first and foremost be brought up with the court that entered the judgment in the first place, which was the Milwaukee County Circuit Court....

... I think in [that] case there weren't such good arguments as to what barred the [S]tate from paying a judgment that hadn't been appealed, and therefore have the force of law over there. But the garnishment is a separate proceeding as I see it.....

... I can't say that the [S]tate's position, in this case, lacks sufficient merit so as to justify my awarding fees.... [T]herefore, I am denying that request for sanctions.

And as to any other costs that could have possibly been sought in Milwaukee County Circuit Court ... that's a matter that would have had to have been brought before [that court].

The trial court also denied the State's request for \$500 in fees.

¶20 Nieves appealed from the final orders of both the Milwaukee County trial court and the Dane County trial court. As noted earlier, on appeal he is pursuing only the appeal of the Milwaukee County order.

DISCUSSION

¶21 At the outset it is important to identify what is at issue before this court. Neither party challenges the Dane County trial court's dismissal of the garnishment action or its denial of both parties' requests for costs and fees, and that appeal is being dismissed. Further, the State, which has not appealed, does not challenge the Milwaukee County trial court's finding that it waived its

sovereign immunity defense in the forfeiture action, and it does not seek to recover the judgment or interest it already paid to Nieves. The only issue presented on appeal is whether the trial court should have considered Nieves's request that the trial court find the State in contempt for failing to pay the judgment and interest for over seventeen months and allow Nieves to recover costs and fees associated with his attempt to collect the judgment and interest. For reasons detailed below, we conclude that the trial court should have decided the merits of those issues and, therefore, we reverse in part and remand for consideration of those issues.

¶22 A court has authority to impose a remedial or punitive sanction for contempt of court pursuant to WIS. STAT. ch. 785. We review the trial court's use of its contempt power under the erroneous exercise of discretion standard. *City of Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995). "A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational and legally sound conclusion." *State v. Dukes*, 2007 WI App 175, ¶26, 303 Wis. 2d 208, 736 N.W.2d 515. "The failure to exercise discretion is itself an [erroneous exercise] of discretion." *State v. Daniels*, 160 Wis. 2d 85, 103 n.7, 465 N.W.2d 633 (1991).

¶23 In this case, the Milwaukee County trial court explicitly declined to address Nieves's allegation that the State was in contempt and his request for costs and fees. Nieves asks this court to "declare the State in contempt and award [Nieves] the costs and fees he expended in collecting the judgment in the Underlying Action" or, alternatively, to reverse and remand to the trial court so that it "may consider [Nieves's] request for costs and fees pursuant to its Order to Show Cause for Contempt."

¶24 The State offers several arguments in opposition to both requests. We address each in turn.

¶25 First, the State argues that Nieves lacks standing to appeal the Milwaukee County trial court decision “because he is not an aggrieved party.” It explains that Nieves was seeking costs and fees related to the garnishment action, which were not properly before the Milwaukee County trial court. We are not convinced. Nieves requested costs and fees related to his efforts to collect the judgment and interest. His memorandum in support of the order to show cause for contempt explained that he was seeking attorney costs and fees incurred since the judgment was entered. The affidavits he filed in support of the order to show cause identified costs and attorney fees incurred for activities such as corresponding with the Milwaukee County Office of Corporation Counsel to make payment arrangements, filing the garnishment action, and preparing the order to show cause. In its written decision, the trial court recognized that Nieves was requesting that the trial court “order the State to pay the costs and fees that [Nieves has] expended in attempting to collect the initial judgment from the State.” The trial court did not decide whether the State was in contempt and, if so, whether Nieves was entitled to costs and attorney fees. Nieves was aggrieved and has a right to appeal.

¶26 Second, the State contends that even if Nieves was aggrieved because the Milwaukee County trial court did not decide his request for costs and fees, Nieves’s “request” was insufficient because he failed to file a motion pursuant to either WIS. STAT. §§ 785.03(1)(a) or 802.05(3). The State argues that the trial court was not required to act where Nieves failed to file a written motion. We decline to address the merits of this argument because it was not raised in the trial court and is therefore waived. *See State v. Caban*, 210 Wis. 2d 597, 604, 563

N.W.2d 501 (1997) (“The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.”). Specifically, the State filed written arguments in opposition to the order to show cause, participated in oral argument at the order to show cause hearing, and filed a post-hearing letter with the trial court. Not once did it assert that the trial court should deny Nieves’s request for costs and fees because no separate motion was filed. We reject the State’s belated attempt to make that argument for the first time on appeal. *See id.*

¶27 Third, in a related argument, the State asserts that “[a]s a result of Nieves’s failure to file a motion for attorney fees and costs, the [trial court] did not erroneously exercise its discretion in deciding not to address Nieves’[s] request.” The State explains: “A court does not erroneously exercise its discretion when not asked to exercise its discretion.” We reject this argument. Nieves explicitly asked for costs and fees at the order-to-show-cause hearing and in his written arguments. The trial court in its decision explicitly recognized that Nieves was asking for those costs and fees. We cannot agree that Nieves failed to ask for costs and fees.

¶28 Next, the State argues that the trial court did not erroneously exercise its discretion. It explains:

To the extent the court did exercise its discretion in deciding not to address Nieves’[s] request for costs and fees, it did not erroneously do so. The court was aware that Nieves had already filed a motion for sanctions [seeking] attorney fees and costs *in the garnishment action*. Moreover, his motion was still pending in Dane County Circuit Court. Furthermore, during the October 13, 2010, hearing, Nieves clearly informed the Milwaukee County Circuit Court that his request for attorney fees and costs was in relation to the fees and costs incurred *in the garnishment action*. In short, Nieves was asking the Milwaukee County Circuit Court to order the State to pay Nieves for his fees and costs incurred in litigating an entirely separate action that was before the Dane County Circuit Court.

Nieves can point to no case law provided to the Milwaukee County Circuit Court in support of his extremely novel position, yet he now complains that the court failed to demonstrate how it reached a reasonable determination in [declining] to address his extraordinary request. The court's explanation that Nieves'[s] "request" for fees and costs was related to the garnishment action, and was a pending motion, demonstrated a reasonable [thought] process.

(Citations omitted.) We are not convinced by the State's argument. While the trial court at one point in its decision noted that Nieves was seeking costs and fees related to the garnishment action, in another part of the decision it acknowledged that Nieves was seeking costs and fees "expended in attempting to collect the initial judgment from the State." The trial court did not conclude that costs and fees were unwarranted. Instead, it explicitly declined to address the issue. We conclude that this was an erroneous exercise of discretion because the trial court did not make a determination on the merits of Nieves's request that the State be found in contempt and that Nieves be awarded costs and fees. *See Daniels*, 160 Wis. 2d at 103 n.7.

¶29 Finally, the State argues that "[t]o the extent that Nieves claims that the court erroneously exercised its discretion in denying his request for attorney fees and costs incurred only in the forfeiture action, his assertion is unavailing." It explains that Nieves's billing records "were anything but helpful" and that "[w]ithout more," the trial court did not understand the evidence related to fees and costs in the forfeiture action. This argument does not alter our conclusion that the trial court erroneously exercised its discretion. This court does not know how the trial court interpreted the billing records, and we decline to speculate on that matter.

¶30 Having concluded that the Milwaukee County trial court erroneously exercised its discretion by not deciding the merits of Nieves's request that the State be found in contempt and that Nieves be awarded costs and fees, the only remaining issue is whether the case should be remanded. Nieves urges this court to determine whether the State's refusal to pay the judgment constituted contempt and direct the trial court to award Nieves his costs and fees. The State opposes this approach and suggests that the proper remedy is to remand the case so that the trial court can decide whether the State was in contempt and, if so, whether Nieves is entitled to any costs and fees. We agree with the State. Whether the State was in contempt and whether Nieves is entitled to costs and fees are issues best decided by the trial court. We reverse in part and remand so that the trial court can make necessary findings and exercise its discretion with respect to those issues.

By the Court.—Order affirmed in part, reversed in part and cause remanded with directions; order dismissed.

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

