

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**IN THE MATTER CONCERNING
JUDGE JAMES R. WAGONER**

**DECISION AND ORDER IMPOSING
PUBLIC ADMONISHMENT**

This disciplinary matter concerns Judge James R. Wagoner, a judge of the El Dorado County Superior Court. Judge Wagoner and his attorney, James A. Murphy, appeared before the commission on August 31, 2011, to contest the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Wagoner and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge James R. Wagoner has been a judge of the El Dorado County Superior Court since 2003. His current term began in January 2009.

On the morning of Friday, July 16, 2010, Judge Wagoner was on the bench presiding over the calendar in department 1 on the second floor of the Main Street Courthouse in Placerville. At approximately 8:45 a.m., the judge received a report concerning the conduct of a member of the public named Penny Arnold, who was reportedly in the courthouse lobby using her cell phone to take pictures or videos of people in the lobby who were involved in dependency court proceedings in

department 5 on the first floor. (Ms. Arnold was present for a proceeding in department 5 that morning.) The judge recessed the proceedings in his court, removed his robe, and proceeded to the lobby with two bailiffs to contact Ms. Arnold about her reported conduct.

When Judge Wagoner contacted Ms. Arnold in the lobby, he ordered her to immediately report to his courtroom for a hearing concerning her conduct in the courthouse that morning. Ms. Arnold, who was not involved in any matter pending before Judge Wagoner, did not comply with the judge's order and asked to speak with her attorney. The judge repeated his order to Ms. Arnold and warned her that if she continued to refuse to comply she would be cited for contempt of court. Ms. Arnold did not comply with the order and consequently the judge directed the bailiffs to arrest her for contempt. Ms. Arnold was handcuffed and escorted to a jury room on the second floor. Her phone and an audio recording device in her possession were confiscated. Ms. Arnold was held in the jury room for approximately 40 minutes. She was then transported to jail pursuant to a jail remand order issued by the judge. The remand order stated that Ms. Arnold was charged with contempt of court, that the matter was set for arraignment in the judge's court on Monday, July 19, 2010, and that bail was set at \$5000. Ms. Arnold was in jail for approximately three hours before she was able to post bail.

On July 16, after Ms. Arnold was arrested, Judge Wagoner issued an order to show cause re contempt in *In re the Matter of Penny Arnold*, No. PC20100441. The OSC stated that Ms. Arnold was cited for contempt for willfully disobeying a court order in contravention of Code of Civil Procedure section 1209(a)(5), which provides that "disobedience of any lawful judgment, order, or process of the court" constitutes contempt. The OSC included the judge's declaration, which states in pertinent part:

2. On July 16, 2010 in the immediate view and presence of the court, the alleged contemnor did the following: The court was made aware by staff that the alleged contemnor was photographing and/or recording private parties in the lobby of the courthouse at 495 Main Street, Placerville, California. This included parties to confidential juvenile matters. [¶] This bench officer proceeded to the lobby to direct the alleged contemnor to the court room (*sic*) for a hearing on this matter, as this was disruptive to the court proceedings and could possibly involve criminal conduct. The alleged contemnor refused to proceed to the court room (*sic*) for the hearing despite repeated warnings that she could be held in contempt and was subject to arrest pending a hearing on contempt charges and despite advice that her attorney, whom she requested, would be available in the court room (*sic*) for consultation. [¶] The conduct was disruptive to the business of the court and the parties involved. Further, it appeared that she was attempting to either continue her surreptitious recording or erase and/or destroy evidence of her conduct. When she was taken into custody, it was also learned that she had a recorder secreted on her person that appeared to be operating.

On July 19, 2010, Ms. Arnold entered a not guilty plea and the matter was set for trial before Judge Wagoner on August 3, 2010.

On August 3, Ms. Arnold appeared with counsel for trial on the contempt charge. At the outset of the hearing, Ms. Arnold apologized to the court. Ms. Arnold stated that she did not purposely cause a disruption and denied that she was taking pictures. She further stated, "I meant no disrespect for you, I was just

asking for my lawyer. I didn't know what was going on." Following the apology, Ms. Arnold's attorney stated that on the morning of the subject incident his client had been sitting in direct proximity to bailiffs at the metal detector, yet nothing she did caused them to respond or to speak to her. No other witnesses testified at the hearing. Judge Wagoner found Ms. Arnold guilty of direct contempt of court and sentenced her to five days in jail, giving her credit for one day served and staying the other four days for one year on the condition that she "obey all laws and all lawful orders and directives of this court."

The commission determined that Judge Wagoner's actions constituted abuse of the contempt power and violated Ms. Arnold's due process rights. First, the commission found that the judge's order that Ms. Arnold immediately report to his courtroom was not a valid order on which a contempt charge could be based. Because Ms. Arnold's conduct did not occur in the judge's courtroom and did not involve a proceeding pending in his court, the judge was without jurisdiction over her and could not lawfully order her to attend a hearing in his courtroom. Courthouse security issues are properly handled by sheriff's deputies, who could have warned or arrested Ms. Arnold if her conduct that morning had been improper. By intervening in this matter and ordering Ms. Arnold to attend a hearing "on the issue that she was creating a disturbance in the courthouse," Judge Wagoner also gave the appearance of having assumed a law enforcement role contrary to canon 2A of the Code of Judicial Ethics.

Judge Wagoner maintains that he had authority to order Ms. Arnold to his courtroom for a hearing concerning her conduct in the courthouse lobby pursuant to the court's statutory (Code Civ. Proc., § 128) and inherent powers. The commission, however, disagreed that a court's statutory or inherent powers to preserve order could be used to order a citizen to attend a hearing concerning conduct occurring outside the courtroom and that had no connection to a pending proceeding. By statute, a court has power to enforce order "in its immediate presence," and "in the proceedings before it." (Code Civ. Proc., § 128 (a)(1)(2).)

Further, a court's authority to order a person in contempt for disorderly conduct is limited to conduct "toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding." (CCP §1209(a)(1).) Judge Wagoner cited no case authority that supports the extension of these powers to the circumstances here.

In his written response to the commission and at his appearance, Judge Wagoner asserted that his actions were based not only on Ms. Arnold's reported conduct in the courthouse lobby that day, but on prior reports he had received alleging disruptive conduct in the courthouse involving Arnold. Reports of disruptive conduct on prior occasions did not give Judge Wagoner authority to order Ms. Arnold to report to his courtroom or to have her arrested for contempt.

Second, the commission found that Judge Wagoner failed to comply with the proper contempt procedures by remanding Ms. Arnold to jail without a hearing. It is misconduct for a judge to use the contempt power to incarcerate someone without following the correct contempt procedures, which include notice and the opportunity to be heard. (See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533.) Judge Wagoner does not dispute that he remanded Ms. Arnold without a hearing. The judge asserts that he understood that a hearing was required, but because they were not in a courtroom and no court reporter was present he felt the better procedure was the one he followed. Judge Wagoner, who was a judge for seven years at the time of the incident, was obligated to know or research the proper contempt procedures.

Third, the commission found that Judge Wagoner wrongly adjudicated the matter as one of direct contempt and wrongly found Ms. Arnold guilty of that charge. Direct contempt concerns conduct that occurs *in open court or in chambers*. (Cal. Judges Benchbook: Civil Proceedings Before Trial (CJER 2008) Sanctions and Contempt, § 17.78, p. 440, italics added.) Because the conduct for which Ms. Arnold was cited did not occur in the judge's courtroom or chambers, it constituted, if anything, indirect contempt.

Fourth, the commission found that the conditions Judge Wagoner placed on Ms. Arnold's contempt sentence – that she obey all laws and all directives of the court for one year – were not authorized by law. Punishment for contempt is governed by Code of Civil Procedure section 1218(a), which provides that a person found guilty of contempt may be fined up to \$1,000, or imprisoned for up to five days, or both. However, there is no provision in section 1218(a) that gives a judge the authority to impose conditions on a contempt sentence such as those imposed by Judge Wagoner, which effectively placed Ms. Arnold on court probation for one year and continued the court's jurisdiction over her.

Fifth, the commission found that after adjudicating the contempt charge, Judge Wagoner failed to comply with the proper contempt procedures by failing to issue an order that recited the evidentiary facts supporting the contempt finding. (*Koehler v. Superior Court* (2010) 181 Cal.App.4th 1153, 1169; *In re Jones* (1975) 47 Cal.App.3d, 879, 881.)

The California Supreme Court and the commission have stressed that “[t]he contempt power, which permits a single official to deprive a person of his fundamental liberty interest without all of the procedural safeguards normally accompanying such deprivation, must be used with great prudence and caution,” and that “[i]t is essential that judges know and follow proper procedures in exercising this power.” (*Public Admonishment of Judge Lisa Guy-Schall* (1999), citing *Ryan v. Commission on Judicial Performance*, *supra*, 45 Cal.3d at p. 533; *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1314; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 694.) Ignorance of proper contempt procedures, without more, constitutes bad faith. (*Cannon v. Commission on Judicial Qualifications*, *supra*, 14 Cal.3d at p. 694.)

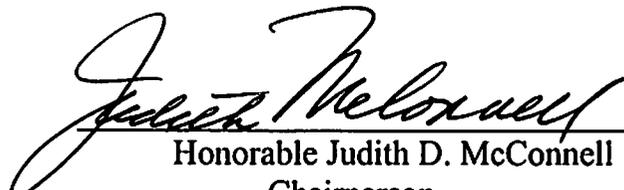
In determining the level of discipline, the commission found that Judge Wagoner's conduct in this matter was aggravated by the fact that he used the contempt power to incarcerate someone over whom he had no jurisdiction. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 857

[“Ordering a person to appear in court when no matter requiring his attendance is pending constitutes serious misuse of the judicial office”].) The judge’s conduct was also aggravated by the fact that he received an advisory letter in 2009 for abusing his authority with regard to individuals who were not before him. He wrote a letter to a married couple, who had submitted information to the grand jury, ordering them to “cease and desist” contact with the grand jury about matters which they had been advised the grand jury no longer desired contact. He improperly threatened to enforce the order with sanctions such as contempt.

The commission concluded that Judge Wagoner’s conduct as described above constituted, at a minimum, improper action.

Commission members Hon. Judith D. McConnell, Hon. Frederick P. Horn, Nanci E. Nishimura, Esq., Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Adam N. Torres, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted for a public admonishment. Commission member Anthony P. Capozzi did not participate.

Dated: Sept. 13, 2011


Honorable Judith D. McConnell
Chairperson