

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 S. Tejon, Colorado Springs, CO 80903		DATE FILED: December 19, 2022 4:48 PM
People of the State of Colorado		<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/> <hr/> Case Number: 2021CR3485 Div.: 19
v.		
Defendant Anderson Aldrich		
Nathan J. Whitney, # 39002 Office of the County Attorney of El Paso County, Colorado 200 S. Cascade Ave. Colorado Springs, CO 80903 Phone: (719) 520-6485 Email: nathanwhitney@elpasoco.com		
SHERIFF BILL ELDER'S MOTION TO DISMISS SECOND VERIFIED MOTION FOR INDIRECT CONTEMPT		

Sheriff Bill Elder, by and through his counsel, the El Paso County Attorney's Office, submits this Motion to Dismiss Anderson Aldrich's ("Aldrich") Second Verified Motion for Indirect Contempt (the "Second Motion") as follows:

C.R.C.P. 121, § 1-15(8) Duty to Confer

Undersigned counsel conferred with Aldrich's counsel regarding the relief requested in this motion and Aldrich opposes this motion.

I. INTRODUCTION

Aldrich has filed two motions for indirect contempt against the El Paso County Sheriff's Office. The First Motion sought remedial sanctions against the El Paso County Sheriff's Office based on his own attorney's allegations that an unidentified law enforcement official from an unidentified law enforcement agency or someone else released and/or verified records from Aldrich's 2021 criminal case (the "2021 Records") in violation of this Court's August 2022

sealing order (the “Sealing Order”). See First Motion, ¶¶ 11, 12, 19, 29; p. 8 (Aldrich’s counsel, Deputy Public Defender Michael Bowman (“Bowman”), affirmed under oath that the First Motion’s allegations are true and correct to the best of his knowledge.). The Second Motion (which is now the operative pleading) also seeks remedial sanctions based on essentially the same allegations, plus statements Elder allegedly made *after* the Court unsealed the 2021 Records. See Second Motion, ¶¶ 6, 11, 12, 15, 16, 17. An investigator, rather than Bowman, affirmed the allegations in the Second Motion. *Id.* at p. 9.

The Second Motion must be dismissed for two reasons.¹ First, the Court lacks jurisdiction to issue a contempt citation because the Second Motion fails to allege facts that, if true, would show that contempt was committed by the El Paso County Sheriff’s Office. See *Fort v. People ex rel. Coop. Farmers’ Exch., Inc.*, 256 P. 325, 328 (Colo. 1927). Second, the Court cannot issue remedial sanctions because the El Paso County Sheriff’s Office does not have “the present ability to comply with” the Sealing Order given this Court lifted it on December 8, 2022. See *In re A.C.B.*, 507 P.3d 1078, 1084 (Colo. App. 2022).

Further, by affirming the First Motion’s allegations, which are largely the same as the Second Motion’s allegations, Bowman has placed himself in the precarious position of being

¹ Interestingly, the Colorado Supreme Court has ruled that the “public defender’s duties are...limited by statute,” *Groves v. Seventeenth Judicial Dist.*, 806 P.2d 947, 948 (Colo. 1991), and “that there is no statutory authority for appointment of the public defender in civil contempt proceedings.” *Vela v. Arapahoe Cnty. Dist. Ct.*, 664 P.2d 243, 245 (Colo 1983). The *Groves* and *Vela* decisions have not been expressly overruled but they were issued before the statute enumerating a public defender’s duties was amended to provide that, “only after the condition of section 21-1-103 have been met, [a public defender] shall: prosecute any appeals or other remedies before or after conviction that the state public defender considers to be in the interest of justice...” *People v. Shank*, 420 P.3d 240, 246 (Colo. 2018) (citing C.R.S. § 21-1-104(1)(b)). Undersigned counsel is unaware of any appellate decision addressing whether Section 104’s “in the interest of justice” provision allows public defenders to prosecute contempt proceedings after appointment in a criminal case. Thus, whether the public defenders have the authority to prosecute this contempt proceeding remains an open question.

both legal counsel and a fact witness that will be called to testify during a show cause hearing. *See Kalina v. Fletcher*, 522 U.S. 118, 129-30 (1997) (United States Supreme Court ruling that when swearing or certifying under penalty of perjury to an affidavit of probable cause, the attorney “performed an act that any competent witness might have performed,” and stating that “tradition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding.”).

Bowman cannot rely on assertions of privilege to escape his witness status. *See, e.g., Church Mutual Ins. Co. v. Coutu*, 2018 WL 2388555, at * 3 (D. Colo. May 25, 2018) (“Neither the attorney-client privilege nor the work product doctrine is absolute as either may be waived...A waiver may be express...Waiver may also be implied through conduct.”) (citing *People v. Madera*, 112 P.3d 688, 691 (Colo. 2005) (prohibiting a litigant from using privilege as both a sword and a shield)) (other citations and quotations omitted).²

II. STANDARD OF REVIEW

The court does not acquire jurisdiction over an indirect contempt proceeding unless the motion and accompanying affidavit state facts that, if true show, that contempt was committed. *Fort*, 256 P. at 328; *Wyatt v. People*, 28 P. 961, 964 (Colo. 1892). The allegations must be sufficient to apprise the respondent of the nature of the alleged violation. *See In re Marriage of Roberts*, 757 P.2d 1108, 1109 (Colo. App. 1988) (verified motion provided sufficient allegations

² Bowman’s status as a witness does not automatically disqualify him from representing Aldrich in this case. Should it arise, the issue of Bowman’s disqualification must be resolved by an application of the considerations set forth in Colorado Rule of Professional Conduct 3.7 (is the attorney “likely to be called as a necessary witness”); *Fognani v. Young*, 115 P.3d 1268, 1272 (Colo. 2005) (determination of whether legal counsel is “likely to be a necessary witness” involves consideration of “the nature of the case, with emphasis on the subject of the lawyer’s testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues.”), and elsewhere.

where it contained a recitation of the court's prior decree and set forth allegations indicating that the respondent disobeyed the court's order by failing to file joint tax returns.).

III. ARGUMENT

A. The Second Motion Fails to State Facts that, if True, Would Show Contempt Was Committed by the El Paso County Sheriff's Office

The Second Motion's scattered and incongruous allegations fail to show that contempt was committed by the El Paso County Sheriff's Office, even if they are accepted as true. The Court lacks jurisdiction to issue a contempt citation and must dismiss the Second Motion as a result.

The Second Motion posits that "it appears clear that a member of law enforcement, and also potentially a member of courthouse staff, gave sealed records to the media....[and] law enforcement staff (and potentially courthouse staff) spoke to the media..." *Id.* at ¶ 12. In doing so, the Second Motion identifies alternate suspects that may have committed the alleged contempt—a courthouse staff member, a member of another law enforcement agency, or perhaps someone else. Of course, the Court cannot hold the El Paso County Sheriff's Office in contempt based on the alleged conduct of alternate suspects.

As further "evidence" of contempt, the Second Motion points to (i) Elder's Motion to Unseal the 2021 Records (which this Court ultimately did); (ii) statements allegedly made by Elder *after* the 2021 Records were unsealed; and (iii) a December 2022 article published by the Associated Press (the "AP Article").³ Second Motion, ¶¶ 6, 11, 12, 15, 16, 17. None of these is evidence of contempt.

³ Jim Mustian et al, 'Next Mass Killer': Dropped case foretold Colorado bloodbath, Associated Press, Dec. 6, 2022, available at <https://abcnews.go.com/Politics/wireStory/mass-killer-dropped-case-foretold-colorado-bloodbath-94589211>.

Elder's Motion to Unseal the 2021 Records and his comments made *after* the Court unsealed them are not evidence of contempt. Instead, they show that the El Paso County Sheriff's Office followed the appropriate legal avenue to lift the Sealing Order and waited to comment on the 2021 Records until *after* the Sealing Order was lifted.

The AP Article also fails to show contempt by the El Paso County Sheriff's Office. The AP Article reported that "Elder...declined to comment on Aldrich's 2021 case..." The AP Article, ¶ 18. This shows that Elder complied with the Sealing Order, not that he violated it. The AP Article further reported that journalists showed documents from Aldrich's 2021 prosecution, which they acquired from a local news outlet, to an anonymous "law enforcement official" who "verified" the documents as "authentic." *Id.*, at ¶ 10. The AP Article does not suggest that the anonymous law enforcement official works for the El Paso County Sheriff's Office. In fact, virtually any law enforcement official could verify the commonplace court documents—a judge's order setting bond and a charging document—referenced in the AP Article. And, the AP Article does not suggest that a member of the El Paso County Sheriff's Office leaked any of the 2021 Records to the local news outlet in the first place. *See id.*

In sum, the Second Motion is self-defeating because it shows that the El Paso County Sheriff's Office complied with the Sealing Order and identifies alternate suspects who may have violated it. This Court lacks jurisdiction to issue a contempt citation and must dismiss the Second Motion.

B. The Court Cannot Issue the Remedial Sanctions Requested in the Second Motion

The Second Motion requests remedial sanctions only. *Id.* at ¶ 32 (Aldrich "is not seeking punitive sanctions..."). The Court, however, cannot issue remedial sanctions in this case.

Remedial sanctions are civil in nature and designed to “force compliance with a lawful order or to compel performance of an act within the person’s power or present ability to perform.” *In re A.C.B.*, 507 P.3d at 1084 (citing C.R.C.P. 107(a)(5)). “Remedial sanctions must be supported by findings of fact establishing that the contemnor (1) failed to comply with a lawful court order; (2) knew of the order; and (3) *has the present ability to comply with the order.*” *Id.* (emphasis added). A showing of the contemnor’s “ability to comply” is a prerequisite to the issuance of remedial sanctions because C.R.C.P. 107(d)(2) requires that a remedial sanctions order include a “purge clause” describing how the contemnor may come into compliance with the order. *See In re Marriage of Webb*, 284 P.3d 107, 110 (Colo. App. 2011).

Here, the Court lifted its Sealing Order on December 8, 2022, ruling that the 2021 Records “shall be unsealed and made accessible to the public.” Since the Sealing Order has been lifted and the 2021 Records are now public, the El Paso County Sheriff’s Office has no present ability to comply with the Sealing Order. The Court thus cannot impose remedial sanctions. *See, e.g., Aspen Springs Metro. Dist. v. Keno*, 369 716, 724 (Colo. App. 2015) (remedial sanctions cannot issue based on a one-time event carried out in the distant past that cannot be purged); *In re Webb*, 284 P.3d at 110 (same).

IV. CONCLUSION

WHEREFORE, Elder respectfully requests that the Court enter an order dismissing the Second Motion together with Elder’s reasonable costs and attorneys’ fees as permitted by law and such other relief the Court deems just and proper.

Respectfully submitted this 19th day of December 2022.

OFFICE OF THE COUNTY ATTORNEY
OF EL PASO COUNTY, COLORADO

BY: s/ Nathan J. Whitney

Nathan J. Whitney, # 39002

First Assistant County Attorney

200 S. Cascade Ave.

Colorado Springs, CO 80903

(719) 520-6485

Fax (719) 520-6487

Attorney for Sheriff Bill Elder

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 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