

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CONTEMPT OF KELLY MICHELLE DORSEY, Supreme Court No. 150298

Respondent-Appellant

Court of Appeals No. 309269

IN RE TYLER MICHAEL DORSEY

44th Circuit Court,
Livingston County,
Family Division
Case No. 08-012596-DL
Hon. David Reader

REPLY BRIEF IN SUPPORT OF THE
APPLICATION FOR LEAVE TO APPEAL
ON BEHALF OF RESPONDENT-APPELLANT,
KELLY MICHELLE DORSEY

PROOF OF SERVICE

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ARGUMENT

I. THE FAMILY COURT LACKED SUBJECT MATTER JURISDICTION AND THUS AN EXCEPTION TO THE COLLATERAL BAR RULE APPLIED.

The Prosecution argues that the family court sitting in a delinquency matter had subject matter jurisdiction to issue any orders to the parent of the juvenile under MCL 712A.6., because it had jurisdiction over the juvenile. (Pros. Answer at 2.) This argument conflates the family court with a court of general jurisdiction. Family courts have no inherent jurisdiction, but depend on statutes and the constitution to define their limited jurisdiction. *Stamadianos v Stamadianos*, 425 Mich 1, 12-14; 385 NW2d 604 (1986); *Fritts v Krugh*, 354 Mich 97, 112; 92 NW2d 604, 612 (1958). Jurisdiction over the juvenile is not the only prerequisite required.

There are two kinds of orders allowed by MCL 712A.6. The first kind are those orders specifically authorized by the other statutes in chapter 712A (juveniles) or chapter 10A (drug courts). *In re Macomber*, 436 Mich 386, 390-91, 398-99; 461 NW2d 671 (1990). For the second kind of order under MCL 712A.6 exercising jurisdiction over adults in juvenile proceedings the court must 1) have jurisdiction over the child; 2) only be acting to ensure the child's well-being; 3) the order must be incidental to the court's jurisdiction over the child; and 4) the order must be necessary for the child's interest. *Id.* at 391. As to the first kind of order allowed by MCL 712A.6; MCL 712A.18(1)(b) permits the court to order reasonable rules for the conduct of parents in the terms and conditions of the child's probation. *Id.*

This Court has ruled that the legislature intended MCL 712A.18 to be interpreted consistently with MCL 712A.6, because they were originally adopted at the same time. *Macomber*, 436 Mich at 391-92. In order to read the statutes consistently with each other the reasonability requirement of MCL 712A.18(1)(b) must be imported into MCL 712A.6; *Cf. Id.* Correspondingly, MCL 712A.6 and its limitations on jurisdiction to issue orders affecting adults

must be applied to MCL 712A.18. *Cf. Macomber*, 436 Mich at 392-93. In this case Tyler was placed on probation by the family court and the drug testing order is a rule of conduct imposed on the parent under MCL 712A.18(1)(b).

MCL 712A.18(1)(b) and MCL 712A.6 must be construed in such a manner that they remain constitutional if possible. *Dep't of Human Servs v Laird (In re Sanders)*, 495 Mich 394, 404; 852 NW2d 524 (2014); *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003). Searches and seizures that violate the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Michigan Constitution are unreasonable and would render the underlying jurisdictional statutes unconstitutional if the statutes gave authority to issue them. US Const, Am IV; Const 1963, art 1, § 11. Ordering an unreasonable search in violation of the Fourth Amendment causes the order to become unreasonable and thus this mandatory requirement for jurisdiction to issue orders affecting adults under MCL 712A.18(1)(b) and MCL 712A.6 was not satisfied. The twice weekly for 90 days drug testing request violated the Fourth Amendment, because Ms. Dorsey, as the parent of a juvenile delinquent, has an undiminished expectation of privacy. *State v Doe*, 233 P3d 1275, 1280 (Idaho 2010); *See State v Moreno*, 203 P3d 1000, 1008 (Utah 2009). No warrant requirement exception applies. *Ferguson v City of Charleston*, 532 US 67, 84; 121 S Ct 1281; 149 L Ed2d 205 (2001); ; *Doe*, 233 P3d at 1280; *Moreno*, 203 P3d at 1008-1012; *People v Chowdhury*, 285 Mich App 509, 523-27; 775 NW2d 845 (2009). The Fourth Amendment issue here is one of first impression in Michigan and therefore is of major significance to the state's jurisprudence. MCR 7.302(B)(3). The Court of Appeals' interpretation of MCL 712A.6 renders it unconstitutional. *Sanders*, 495 Mich at 404.

The prosecution and the Court of Appeals confused the collateral bar rule with the issue waiver and preservation rule. (Pros. Answer at 2.; Ct. App. Op. at 10.) Ms. Dorsey understands that she must show that an exception to the collateral bar rule applies, but the waiver and

preservation analysis utilized by the Court of Appeals is not the applicable rule. *State Bar of Michigan v Cramer*, 399 Mich 116; 125 249 NW2d 1 (1976), quoting *Maness v Meyers*, 419 US 449; 95 S Ct 584; 42 L Ed 2d 574 (1975). In its effect it is very similar to waiver, but the Court of Appeals should have analyzed this case solely under the collateral bar rule and its exceptions to avoid confusion in future cases that cite to this one. MCR 7.302(B)(5). The case cited by the prosecution, *In re Dudzinski*, 257 Mich App 96; 667 NW2d 68 (2003) also applied the collateral bar rule. *Dudzinski* is distinguishable in that there was no exception to the collateral bar rule available in that case. It was before a court of general jurisdiction so there was no subject matter jurisdiction argument to be made and the order involved did not require the defendant to produce evidence. In this case exceptions to the collateral bar rule do apply.

In any event issue preservation only requires that an issue be raised before the trial court so as to limit appellate review to those issues the trial court has adjudicated at a time when both sides can respond to them factually. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). In this case Ms. Dorsey raised the issue of exceptions to the collateral bar rule, specifically of the lack of subject matter jurisdiction by family court, before the trial court in post-trial motions after the show cause trial. (Resp't Mot. to Correct an Invalid Sentence at 4-5, Mar. 2, 2012; Br. in Support at 3; Resp't Mot. for a New Trial or J. of Acquittal at 2-3, Br. in Support at 6-7, Mar. 8, 2012; Mot. Hr'g Tr. 4:14 - 12:2, 19:22-25 -21:1-6, Mar. 22, 2012.) Subject matter jurisdiction challenges cannot be waived and may be raised at any time regardless of preservation. *Shane v Hackney*, 341 Mich 91, 99; 67 NW2d 256 (1954); *Moody v Home Owners Ins Co*, 304 Mich App 415, 439; 849 NW2d 31 (2014).

The Fourth Amendment challenge to the drug testing was also raised before and ruled on by the trial court in the post-trial motions and is actually an essential sub-component of the subject matter jurisdiction argument. (Resp't Mot. to Correct an Invalid Sentence at 5; Resp't

Mot. for a New Trial or J. of Acquittal at 2-3, Mar. 8, 2012, Br. in Support at 6-7; Mot. Hr'g Tr. 4:14 - 12:2, 19:22-25 -21:1-6, Mar. 22, 2012.). In this role its consideration is necessary to determine subject matter jurisdiction so it can be raised at any time and, at least in this context, is not subject to waiver. *Hackney*, 341 Mich at 99; *Moody*, 304 Mich App at 439; *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (courts "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.") .

II. THE ARGUMENT THAT THE ORDER IS ALSO EXEMPT FROM THE COLLATERAL BAR RULE BECAUSE IT REQUIRED AN IRRETRIEVABLE SURRENDER OF CONSTITUTIONAL RIGHTS WITHOUT MEANINGFUL REVIEW PRIOR TO THE CONTEMPT WAS PRESERVED

The prosecution asserts that this issue is not preserved (Pros. Answer at 2.) It is however, not a new issue, but a matter of law argument dependent on the Fourth Amendment issue raised and decided by the trial court in post-trial motions and by the Court of Appeals. (Resp't Mot. to Correct an Invalid Sentence at 5; Resp't Mot. for a New Trial or J. of Acquittal at 2-3, Mar. 8, 2012, Br. in Support at 6-7; Mot. Hr'g Tr. 4:14 - 12:2, 19:22-25 -21:1-6, Mar. 22, 2012.) The new argument is simply a secondary argument that an additional exception to the collateral bar rule applies. A party may improve arguments of law on appeal, just not new issues, which were not presented below. *People v Hall*, 290 Mich 15, 18-19; 287 NW 361 (1939). Even if viewed as a new issue it invokes a question of law and the facts necessary to resolve it were already presented before the courts below. *Foerster-Bolser Constr*, 269 Mich App at 427.

This argument, unlike the one above, takes the Fourth Amendment issue outside of the context of its role in the subject matter jurisdiction challenge. The Court of Appeals held that the Fourth Amendment issue was not preserved as the underlying January 2011 order was not

appealed and the issue arose only in the contempt proceeding. (Ct. App. Op. at 10.) This is not a statement of the preservation doctrine, but it is really a statement of the collateral bar rule which has unique exceptions. *State Bar of Michigan v Cramer*, 399 Mich 116; 125 249 NW2d 1 (1976), quoting *Maness v Meyers*, 419 US 449; 95 S Ct 584; 42 L Ed 2d 574 (1975); *In re Hague*, 412 Mich 532, 544-45; 315 NW2d 524 (1982); Dobbs, *The Law of Remedies* (2d ed Abr) pp 154-55.

III. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MS. DORSEY OF CRIMINAL CONTEMPT.

The Prosecution asserts that contempt orders reflected clerical rather than substantive errors reflecting the box checked in the order rather than the actual burden of proof applied. (Pros. Answer at 2.) This is merely a restatement of the ruling of the Court of Appeals. (Ct. App. Op. at 11.) The prosecution offers no analysis on this point and the Court of Appeals relies entirely on the trial court's clarification at the post-trial motions hearing 42 days after the judgment was entered. (Mot. Hr'g Tr. 15:20-22, 19:22-25.) This clarification from the trial court came only after Ms. Dorsey raised the issue in post-trial motions. However, it is the intent of the trial court at the time it entered the order that matters. *Central Cartage Co v Fewless*, 232 Mich App 517, 536; 591 NW2d 422 (1998). Furthermore, the orders in this case confused the aspects of criminal versus civil contempt including the burden of proof applicable to each. The label, civil or criminal, a court attaches to a contempt order is not determinative of the type of contempt order issued. *Shillitani v United States*, 384 US 364, 369; 86 S Ct 1531; 16 L Ed 2d 622 (1966); *Cramer*, 399 Mich at 128. Instead the character and purpose of the contempt proceeding determine whether a contempt is criminal or civil in nature. *Shillitani*, 384 US at 369. As the errors on the orders relate to the kind of contempt imposed by the family court, the court's correction, 42 days after the fact, cannot be outcome determinative. *Id.*;

Clerical errors may be corrected at any time under MCR 6.435(A), but substantive errors cannot be corrected after the court enters judgment pursuant to MCR 6.435(B). The characterization of an error as substantive or clerical must be manifest from the whole record and the circumstances. *Emery v Whitwell*, 6 Mich 474, 488 (1859). Errors of deliberate nature, meaning the party making it intended the result, and mistakes of law are not clerical. *Am Legion Post 5 v Cedar Rapids Bd of Review*, 646 NW2d 433, 437-438 (Iowa 2002). There is little published authority discussing the distinction in Michigan in this context and the issue is likely to recur. MCR 7.302(B)(3).

A conviction for criminal contempt must be based upon evidence proven beyond a reasonable doubt showing 1) the willful disregard or disobedience of a court order, and 2) a contempt that is clearly and unequivocally shown. *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971); *People v Boynton*, 154 Mich App 245, 247; 397 NW2d 191 (1986). Guilt of criminal contempt based on a preponderance of the evidence is indistinguishable from an acquittal. The February 6, 2012 contempt order convicted Ms. Dorsey of criminal contempt based on a preponderance of the evidence. (Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 6, 2012.) The February 10, 2012 order of contempt did not specify the kind of contempt, but found her guilty by a preponderance of the evidence and imposed a fixed jail sentence of 93 days consistent with a criminal contempt sanction. (Order of Contempt [Kelly Dorsey] ¶ 6, Feb. 10, 2012.) There was no mention of any burden of proof at the show cause hearing when the family court made its contempt finding and the family court nor did characterize the contempt as civil or criminal. (Show Cause Hr'g Tr. 26:24-25, 27:1-25, 28:1-4, Feb. 2, 2012.)

At the show cause hearing and in the February 6, 2012 contempt order the family court was still trying to coerce Ms. Dorsey to drug test. The family court adjourned sentencing without imposing any definite sentence except to report for drug testing forthwith (Show Cause

Hr'g Tr. 31:6-25; Order of Contempt [Kelly Dorsey], Feb. 6, 2012). It implied an unknown sentence was suspended pending the results, but this made the sentence conditional on her drug test results to coerce her to take the drug test. *Hicks v Feiok*, 485 US 624, 634-40; 108 S Ct 1423; 99 L Ed 2d 721 (1988); Dobbs, *The Law of Remedies* (2d ed Abr) pp 138-140. As the sentence was coercive the first contempt order was actually civil in nature even though the family court called it criminal. *Shillitani*, 384 US at 369. The February 10, 2012 contempt order imposed a definite sentence and was criminal in nature, but the civil coercive mindset still spilled over and the family court selected preponderance of the evidence as the burden of proof. The Court of Appeals characterized this as merely checking the wrong box, but the family court confused the elements and characteristics of civil contempt with those of criminal contempt. Given that the omission of a sentencing term is an error of substance then it certainly follows that granting an implicit acquittal is as well. *People v Olsen*, 482 Mich 881; 752 NW2d 465 (2008).

The Prosecution also argues that the criminal contempt was willful and unequivocally shown. (Pros. Answer at 2.) Curiously, the prosecution refutes the argument made by Ms. Dorsey in the courts below that relied by analogy on *In re Contempt of Rapanos*, 143 Mich App 483; 372 NW2d 598 (1985) for the proposition that the contempt was not willful as she was seeking the advice of an attorney. However, Ms. Dorsey did not include this particular argument in the Application for Leave to Appeal due to *Brown v Brown*, 335 Mich 511, 518-519; 56 NW2d 367 (1953).¹ Instead Ms. Dorsey argues that the contempt was not unequivocally shown.

The January 14, 2011 order was broad yet vague in requiring Ms. Dorsey to drug test upon the request of her son's probation officer. In *Matish* contempt was not unequivocal where

¹ Contrary to the assertion by the Court of Appeals in this case, it did in fact adopt the federal rule that willfulness was not established when a person relies upon the advice of an attorney in *Rapanos*. *In re Kutek*, unpublished opinion per curiam of the Court of Appeals, issued [Aug. 9, 1996], p 2. This case and *Kutek* illustrate the problems inherent in broadly applying *Brown*.

the attorney-defendant ensured that an attorney was in attendance on the day of trial as ordered even though the case was not tried that day. *Matish*, 384 Mich at 571-572. The court order did not require her to test at the first opportunity upon request nor did it require her to forego the advice of counsel. An Alabama court held that an order without a target date to place a child in a facility was not unequivocal enough to support a contempt conviction against the agency director for waiting 8 days to place the child rather than doing so at the first opportunity. *Ex Parte Madison County Dep't Human Res*, 136 So3d 485, 491 (Ala Civ App 2013). Similarly, this order did not have a target date or direction to comply within a certain time period and hence the order was not unequivocal. A reasonable delay to obtain legal advice would not violate it. The first show cause motion was filed less than 24 hours after the first request to test. Given Ms. Dorsey's indigent status, that she was not represented by counsel, and that the order did not specify immediate compliance the show cause motion was premature. After all juvenile proceedings are not designed to prosecute the parent. *In re Nolan W.*, 45 Cal 4th 1217, 1237-1238; 203 P3d 454 (Cal 2009). Ms. Dorsey merely temporarily conditioned her compliance on obtaining legal advice so she could consider her options including filing a motion to modify the order. There is little authority in Michigan analyzing and expounding on the unequivocally shown element of criminal contempt. MCR 7.302(B)(3); MCR 7.302(B)(5).

IV. EVEN IF THE COURT AFFIRMS THE CONTEMPT ORDERS IT SHOULD NOT ALLOW THE IMPOSITION OF THE REMAINING SENTENCE PURSUANT TO *ROSE V AARON* AS THE UNDERLYING ORDER WAS UNCONSTITUTIONAL.

The Prosecution urges this Court to deny the Application or affirm the Court of Appeals opinion and the trial court's orders of contempt. (Pros. Answer at 2; Pros. Br. at 5.) Ms. Dorsey served 42 days of her jail sentence. (Register of Actions at 7.) Her full sentence imposed by the family court was a 93 day jail sentence, a \$200 court service fee, a \$500 fine, and attorneys' fees for court appointed counsel at the show cause hearing. (Sentencing Hr'g Tr. 5:1-8, Feb. 9, 2012;

Order of Contempt [Kelly Dorsey] ¶ 9, Feb. 10, 2012.) The remainder of her sentence was stayed pending appeal and an appeal bond granted by the family court. (Mot. Hr'g Tr. 21:2-5, Mar. 22, 2012.); Register of Actions 7.)

If this Court leaves in place the status quo either by affirming the Court of Appeals or by denying the Application for Leave to Appeal that action would send Ms. Dorsey back to jail even though the underlying order was held unconstitutional. This outcome, raised for the first time by the Court of Appeals decision, would be contrary to precedent even if the contempt orders are upheld. *Rose v Aaron*, 345 Mich 613, 615; 76 NW2d 829 (1956); *Holland v Weed*, 87 Mich 584, 588; 49 NW 877 (1891); *Lester v Sheriff of Oakland County*, 84 Mich App 689, 698; 270 NW2d 493 (1978). This issue is exempt from the preservation rule as it could not have arisen until a court held the underlying order unconstitutional and it is purely a question of law that can be decided based on the facts presented below. *Foerster-Bolser Constr*, 269 Mich App at 427.

In *Rose v Aaron* the trial court entered a temporary restraining order preventing the defendant from receiving gifts from or visiting the plaintiff's wife. *Rose*, 345 Mich at 614. The plaintiff then sought a contempt order based on violations of the temporary restraining order. *Id.* The trial court held the defendant in criminal contempt and sentenced him to 30 days in jail and to pay \$50 in court costs. *Id.* The sentence was suspended pending appeal with the intent to re-sentence him if the contempt order was upheld. *Id.* at 615. The *Rose* Court held that the temporary restraining order was erroneously issued as the plaintiff was not entitled to it by law. *Id.* at 614. However, the *Rose* Court declined to reverse the contempt order on the basis that it had to be obeyed until overturned on appeal even though it was erroneous. *Id.* at 615. In spite of upholding the trial court's contempt order, this Court did not allow the sentence to be imposed or for a re-sentencing. This Court wrote in *Rose*:

That order further provided, however, that the sentence therein specified be suspended to permit an appeal here, failing in which defendant was to be required to present himself to the trial court 'for re-sentence.' In line with the reasoning in *Holland v. Weed, supra*, we do not think, in view of the circumstances of this case and the provisions of the lower court's order, that the court is called upon to protect its dignity by resentencing defendant for violation of a temporary restraining order improperly entered. [*Id.* at 615.]

In this case, as in *Rose*, the sentence for the criminal contempt conviction was stayed pending appeal and an appeal bond was granted. (Mot. Hr'g Tr. 21:2-5, Mar. 22, 2012; Register of Actions 7.) As in *Rose*, the court left open the possibility of imposing the remainder of the sentence should the appeal fail. (Mot. Hr'g Tr. 21:15-20, Mar. 22, 2012.) The underlying order to drug test was held unconstitutional by the Court of Appeals. (Ct. App. Op. at 9-10.) In *Rose* the underlying order granting a temporary restraining order was also held erroneous. Hence, this Court should follow *Rose* and decline to permit the imposition of the balance of the sentence. MCR 7.203(B)(5).

RELIEF REQUESTED

Ms. Dorsey requests that this Court grant leave to appeal to address the issues in the application and that this Court ultimately reverse the opinion of the Court of Appeals from this case. Ms. Dorsey also requests the entry of a judgment of acquittal on the two show cause orders issued in this case. Alternatively, Ms. Dorsey requests a new trial and any other just relief.

Respectfully submitted,

December 8, 2014

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STATE OF MICHIGAN
COURT OF APPEALS

In re Contempt of DAVID KUTEK.

UNPUBLISHED

CLARENCE KING,

August 9, 1996

Plaintiff-Appellee,

v

No. 178167

LC No. 00159635

DAVID KUTEK,

Defendant-Appellant,

and

REDFORD POLICE DEPARTMENT,

Defendant.

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction of contempt of court for failing to comply with a writ of habeas corpus. We reverse.

Defendant first contends that the trial court lacked authority to issue the writ and that the writ did not comply with the court rules. This argument is without merit. The trial court had authority to issue the writ pursuant to MCL 600.4304; MSA 27A.4304. The form of the writ substantially complied with the court rule, MCR 3.303, and no formal complaint was required. MCR 3.303(F)(1)(a).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next argues that the evidence was insufficient to convict him of contempt of court. To sustain a conviction of criminal contempt, the prosecution must prove two elements: that the individual willfully disobeyed or disregarded a court order, and that the contempt shown is unequivocal and clear. *In re Contempt of O'Neil*, 154 Mich App 245, 247; 397 NW2d 191 (1986).

The evidence at the bench trial showed that defendant contacted the prosecutor's office, advised a prosecutor that plaintiff was in his custody, that he had been served with a writ of habeas corpus from Recorder's Court and that federal agents were at the police department seeking custody of plaintiff. Defendant asked the prosecutor's advice, and was told to turn plaintiff over to the federal agents. The prosecutor also told defendant that the prosecutor assigned to the issuing court had been advised, so defendant did not think it was necessary to contact the court directly. This Court has recognized that when an individual relies, in good faith, upon his attorney's advice, he cannot be guilty of criminal contempt because the element of intentional violation of a court order has not been satisfied. *In re Contempt of Rapanos*, 143 Mich App 483, 495; 372 NW2d 598 (1985). We conclude that the evidence was insufficient to convict defendant of criminal contempt beyond a reasonable doubt.

Because we hold that the evidence was insufficient to convict defendant, we need not address the other issues which defendant has raised.

Reversed.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin