



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

July 24, 2018

To:

Hon. Mark J. McGinnis
Circuit Court Judge
Outagamie County Justice Center
320 S. Walnut St.
Appleton, WI 54911

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
320 S. Walnut St.
Appleton, WI 54911

Alexander Duros
Assistant District Attorney
320 S. Walnut St.
Appleton, WI 54911

Joseph N. Ehmann
Regional Attorney Manager
Office of the State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Melinda J. Tempelis
District Attorney
320 S. Walnut St.
Appleton, WI 54911-5918

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

2017AP1743-CR State of Wisconsin v. Brian D. Mitchell (L. C. No. 2017CF59)

Before Seidl, 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).

Brian Mitchell appeals an order finding him in contempt of court for his conduct during a proceeding in his criminal case. The State filed a letter with this court in lieu of a response brief

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

in which it concedes the circuit court's contempt sanction constituted an unauthorized penalty. After review of Mitchell's brief and the record, this court concludes this appeal is appropriate for summary disposition. The contempt order is summarily reversed.

The State charged Mitchell with human trafficking, contrary to WIS. STAT. § 940.302(2)(a). Mitchell's second appointed counsel filed a demand for a speedy trial on May 18, 2017. However, counsel filed a motion to withdraw from representation on May 22, 2017, and the circuit court signed an order granting the motion on the same date. Nonetheless, three days later, counsel requested a hearing before the circuit court on his motion to withdraw in light of Mitchell's speedy trial demand.

The hearing was held on June 6, 2017, with Mitchell, his counsel, and the prosecutor appearing. The circuit court held Mitchell in contempt of court at the hearing. The contempt finding occurred after a lengthy discussion between Mitchell and the court about how to balance Mitchell's speedy trial demand with counsel's withdrawal and any eventual reappointment of counsel.² The court based its contempt finding upon what it described as Mitchell's "interrupting and creating nonsense," which it found was "disrespect[ful] to the court." The court took specific note that Mitchell had "roll[ed] [his] eyes" at the court multiple times. After announcing this finding, the court asked Mitchell if there was "anything [he]'d like to say" before the court imposed "a consequence for that," to which Mitchell responded, "No." The court imposed a sentence of six months in jail for the contempt, and it set three purge conditions

² Mitchell's jury trial was scheduled at that time for August 16, 2017. After the contempt order was entered, and after the trial was rescheduled, the State moved to dismiss the case against Mitchell without prejudice. The circuit court granted that motion.

for the jail term: (1) “writing an apology letter” to the court; (2) “appearing here in court and making a verbal apology”; and (3) paying a \$5000 fine. After listing these conditions, the court asked Mitchell if he had “[a]nything on that issue,” to which Mitchell again responded, “No.” The court ordered Mitchell to begin serving his jail sentence on the day of the hearing.

At a June 23, 2017 hearing, Mitchell, represented by newly appointed counsel, apologized in open court to the circuit court for his actions at the June 6 hearing. The court also stated it had received an apology letter from Mitchell. The court determined that those two purge conditions had been satisfied. However, the court declined to rescind the \$5000 purge condition when it found Mitchell continued to act disrespectfully toward the court after the apology, specifically noting Mitchell gave the court what it described as a “fuck-you look” while the court spoke to him.

On July 18, 2017, forty-two days into Mitchell’s jail sentence for the contempt, the court entered a written order memorializing its contempt finding. In the order, the court struck the \$5000 purge condition and found Mitchell had satisfied the purge conditions. Mitchell now appeals the contempt order.

Mitchell raises three issues. First, Mitchell contends the circuit court’s contempt finding was procedurally improper and for that reason the order must be reversed. Second, he argues the circuit court erred in imposing contempt because Mitchell’s conduct, as evidenced by the June 6 hearing transcript, was not contemptuous. Third, Mitchell contends the circuit court failed to grant him his right of allocution concerning the alleged contempt. Since we reverse the contempt order on other grounds, we do not reach the latter two issues. *See State v. Blalock*, 150 Wis. 2d

688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds).

We conclude the contempt order must be reversed in light of the State's concessions, which relate to Mitchell's first argument. Mitchell correctly contends that the circuit court's sanction can only be categorized as a summary contempt and not a nonsummary punitive or remedial contempt. A nonsummary punitive contempt must be initiated by a complaint filed by the State. WIS. STAT. § 785.03(1)(b). A nonsummary remedial contempt requires that an "aggrieved person" initiate the proceedings and that the court provide notice and a full and fair hearing to the contemnor before imposing a sanction. *B.L.P. v. Circuit Court for Racine Cty.*, 118 Wis. 2d 33, 42, 345 N.W.2d 510 (Ct. App. 1984). Here, the proceeding was neither nonsummary punitive contempt nor nonsummary remedial contempt. It was clearly summary contempt under WIS. STAT. § 785.04(2)(b).

Mitchell argues the circuit court's summary contempt penalty exceeded that permitted by WIS. STAT § 785.04(2)(b) and therefore must be set aside. The State has conceded that "the circuit court's summary contempt sanction of \$5,000 and six months in jail was an unauthorized penalty." The State and Mitchell are both correct. For summary contempt, § 785.04(2)(b) only permits "a fine of not more than \$500 or imprisonment in the county jail for not more than 30 days or both." While the court's sanction fell within the permissible penalties for a nonsummary proceeding, *see* § 785.04(2)(a), it was well beyond that allowed for summary contempt.

In addition to expressly conceding that the circuit court imposed an unauthorized penalty, the State does not provide a response to Mitchell's argument that the unauthorized penalty requires full reversal of the contempt order. Nor does the State assert that this court or the circuit

court may now reduce the contempt sanction to the statutory limit without full reversal.³ We interpret the State's silence on this point as a concession of reversible error, and we have no obligation to develop arguments to the contrary. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded); see also *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court "cannot serve as both advocate and judge" by addressing undeveloped issues).

Therefore,

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

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

Sheila T. Reiff
Clerk of Court of Appeals

³ Nor would there be any reason for this court to remand for further proceedings in light of the circuit court's subsequent order stating that Mitchell has satisfied the conditions of his contempt.