DISTRICT COURT, EL PASO COUNTY, COLORADO 270 S. Tejon, Colorado Springs, CO 80903	DATE FILED: January 3, 2023 4:34 PM
People of the State of Colorado v. Defendant Anderson Aldrich	☐ **COURT USE ONLY** ☐ Case Number: 2021CR3485 Div.: 19
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SHERIFF BILL ELDER'S REPLY IN SUPPORT OF MOTION TO DISMISS SECOND VERIFIED MOTION FOR INDIRECT CONTEMPT

Sheriff Bill Elder, by and through his counsel, the El Paso County Attorney's Office, hereby submits this Reply in Support of Elder's Motion to Dismiss as follows:

I. INTRODUCTION[1]

Aldrich's Objection to Elder's Motion to Dismiss (the "Response") is self-defeating. The Response confirms that this Court lacks jurisdiction and cannot issue remedial sanctions. Consequently, the Court must decline to issue a contempt citation and dismiss the Second Motion.

II. THE COURT LACKS JURISDICTION

A court does not acquire jurisdiction over an indirect contempt proceeding unless the motion and accompanying affidavit state facts that, if true, show contempt was committed.

[1] The defined terms used herein have the same meaning as in the Motion to Dismiss.

People v. Proffitt, 865 P.2d 929, 930 (Colo. App. 1993) (citing *Fort v. People ex rel. Coop. Farmers' Exch., Inc.*, 256 P. 325, 328 (Colo. 1927)).

The Response fails to identify any factual allegations that show the El Paso County Sheriff's Office committed contempt. Instead, the Response argues that "[t]he Sheriff's motion then goes on in the rest of the pleading seemingly to assert its defense in advance of the show cause hearing" and it "is inappropriate to file a motion…and try to assert their factual defenses by pleading as a way to circumvent the contempt procedures under Colorado law." Response, ¶¶ 13, 14.

The Response is misguided for two reasons. First, the Motion to Dismiss asserts a lack of jurisdiction, not factual defenses. *See* Motion to Dismiss, pp. 1-4. The issue of jurisdiction must be resolved by an examination of the Second Motion, itself, not by the presentation of extraneous evidence during a show cause hearing. *See Fort*, 256 P. at 328; *Wyatt v. People*, 28 P. 961, 964 (Colo. 1892); *Proffitt*, 865 P.2d at 930; *In re Marriage of Roberts*, 757 P.2d 1108, 1109 (Colo. App. 1988). Second, jurisdiction is a threshold matter that should be resolved at the earliest possible stage in a proceeding; but, nevertheless, may be raised at any point during a proceeding. *See Currier v. Sutherland*, 218 P.3d 709, 714 (Colo. 2009) ("Because a lack of subject matter jurisdiction means that a court has no power to hear a case or enter a judgment, it is an issue that may be raised at any time, even after a verdict has been rendered.") (internal citations omitted). Thus, the Motion to Dismiss properly asserts a lack of jurisdiction.

The Response offers no other argument supporting the Court's exercise of jurisdiction. It does not identify any allegations that show contempt was committed by the El Paso County Sheriff's Office. *See* Response, *et seq.* Instead, the Response and Second Motion show that the El Paso County Sheriff's Office complied with the Sealing Order and identify alternate suspects

who may have violated it. Second Motion, ¶ 6, 11, 12, 15, 16, 17; *see also* Motion to Dismiss, pp. 3-4. The Court cannot exercise jurisdiction based on these scattered and incongruous assertions.

Consequently, the Court must decline to issue a contempt citation and dismiss the Second Motion.

III. THE COURT CANNOT ISSUE REMEDIAL SANCTIONS

The Response does not address Elder's argument regarding the Court's inability to issue remedial sanctions. Aldrich should not be able to refute this argument now. *See, e.g., United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004) ("The court will not consider…issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation.").

Remedial sanctions require a showing that the contemnor has the "present ability to comply" with a court order. *In re A.C.B.*, 507 P.3d 1078, 1084 (Colo. App. 2022). A remedial sanction order must also include a "purge clause" describing how a contemnor may come into compliance with the court order. C.R.C.P. 107(d)(2); *In re Marriage of Webb*, 284 P.3d 107, 110 (Colo. App. 2011). In the absence of these requirements, remedial sanctions cannot be imposed. *See, e.g., Aspen Springs Metro. Dist. v. Keno*, 369 716, 724 (Colo. App. 2015); *In re Webb*, 284 P.3d at 110.

The Response remains silent on this issue because Aldrich confesses that "[i]n the first motion…defense counsel requested that the case remain sealed…Since that time, however, the case has been unsealed, and the requested sanctions lack the gravity necessary to ensure this behavior does not repeat itself…" Second Motion, ¶ 42. Put more succinctly, Aldrich admits that the El Paso County Sheriff's Office has no "present ability to comply" with the Sealing

Order because it was lifted by this Court, making the 2021 Records "accessible to the public." The Court cannot issue remedial sanctions as a result.

Consequently, the Court must decline to issue a contempt citation and dismiss the Second Motion.

IV. BOWMAN IS A WITNESS WHO MAY BE CALLED TO TESTIFY IF A SHOW CAUSE HEARING IS HELD

C.R.C.P. 107(c) provides that a motion for indirect contempt must be "supported by affidavit that indirect contempt has been committed…" *See also Spencer v. Kelly*, 470 P.2d 606, 608 (Colo. 1970) (a verified motion satisfies the affidavit requirement). The purpose of this requirement is to ensure that contempt citations are issued upon allegations affirmed by a person with personal knowledge (*i.e.*, a witness), and not upon conjecture or speculation. It is, therefore, axiomatic that an individual who attests to the allegations in a motion for indirect contempt may be called to testify as a witness during a show cause hearing.

In analogous circumstances, where a prosecutor swore to the allegations in a probable cause affidavit, the United States Supreme Court held that the prosecutor "performed an act that any competent witness might have performed…" *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997). Following *Kalina*'s logic, other courts have found that attorneys who step outside of their role as legal counsel become witnesses subject to discovery and examination. *See, e.g., Perez v. Alegria*, 2015 WL 47444487, at * 4 (D. Kan. June 24, 2015) (rejecting a blanket privilege objection by an attorney as the basis for prohibiting his deposition and document discovery when the attorney was also a fact witness); *United Phosphorous, Ltd. V. Midland Fumigant, Inc.*, 164 F.D.R. 245, 348 (D. Kan. 1995) ("[a]ttorneys with discoverable facts, not protected by the attorney-client privilege or work product, are not exempt from being a source for discovery by

virtue of their license to practice law or their employment by a party to represent them in litigation.")

Here, Bowman attested to the First Motion's allegations, which are largely the same as the Second Motion's allegations. In doing so, Bowman stepped outside of his role as legal counsel into that of the fact witness whose attestation initiated this contempt proceeding. Bowman may, therefore, be called as a witness if a show cause hearing is held.

The Response's arguments to the contrary are unavailing. First, the Response seems to conflate C.R.C.P. 11(a)'s requirement that attorneys sign pleadings with C.R.C.P. 107(c)'s requirement that a motion for indirect contempt is supported by an "affidavit" executed by a person with knowledge (*i.e.*, a witness). Response, ¶ 10. These are separate and distinct requirements. An attorney who executes an affidavit pursuant to C.R.C.P. 107(c) becomes a witness whereas an attorney who only signs a pleading pursuant to C.R.C.P. 11(a) does not.

Second, the cases cited by Aldrich are inapposite and indicate that counsel has misconstrued Elder's argument on this point. *See id.* at ¶¶ 11-12. For instance, *People v. Botham*, 629 P.2d 589, 596, (Colo. 1981) held that an attorney may act as an affiant to support an ancillary motion, such as a motion to disqualify a judge, when the attorney has personal knowledge of the facts attested to. The other cases cited by Aldrich have similar holdings. *See id.* at ¶ 12. To be clear, Elder does not argue that an attorney's attestation is insufficient to support a motion for indirect contempt. Instead, Elder argues that, if the Court exercises jurisdiction and holds a show cause hearing, Bowman may be called as a witness to testify regarding the allegations which he affirmed pursuant to C.R.C.P. 107(c).

In sum, Bowman voluntarily stepped outside of his role as legal counsel by affirming the First Motion. He may, therefore, be called as a witness to testify if a show cause hearing is held.

V. CONCLUSION

The bulk of the Response is spent arguing over a footnote in the Motion to Dismiss indicating that public defenders may not have statutory authority to prosecute civil contempt proceedings. Whether public defenders have such authority is beside the point because the Court cannot exercise jurisdiction or issue remedial sanctions in the first place.

Elder, therefore, requests that the Court enter an order dismissing the Second Motion together with such other relief the Court deems just and proper.

Respectfully submitted this 3rd day of January 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2023, a true copy of the foregoing was e-served via Colorado Courts E-Filing system to the following:

Michael Bowman Esq.
Joseph Archambault, Esq.

s/Dee Lambert