

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 No. 2012AP278

Cir. Ct. No. 2010CF247

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE FINDING OF CONTEMPT IN STATE OF WISCONSIN V. CESAR DELEON:

CESAR DELEON,

APPELLANT,

V.

**CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE SUE E.
BISCHEL, PRESIDING,**

RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
SUE E. BISCHEL, Judge. *Modified and, as modified, affirmed.*

¶1 PETERSON, J.¹ Cesar Deleon appeals an order finding him in contempt of court fourteen times and imposing a sanction of thirty days' jail for each contemptuous act to be served consecutively to his prison sentence. Deleon argues the circuit court erred by finding him in contempt multiple times and by ordering his sanction be served consecutively to his prison term.

¶2 We conclude the court did not err by holding Deleon in contempt for multiple acts or by ordering his sanction be served consecutively to his prison sentence. However, because the Brown County Circuit Court concedes Deleon committed only twelve contemptuous acts, we modify the court's order from fourteen acts to twelve and reduce Deleon's sanction from 420 days to 360 days. We affirm the order as modified.

BACKGROUND

¶3 The State charged Deleon, who at the time was a prisoner in the segregation unit at the Green Bay Correctional Institution, with assaulting a prison guard by throwing urine on him. Deleon contested the allegation and requested that six prison inmates be transported to trial as defense witnesses.

¶4 At a pretrial hearing, the court determined it would sign a transport order for two inmate witnesses. Deleon's trial counsel subsequently wrote to the court, providing it with transport orders for all six witnesses. In response, the court wrote to the parties, stating it did not intend to sign any orders to produce the inmate witnesses.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 At the next hearing, Deleon's counsel advised the court that he explained to Deleon that the court determined the witnesses would not be produced for trial. Deleon then expressed concern about the witnesses and the following exchange occurred between the court and Deleon:

[The Court]: Mr. Deleon, we have rehashed that issue about the witnesses all the time and I'm not changing my mind.

[Deleon]: Last time you say they would, and now I thought it was—at the last moment you was talking about no?

[The Court]: No.

[Deleon]: No, no, no. You need to explain this to me. I not getting it. I not understanding.

[The Court]: Then you're not hearing me.

[Deleon]: You're not giving me a fair process.

[The Court]: Mr. Deleon, you can tell the appellate judges in Wausau that.

[Deleon]: You pissing me off.

[The Court]: What did you just say?

[Deleon]: I said you pissing me off.

[The Court]: You are in contempt.

[Deleon]: I don't give a fuck.

[The Court]: Well, good, because then you're in contempt again.

[Deleon:] I don't give a fuck.

[The Court]: Keep it up. Three.

(Defendant spits towards the bench. Defendant restrained by court security.)

[The Court]: Thank you. Make it four.

[Deleon]: I'm relaxed. Get your hands off me.

(Discussion between court security and the defendant off the record.)

[Deleon]: That fucking old lady piss me the fuck off.

[The Court]: That's five. Six.

[Deleon]: Ever since I been having showing you respect, and every time I come, you always yelling at me or you always yelling at my attorney or the district attorney. You always got a fucking attitude.

[The Court]: That's seven. You want to keep it up or not? All right. We're having a trial on Tuesday, I guess. I don't know what else to do. I would like to know for sure if we're having a trial, but he's not in much of a mood to be rational right now. That's the problem.

[Deleon's trial counsel]: At this point, my presumption is we are. For my part.

[The Court]: Mr. Deleon, I can't have them remove you yet because I am required to do something about your seven contemptuous things. The record will reflect what you said. It won't reflect that you spit at me. You tried to hurl spit across the room at me. That's the reality of it. That was probably on contempt four or five. I am required—

[Deleon]: It's what you get when you disrespect people. You think just 'cause you sitting up there in that chair, you got that robe, you can just—

[The Court]: Mr. Deleon, I have to finish saying something.

[Deleon]: I don't give a shit. You do what you gonna do.

[The Court]: We're up to eight. I have to give you a chance to say something before I decide what your sanction should be for your contempt. You have a right to make the statement. Is there anything you'd like to say before—

[Deleon]: Shit to say.

[The Court]: That's up to nine, I think. Whatever the maximum—

[Deleon]: Make it 12. I don't give a fuck.

[The Court]: That's good. You're up to ten.

¶6 Deleon's defense counsel interjected, asking the court to take into consideration the prison environment Deleon lived in, the language used there, and the level of frustration Deleon felt.

[The Court]: I will certainly do that. I can only say this. In 19 years, that's the most outrageous language that I've heard. Spitting, it's unbelievable. And I know Mr. Deleon doesn't think he's been treated fairly. I would bet anyone else—

[Deleon]: I'm asking for a fair trial. Ever since I been here, you doing the same shit over and over.

[The Court]: We're up to 11 or whatever it is. I'll count them later when I read the transcript. I'm going to impose the maximum sentence on each one of those contempts—I think it's 30 days, but I'm not sure—to be served consecutively to each other. And I'll assume we'll be having the trial on Tuesday. Mr. Deleon, if this is what's going to happen on Tuesday, you're not going to last long. You know that and I know that. You're going to end up being removed and you're going to have a trial with just your lawyer sitting here and you're not here. I hope that doesn't happen. So I hope things are different on Tuesday. Do you want to consider taking the district attorney's offer to plead to a disorderly conduct?

[Deleon]: Shit.

[Deleon's defense counsel]: I believe he responds in the negative, ma'am.

[The Court]: All right. Thank you. Then we'll see you Tuesday morning at 8:30.

¶7 The court issued a written decision and order, concluding “[e]ach use of profanity, and spitting, constitutes an act of separate contempt.” The court outlined each act and found Deleon made eleven profane statements and committed one act of spitting. It imposed a thirty-day sanction for each act, “to be served consecutively to each other and all other sentences the defendant is

currently serving” After the court issued its order, the State moved to dismiss the assault by a prisoner charge, and the court granted the motion.

DISCUSSION

¶8 On appeal, Deleon argues the court should have found he committed only one act of contempt, not multiple acts.² He also asserts the court lacked authority to impose the punitive contempt sanction consecutively to his prison sentence.

¶9 A circuit court’s determination that an individual “has committed a contempt of court will not be reversed by a reviewing court unless contrary to the great weight and clear preponderance of the evidence.” *Currie v. Schwalbach*, 139 Wis. 2d 544, 551-52, 407 N.W.2d 862 (1987). However, whether the court properly applied the law to the facts is a question of law we review independently. *Id.*

I. Number of contemptuous acts

¶10 Deleon offers two arguments in support of his assertion that the court erred by citing him for multiple acts of contempt. First, he argues his spitting and repeated profanities amounted only to a single act of contempt because they took place during a short period of time. Second, he asserts he cannot be held in contempt multiple times for conduct that was seemingly encouraged by the court.

² Given the Circuit Court’s concession that the court found Deleon in contempt for twelve acts, we address Deleon’s arguments in the framework of twelve acts.

Multiple contemptuous acts

¶11 WISCONSIN STAT. § 785.01(1)(a) defines “contempt of court” as intentional “[m]isconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court.”³ (Emphasis added.) Deleon argues misconduct, as used in WIS. STAT. § 785.01(1)(a), “connotes *behavior* rather than a single word or act.” He asserts that, because his spitting and profanities “took place in a short period of time during a single court proceeding,” his actions amounted only to a single act of misconduct and, therefore, only a single contemptuous act. (Capitalization omitted.) In support, Deleon cites cases from other jurisdictions that have determined repeated disrespectful conduct constitutes one contemptuous act. *See United States v. Murphy*, 326 F.3d 501, 504 (4th Cir. 2003) (vacating two of three contempt sanctions based on rule of lenity); *Williams v. State*, 599 So. 2d 255, 256 (Fla. Dist. Ct. App. 1992) (defendant’s two profane statements, separated in time only long enough for trial court to find defendant in contempt, are properly viewed as single instance of contempt).

¶12 We conclude the circuit court properly determined Deleon’s spitting and repeated profanities amounted to multiple contemptuous acts. First, to the

³ WISCONSIN STAT. § 785.01(1) also defines “contempt of court” as intentional:

- (b) Disobedience, resistance or obstruction of the authority, process or order of a court;
- (bm) Violation of any provision of s. 767.117 (1);
- (c) Refusal as a witness to appear, be sworn or answer a question; or
- (d) Refusal to produce a record, document or other object.

extent DeLeon suggests WIS. STAT. § 785.01(1)(a)'s use of the word "misconduct" is ambiguous and we should apply the rule of lenity to conclude he may only be sanctioned for a single contemptuous act, we observe the rule of lenity applies only to criminal statutes and the contempt statutes are civil in nature. *See State v. Cole*, 2003 WI 59, ¶13, 262 Wis. 2d 167, 663 N.W.2d 700 (rule of lenity applies to criminal statutes); *see also State v. Carpenter*, 179 Wis. 2d 838, 840, 508 N.W.2d 69 (Ct. App. 1993) ("contempt of court is not a crime").

¶13 Moreover, any perceived ambiguity in WIS. STAT. § 785.01(1)(a) is resolved by WIS. STAT. § 785.04(2)(b)'s provision that a circuit court may impose punitive sanctions for "each separate contempt of court."⁴ Section 785.04(2)(b) applies only when a court, as the court did here, uses summary procedure to sanction an individual for a contempt committed in the court's presence. *See* WIS. STAT. § 785.04(2)(b); *see also* WIS. STAT. § 785.03(2).⁵ If an individual, through his or her "misconduct," could only commit one contemptuous act before receiving immediate sanctions, § 785.04(2)(b)'s provision allowing a court to summarily impose sanctions for "each separate contempt of court" would be rendered superfluous. *See Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶113, 333

⁴ WISCONSIN STAT. § 785.04(2)(b) provides: "Summary procedure. A court, after a finding of contempt of court in a summary procedure under s. 785.03 (2), may impose for each separate contempt of court a fine of not more than \$500 or imprisonment in the county jail for not more than 30 days or both."

⁵ WISCONSIN STAT. § 785.03(2) provides:

SUMMARY PROCEDURE. The judge presiding in an action or proceeding may impose a punitive sanction upon a person who commits a contempt of court in the actual presence of the court. The judge shall impose the punitive sanction immediately after the contempt of court and only for the purpose of preserving order in the court and protecting the authority and dignity of the court.

Wis. 2d 273, 797 N.W.2d 854 (when construing statutes, courts avoid constructions that would render any portion of the statute superfluous).

¶14 Further, although Deleon cites cases from other jurisdictions in support of his assertion that his repeated acts constituted only a single act of contempt, we observe that still other jurisdictions have concluded multiple disrespectful acts during a single proceeding constitute multiple acts of contempt. *See Smith v. Maryland*, 855 A.2d 339, 343 (Md. 2004) (court may find individual in contempt multiple times in single proceeding); *Jackson v. Bailey*, 605 A.2d 1350, 1356-57 (Conn. 1992) (three statements in approximate thirty second time frame properly treated as three separate instances of contempt).

¶15 We find these cases more persuasive than the ones cited by Deleon. To conclude otherwise would allow a litigant to show disrespect to the court multiple times during the same hearing, even when there has been a pause between those acts. In this case, each of Deleon's contemptuous acts was separated by a question or comment from the court. As a result, the court properly determined his actions amounted to distinct contemptuous acts.

Conduct allegedly prompted by the court

¶16 Deleon next argues the court erred by citing him for multiple acts of contempt because he asserts his conduct was prompted in part by his dialogue with the court. Specifically, he contends the court, by saying "good" and "keep it up," encouraged his conduct and, therefore, he cannot be found in contempt for these actions. In support, Deleon cites cases from other jurisdictions that hold otherwise contemptuous conduct is not punishable when invited by the court. *See State v. Bullock*, 576 So. 2d 453, 458 (La. 1991) (holding a statement in "response to a question by the judge which seemed to invite and encourage further verbal

sparring’ is not contemptuous.” (quoting *In re Masinter*, 355 So. 2d 1288, 1291 (La. 1978)); *Johnson v. State*, 642 A.2d 259, 264 (Md. Ct. Spec. App. 1994) (judge may not find a defendant guilty of contempt if judge provoked behavior).

¶17 Deleon relies heavily on *Johnson* to argue we should determine he committed only one contemptuous act. In *Johnson*, the defendant engaged the judge in a heated back-and-forth dialogue that culminated with the defendant amassing ten convictions for contempt at the rate of five months and twenty-nine days per conviction to be served consecutively. *Johnson*, 642 A.2d at 261-62. As the defendant hurled insults at the judge, the judge asked the defendant, “what’s wrong with you?” and stated, “call me that again and I’ll give you another one.” *Id.* When Johnson threatened to shoot the judge, the judge replied, “And you’d better shoot straight when you try. When you get out come on.” *Id.* at 262. Finally, when Johnson was removed from court, the judge stated, “Record should show that ... if I’d have had a shotgun I need to have shot him but I don’t have it today.” *Id.*

¶18 On appeal, the court reasoned that “if a trial judge is to maintain proper control of the judicial process, he or she must act in a manner appropriate with his or her station.” *Id.* at 263. It noted that a judge must try to defuse a tense situation and may not respond to emotional or irresponsible behavior in kind. *Id.* Although the defendant was inappropriate, the court determined the judge lost his temper and therefore may have provoked the defendant into committing additional acts of contempt. *Id.* at 264. The court concluded that convictions for provoked acts could not stand and, because it could not determine which contemptuous acts were solely the defendant’s own doing, the entire incident must constitute only one episode of contempt to “insure justice.” *Id.*

¶19 We conclude the circuit court did not provoke Deleon’s outrageous behavior. Deleon made two contemptuous statements before the court found him in contempt and made the third contemptuous statement before the court said anything more. Although the court, during moments of its dialogue with Deleon, used the words “good” and “keep it up” while it found Deleon in contempt, the court, unlike the one in *Johnson*, did not verbally spar with Deleon to the point where it appeared the court invited Deleon’s behavior. Instead, the court attempted to shift focus by inquiring about the status of trial. Deleon’s trial counsel advised the court that he presumed trial was still happening. Then, as the court attempted to explain to Deleon his right of allocution, Deleon interrupted with more contemptuous statements. Deleon made another contemptuous statement after his attorney spoke in mitigation of his behavior and after the court stated it would take Deleon’s circumstances into consideration. When the court asked Deleon if he wanted to consider the district attorney’s plea offer, Deleon responded with yet another profane statement. Finally, Deleon’s act of spitting at the court cannot be construed as being invited behavior by the court.

¶20 Although the court could have handled the situation differently, such as by inviting Deleon’s counsel to talk to Deleon or by taking a recess, the court is not responsible for Deleon’s conduct. Deleon is an adult, seemed savvy about court procedures, and was represented by an attorney. He cannot blame the court for his abominable behavior.

II. Consecutive Sanction

¶21 Deleon, who is currently serving a prison term until 2058, next argues the court erred by ordering his contempt sanction be served consecutively to his prison sentence. He argues his contempt sanction must be served concurrently to his prison sentence because there is no statutory authority allowing a contempt sanction to be imposed consecutively.

¶22 “A court’s power to use contempt stems from the inherent authority of the court.” *Frisch v. Henrichs*, 2007 WI 102, ¶32, 304 Wis. 2d 1, 736 N.W.2d 85 (quoting *Griffin v. Reeve*, 141 Wis. 2d 699, 706 n.4, 416 N.W.2d 612 (1987)). The legislature may, within limitations, regulate this power and “when the procedures and penalties of contempt are prescribed by statute, the statute controls.” *Douglas Cnty. v. Edwards*, 137 Wis. 2d 65, 88, 403 N.W.2d 438 (1987) (citing *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, 367, 4 N.W. 390 (1880)).

¶23 We agree with Deleon that WIS. STAT. ch. 785 says nothing about whether contempt sanctions may be served concurrently or consecutively. However, because the legislature has not prescribed how contempt sanctions may be served, the court’s inherent power in this area allows it to impose sanctions as it deems appropriate. Here, the court determined it was appropriate for Deleon to serve his contempt sanction consecutively to his prison sentence.

¶24 Deleon, nevertheless, argues that because a court’s contempt power is used to ensure the dignity of the courtroom, “it means little to impose a punishment for that contempt decades down the road.” If Deleon believes someone with a long prison sentence should be able to escape the consequences of his or her contemptuous conduct, Deleon can make that policy argument to the legislature. Absent a change in the statute, we conclude a circuit court has the

discretion to order punitive contempt sanctions to be served either concurrently or consecutively to an existing sentence.

¶25 Finally, the court found Deleon made eleven profane statements and spit one time but sanctioned him for fourteen, instead of twelve, contemptuous acts. On appeal, the Circuit Court recognizes this error and concedes that, if we affirm, the court's order should be "modified to reflect 12 rather than 14 acts of contempt and 360 rather than 420 total days in jail." We modify the order accordingly.

By the Court.—Order modified and, as modified, affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

