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**DISTRICT IV**

April 18, 2013

*To*:

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

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2012AP1704 In re the Finding of Contempt in re the Paternity of J.S.R.: State of Wisconsin and Katherine T. Rowinski v. Dominic P. Parise, Jr. (L.C. # 1995PA1)

Before Lundsten, P.J.

Dominic P. Parise, Jr. appeals an order finding him in contempt.[1] Based on our review of the briefs and record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reverse and remand for further proceedings consistent with this opinion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

On April 16, 2012, an "Order to Show Cause" was personally served on Parise. The order and an attached affidavit advised Parise that he had failed to pay child support, that he would be required at a hearing on June 25, 2012, to show cause for his failure, and that, if he was found to be in contempt, he faced, among other possible sanctions, up to six months of imprisonment. The order advised Parise: "**YOU HAVE A RIGHT** to be represented by an attorney at this hearing. Unless good cause is shown, failure to appear with an attorney will be deemed a waiver of that right. If you cannot afford an attorney, contact the Office of the Public Defender to determine if that office will represent you."

Parise appeared personally at a contempt hearing on June 25, 2012. He advised the court that he wanted a continuance to obtain an attorney. Parise gave the following explanation for why he had appeared without counsel and why he needed a continuance to obtain counsel: (1) he did not want to spend money on an attorney if there was no need for one; (2) he thought there would be no need for an attorney because he anticipated paying off back child support with the proceeds of the sale of his home; (3) the sale was set to close on May 31 and was moved back to June 15; (4) the closing did not go through on June 15; (5) he wrote to the court requesting a continuance[2]; (6) the attorney that had assisted Parise previously told Parise, a couple of months prior, that the attorney was no longer "doing family things"; (7) he called "a couple different places" and was told he would need $1,000 to $1,500 for an attorney; and (8) he needed "about a month to come up with that type of money."

[2] The circuit court acknowledged at the beginning of the hearing that, about a week prior to the hearing, the court had received a written request for a continuance. Although we do not find the written request in the appellate record, we will assume the request was made based on the court's statement.

The circuit court denied Parise's request for a continuance. The court indicated that it accepted Parise's assertions, but that the "issue has been going on for some fairly significant period of time" and Parise's failure to pay was not just a recent event. The court expressed the view that there was no reason not to go forward with the hearing because the child support agency was "not asking that you be incarcerated today." The court stated that Parise would have an opportunity to obtain counsel and have another hearing before he might be incarcerated. The hearing proceeded and, after the admission of some stipulated evidence and some testimony from a child support investigator, the circuit court found Parise in contempt.

It is undisputed that Parise had the right to counsel at the contempt hearing. Parise argues that the circuit court failed to comply with the requirement that the court inform him of his right to an attorney at public expense if he was indigent, and did not obtain a waiver of that right. He also argues that the circuit court erroneously exercised its discretion when it denied his request for a continuance.

The State, represented by corporation counsel, acknowledges that the circuit court did not advise Parise of his right to a court-appointed attorney if indigent, but contends that the record shows that Parise was aware of his right to have an attorney at public expense if he was indigent. The State acknowledges statements in ***State v. Pultz***, 206 Wis. 2d 112, 556 N.W.2d 708 (1996), and ***Ferris v. State ex rel. Maass***, 75 Wis. 2d 542, 249 N.W.2d 789 (1977), requiring the court, in a contempt proceeding, to engage in a colloquy regarding the right to counsel. But the State

contends that no such colloquy was required here because the record shows that Parise was aware that he was entitled to an attorney at public expense if he was indigent.[3]

The rule suggested by the State—that no colloquy is required if the record demonstrates that the person facing contempt already knows about his or her right to counsel—may or may not be reasonable. However, so far as we can tell, we are bound by plain language requiring a colloquy under the circumstances of this case. In ***Pultz***, the court stated:

> The circuit court must engage in a colloquy that clearly conveys the existence of this right to the defendant. Further, the colloquy must be initiated by the judge to inquire whether the defendant believes him or herself indigent.

***Pultz***, 206 Wis. 2d at 132. And in ***Ferris***, the court was similarly clear:

> That means that absent a knowing and intelligent waiver of counsel, the court, prior to the hearing on contempt, must advise the alleged contemnor of his right to counsel and advise him that if he is indigent, the court will appoint counsel for him at public expense.

***Ferris***, 75 Wis. 2d at 546.

The State provides no authority for the proposition that, in the circumstances here, the colloquy requirement is superseded by more specific law excusing a court from engaging in a

[3] The State does not argue that Parise's right to counsel did not apply at the hearing because the court did not intend to immediately impose imprisonment. The absence of this argument seems appropriate. We can discern no reason why the right to counsel during a proceeding would be affected by a court's intent not to impose an available sanction. For example, we discern no reason why an indigent person could be denied the right to counsel in a criminal disorderly conduct proceeding because of a court's promise not to impose any type of incarceration, even though incarceration is an available penalty.

colloquy if the record discloses that the person with a right to counsel has full knowledge of that right. Put differently, the State provides no path to affirming the circuit court.[4]

Even if we were to assume that evidence of Parise's actual knowledge of his right to counsel was an adequate substitute for the required colloquy, there is the separate matter of the circuit court's decision to deny Parise's request for a continuance to obtain counsel.

The State argues that the circuit court could have concluded that Parise was motivated by a desire to delay the proceedings. The problem with this argument is that the circuit court made no such finding. To the contrary, the circuit court appeared to accept Parise's explanation. And, the State does not explain why Parise's explanation, if believed, was insufficient. As indicated above, Parise explained that he wanted to avoid wasting money on an attorney, that he expected the house closing shortly before the scheduled hearing would provide sufficient funds to clear his arrearage, that after learning that the closing had fallen through he contacted the circuit court to request additional time, and that he did make inquiries about obtaining an attorney but could not currently afford the $1,000 to $1,500 necessary to retain an attorney. Rather than reject Parise's assertions, the circuit court justified denying the continuance request by stating: (1) that the matter had been "going on for some fairly significant period of time" and (2) that the child support agency was not asking for jail to be imposed immediately. The case law we cite above explains why the first reason is insufficient, and the State implicitly concedes that the second is legally insufficient.

[4] The State suggests that language in the notice advised Parise of his right to counsel if he was indigent. We agree that this notice could have formed the starting point for a colloquy but, standing alone, it was not a substitute for the circuit court's obligation to engage Parise in a colloquy to ensure Parise's understanding of the right.

The decision to grant or deny a request for a continuance to obtain counsel is within the discretion of the circuit court. ***Phifer v. State***, 64 Wis. 2d 24, 30, 218 N.W.2d 354 (1974). In deciding whether to grant or deny such a request, "'a court may not insist upon expeditiousness for its own sake,'" but may deny the request based on a finding that the delay would be unreasonable or that the party requesting the delay is attempting to obstruct the proceeding. *See* ***id.*** at 30-31 (quoted source omitted). Here, the circuit court provided no explanation as to why the requested delay was unreasonable in the context of what had transpired previously, and made no finding that Parise was attempting to obstruct the proceeding. We are, therefore, unable to conclude that the court's decision to deny the request was a reasonable exercise of discretion.

To be clear, we do not hold that there is no law supporting the State's theory that evidence of actual knowledge of the right to an attorney at public expense, if indigent, negates the need for a colloquy on the topic. Rather, the State points to no such authority, and our own significant, but non-exhaustive, effort to locate such law proved fruitless. Also, we stress that it may be that the circuit court could have made findings that would have supported a discretionary decision to deny Parise's motion for a continuance. But the court essentially did the opposite. After Parise requested a continuance and offered his explanation for his failure to obtain counsel for the scheduled hearing, the circuit court stated: "Well, Mr. Parise, I certainly understand you found yourself in an unfortunate circumstance with an issue related to the sale of your house. I don't have any reason to believe that you are lying ...."

For the reasons above, we reverse and remand for further proceedings consistent with this opinion.

IT IS ORDERED that the order is summarily reversed and the cause is remanded for further proceedings consistent with this opinion. *See* WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*