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STATE OF WISCONSIN,

Plaintiff,

Case No.: 01 CM 167

-vs-

DANITA M. SCHARENBRUCH,

Defendant.

PRETRIAL MOTIONS

DATE: May 17, 2001

BEFORE: HONORABLE DEE R. DYER
Circuit Court Judge, Branch VI
Outagamie County
Appleton, Wisconsin

APPEARANCES: CARRIE SCHNEIDER
Assistant District Attorney
320 South Walnut Street
Appleton, WI 54911
appeared on behalf of the State.

GREGORY A. PARKER
Kachinsky & Petit Law Offices
101 West Canal Street
PO Box 900
Neenah, WI 54957-0900
appeared on behalf of and with the Defendant.

Defendant, Danita Scharenbroch, appearing,
in person.

PAULETTE L. NORBY, RMR, CRR
Official Reporter
Branch III

1 PROCEEDINGS: May 17, 2001,
2 10:04 A.M.

3
4 THE COURT: Be seated. Good morning.

5 MR. PARKER: Good morning, Your Honor.

6 MS. SCHNEIDER: Good morning, Your
7 Honor.

8 THE COURT: This is the matter State
9 of Wisconsin versus Danita Scharenbroch,
10 01 CM 167. Miss Schneider appearing on behalf of
11 the State; Mr. Parker on behalf of Miss
12 Scharenbroch. Miss Scharenbroch appears in person.
13 You are Miss Scharenbroch?

14 THE DEFENDANT: Yes.

15 THE COURT: Several motions today.
16 Let's start out with the defendant's motion to
17 dismiss. Is there expected some testimony today,
18 Mr. Parker?

19 MR. PARKER: No, Your Honor. In
20 reviewing the case and the facts I've decided that
21 it would not be appropriate at this time to bring
22 in any evidentiary witnesses at this point.

23 THE COURT: All right. You wish to be
24 heard on argument on that motion?

25 MR. PARKER: I do, Your Honor.

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THE COURT: Go right ahead.

MR. PARKER: Regarding the defendant's motion to dismiss with respect to the motion filed on April 4th, 2001, and the State's response filed on April 18th, 2001, I guess my response, I mean, the Court has read all of, both of these motions; however, I think I need to expound upon the *Carpenter* case and its progeny and the fact that I don't believe that the State has grasped how I posited the motion to dismiss here.

In particular, on Page 3 of the State's response, violation of a court order under 940.47 stating that it is a criminal offense, the State says that the defendant has argued because of Court of Appeals ruling *State v. Carpenter*, that the matter should be considered a non-criminal contempt situation. I am saying that this is not a crime as defined under 939.12, therefore, it would be, if it was going to be brought before a court procedurally proper, bring it under a nonsummary procedure, which would be a punitive sanction, which would be an act of criminal contempt.

However, there is much case law besides *Carpenter* that states that contempt of court, criminal contempt, is not a crime. In

1 particular, *Carpenter* states that also *In Re: Brian*
2 *McGee*, which is 150 Wis. 2d 178, page 183, where it
3 says, "Nonsummary contempt procedures pursuant to
4 785.03(1)(b) requires a complaint." We have a
5 Complaint issued. The problem is this Complaint is
6 issued and it is charging it as a crime, not as a,
7 not as criminal contempt. And also the State had
8 purpose for contempt situations where the court
9 passed an act in nonsummary procedures is to
10 preserve the dignity and authority of the Court.
11 That is the basis for the criminal contempt. In
12 addition, in the *McGee* case, at 150 Wis. 2d 178, at
13 184, there they talk about the fact that criminal
14 contempt, specifically citing from the case,
15 "Chapter 785, Stats.," -- which my client has been
16 charged under 785.04(2)(a) -- the case states,
17 "specifically does not draw civil and criminal
18 contempt ... See sec. 785.01 Statutes Annotated,
19 committee comment 2 and 3. Contempt proceedings
20 are *sui generis*, and are neither civil actions nor
21 criminal prosecutions within the ordinary meaning
22 of those terms."

23 And also with respect to going further
24 of the progeny under *Carpenter*, there's also
25 *State ex rel. Jenkins v. Fayne*, F-a-y-n-e,

1 24 Wis. 2d 476, at 479.

2 Now, it, Your Honor, was a point where
3 we were under the old contempt Statutes when it was
4 under the 295, Section 295 Stats. Here, in *Fayne*,
5 what the court is saying, at 479, is a misdemeanor,
6 here in this case this person was charged with
7 contempt, "A misdemeanor is defined by sec. 939.60,
8 Stats., in the following terms: A crime punishable
9 in the state prison is a felony. Every other crime
10 is a misdemeanor." That is still the law today.
11 Under here, though, the Court goes on to say that,
12 "The punishment for contempt is set forth not in
13 the criminal code, but under the chapter dealing
14 with general court provisions" -- and at that time
15 it was Chapter 256. "It is true that contempt is
16 punishable by fine or by imprisonment or both,
17 pursuant to [the old] secs. 256.06 and 295.13,
18 Stats.; and it is also true that sec. 256.03 speaks
19 of 'criminal contempt' citations to be 'crimes,'
20 for that section provides for possible criminal
21 prosecution in addition to the punishment imposed
22 by other sections of ch. 256."

23 Now, this court further, 479, "This
24 court, under an earlier statute, held that
25 conviction of contempt of court was not 'conviction

1 of a criminal offense.'" They are citing
2 *Farrell v. Phillips*, a 1909 case. "Although" --
3 and moving to page 480 of that case, "Although a
4 person punished for contempt may be liable to
5 indictment and information for such offense, a
6 'criminal contempt' is not a crime or misdemeanor
7 as those terms are generally defined in the
8 statutes."

9 So I think the progeny is fairly clear
10 that under a nonsummary punitive criminal contempt
11 action, which is basically what I think the State
12 tried here, it's not a crime, Your Honor. It is a
13 contempt situation. Contempt actions are sought to
14 vindicate the authority and the dignity of the
15 court in criminal cases. But if it's punitive like
16 they are asking for here, not such as a summary
17 contempt where somebody does something in front of
18 you and you go to work and find them in contempt
19 right there, this is nonsummary, and what they are
20 trying to do is they are trying to cure a what they
21 perceive as a past wrong or act or violation of an
22 order.

23 The other problem with this, with the
24 State's position, is that they bring forth the fact
25 that my client violated a court order. This court

1 order is, it's my understanding from the record,
2 was imposed on Mr. Hudson who was incarcerated at
3 the Outagamie County Jail at that time. Okay? He
4 was incarcerated on June 27th, I believe he was
5 brought before Kathleen Lhost, the Court
6 Commissioner at that time, and a no-contact
7 provision was imposed against anyone mentioned in
8 the Criminal Complaint. At that time Mr. Hudson
9 was under the bond conditions under the no-contact
10 order.

11 There is no case law, Your Honor, that
12 I have found out there, and, as you can see, if you
13 looked, I can't find anything where it shows that a
14 third party is subject to the bond conditions or an
15 order that is specifically given to the defendant
16 under these particular circumstances; and also if
17 we are to look at this matter as a contempt
18 situation, if that is the case, *State ex rel.*
19 *Reynolds v. County Court*, 11 Wis. 2d 560 basically
20 states that it's not so much the act of the nature
21 itself which determines the contempt, rather the
22 manner in which it was committed and its resultant
23 injury to the dignity and the authority of the
24 courts. So that's, that's what contempt, I
25 believe, in a nutshell is all about.

1 So with respect to that, I would then
2 like to back up, Your Honor, to the State's claim,
3 the Court Commissioner's order of no contact was
4 proper per the Wisconsin Statutes of 940.47. Yes,
5 it was, it was proper to Mr. Hudson, but beyond
6 that, Mr. Hudson's not going anywhere, he was under
7 substantial cash bond, he wasn't going to get out
8 to intimidate anybody, the State could have put all
9 of the victims on the witness list or all of the
10 people in the witness list or all the people
11 mentioned in the Criminal Complaint, they could
12 have found out their phone numbers, barred them
13 from calling, that is something that is, quite
14 literally, a typing in of information right into
15 this system that's where the prisoners call out
16 from the county jail. That was never done in my
17 client's case.

18 Instead, numerous phone contacts were
19 made with respect to my client's residence at --
20 687-0218 is her phone number, approximately 1,434
21 calls were attempted to that residence, and that
22 was from June 27th, 2000, through February 15th of
23 2000. The number of completed calls was 146. The
24 number of calls which the State locked in on the
25 system, which I'm presuming was Investigator

1 Malchow, was 25. They locked in these calls which
2 means that what they did is they locked in the
3 calls to preserve those audio conversations either
4 for transcription or as evidence to be presented
5 possibly later. There's no right to privacy

6 because the prisoner is informed, and anybody
7 that's on the phone with them is informed that this
8 call may be monitored. So they have 25 calls that

9 they lock in between July 1st, 2000, and August
10 18th of 2000, and then they go and charge my client
11 with nine counts of violating a court order in this
12 particular instance from February 4th to

13 February 11th, there were nine calls received at
14 the residence at that time. Now, none of these
15 calls were locked in, however, Your Honor, not a

16 one. And, in addition, with respect to Count 1, on
17 February 4th, 2001, at 12:56 P.M., Kenneth Hudson
18 made a call, that's what Count 1 says. Your Honor,
19 no call was made at 12:56 P.M. on that date, and
20 the records show that:

21 Also, the State puts forth that on
22 Page 3 of the Criminal Complaint that Investigator
23 Malchow first became aware of the phone contact,
24 and I quote, "Malchow reports that in November of
25 2000, while the court orders issued by Court

1 Commissioner Lhost were still in effect, Malchow
2 became aware from records in the Outagamie County
3 Jail that Kenneth A. Hudson was having telephone
4 conversations with Danita M. Scharen- broch."

5 Well, you know, they knew about that
6 way back in July, they knew about that, because the
7 first call that was locked in was July 1st of 2000,
8 and from that point on 25 calls were locked in.

9 What they were doing, Your Honor, is they were
10 building their case, they were collecting evidence,
11 which they should have been, if he was ignorant
12 enough to make any comments about his penal
13 interest while he's on the phone with somebody,
14 that's an effective law enforcement tool to do
15 that. But why, Your Honor, do we, why do we put in
16 a Complaint, why does the State put in a Complaint
17 that they first became aware of this in November of
18 2000 when, actually, it was in July of 2000? That
19 seems disingenuous, somewhat, or somewhat
20 neglectful.

21 The Criminal Complaint on the last
22 page, Page 4, states that, second sentence,
23 "Investigator Malchow reports that he personally
24 reviewed portions of the phone conversations
25 recorded and kept on file in the Outagamie County

1 Jail." And I'll just kind of excerpt from this
2 last sentence. He reports Scharenbroch appeared to
3 be ready and willing to discuss various matters
4 with Kenneth Hudson. Well, they are stating that
5 these records and statements were kept on file.
6 Well, we know from another motion filed to the
7 Court regarding discovery problems here that that's
8 not the case, either, that they don't have those
9 conversations. So I will take that up when we hear
10 that motion.

11 I'd just like to finish so we don't
12 confuse the Court and everybody else here, that the
13 motion to dismiss, I believe, is supported by case
14 law, the statutes and I think the brief and my oral
15 recitation here supports that.

16 THE COURT: Miss Schneider?

17 MS. SCHNEIDER: Thank you, Your Honor.
18 I think I will deal with what was in defense motion
19 as the first issue, which apparently wasn't raised
20 at all today here, and that is whether or not the
21 court, there was a substantial showing for the
22 court to order the conditions under 940.47.

23 THE COURT: Well, that wasn't ordered
24 here, so let's move on.

25 MS. SCHNEIDER: Issue two that

1 Attorney Parker raises is the application of 785
2 along with 940.47. I know from the defense brief
3 and from the Criminal Complaint that was filed
4 there seems to be a particular issue or factor that
5 defense is focusing on, and that is verbiage in the
6 Criminal Complaint that says, "The penalty for this
7 misdemeanor offense is a fine of not more than ..."
8 I can explain to the Court that verbiage was put in
9 there, we have many crimes in our statute books
10 that are unclassified, it is in some respects
11 policy of our office when it is something that's
12 punishable by less than a year, or a year or less,
13 that's put in there as a misdemeanor offense.

14 The same thing, I guess the Criminal
15 Complaint could have been drafted, the penalty for
16 this offense, and if that -- I know there are
17 specific verbiage in the defense brief over the
18 issue that it was characterized as a misdemeanor
19 offense, and the State thinks that modification
20 would be fine and we still would be proceeding here
21 today if that's an issue he seems to be, or an
22 issue for the defense.

23 I would note he did quote 939.12,
24 which defines a crime. That statute specifically
25 says: "A crime is conduct which is prohibited by

1 state law and punishable by fine or imprisonment or
2 both. Conduct punishable only by a forfeiture is
3 not a crime." In this case we have conduct which
4 is punishable by a fine or imprisonment or both. I
5 would also note that not having reviewed the two,
6 actually three cases the defense, completely,
7 cites, to know if they are completely on point, the
8 State did raise an issue, *Carpenter* is
9 distinguishable. *Carpenter* was a case where there
10 was a criminal non-support case filed by the
11 district attorney's office. There were at one
12 point orders made underneath that case and the
13 district attorney then filed a separate contempt
14 action. Those violations were not subject to
15 940.47 as we have in this case, and they are
16 somewhat distinguishable.

17 The second factor the State wants to
18 point out is the defendant makes an issue of the
19 penalty section being listed under 785 of the
20 Wisconsin Statutes. As it is noted in our brief,
21 the legislature at one point created the 940.47
22 section of the statutes to allow for orders to be
23 enforced and in place when defendants are to be
24 released. There is also subsequent to that
25 penalties associated for violating that, and those

1 penalties, the description of those violation of
2 court orders, is specifically titled 940.48, still
3 within the criminal conduct, criminal code of the
4 State of Wisconsin.

5 I would also note another factor of
6 interest is that when you look at 785.03(1)(b),
7 which is the nonsummary procedure, punitive
8 sanction, which is what we've charged for this
9 offense, it specifically says in those sections
10 that -- it is towards the end of the sub-
11 section (b): "The complaint shall be processed
12 under chs. 967 to 973," which is the criminal
13 procedure, and then subsequent proceedings at
14 trial, preliminary hearings. So that subsections
15 for Nonsummary Procedure, punitive sanction,
16 specifically directs the courts; and the statute
17 was written so that the complaint is processed
18 under 967 to 973, which is criminal procedure.

19 I would note in listening to defense
20 argument, one other case, or one other statute rose
21 to my attention that the District Attorney's office
22 consistently prosecutes for violations under
23 Chapter 813, violations of injunctions. We process
24 them as criminal violations. Those do not
25 technically fall within the 967 to 973, but those

1 are still processed through our office for criminal
2 violations. I think the legislature was clear when
3 it created 940.47, that violation of that shall be
4 treated at criminal violations. The nonsummary
5 punitive sanction specifically directs the court
6 that the complaint and the subsequent proceedings
7 shall occur under 967 to 973. I think that that
8 alone and those factors alone with what the State
9 cites points to the fact that the State is allowed
10 to proceed as it has charged.

11 The defense tries to argue, and I'm
12 not real sure where this falls into the issues of
13 whether the violation is a criminal offense, but
14 the defense, because they mentioned it, now I'll
15 mention it as well, makes issue of what I believe
16 are really evidentiary issues, issues of fact, not
17 issues of law.

18 The defense goes on to argue the State
19 was aware of Miss Scharenbroch's contact with
20 Mr. Hudson, it went on until November, they didn't
21 stop it. Those are issues of fact, those are
22 issues Mr. Parker can raise at the time of a trial
23 in this proceeding. Is it an issue whether or not
24 this is under 940.47 as criminal, violation should
25 be criminal? I don't think so. He also discusses

1 number of completed calls, locked in calls, calls
2 are not locked in, those are all issues of fact,
3 they go to weight of the evidence for the State's
4 case, not to the issues that are raised in his
5 motion.

6 I am going to leave any further
7 discussion -- at that point I think later there is
8 a motion where we may address some of those issues.

9 MR. PARKER: May I respond?

10 THE COURT: Yes, briefly.

11 MR. PARKER: One thing to say. The
12 State cites 785.03(1)(b) Nonsummary Procedure,
13 punitive sanction. Committee notes, Committee
14 notes of the Statutes Annotated says that in
15 Committee Comment-1979, second page, here we are
16 talking about the procedure for (1)(b): "The
17 procedure for seeking a punitive sanction in a
18 nonsummary situation is made the same as for a
19 criminal violation." "The council believes that
20 the simplest solution is to have all of the
21 procedures set forth in chs. 967 to 973 made
22 applicable to the punitive sanction proceeding
23 because there is no real distinction between the 2
24 types of proceedings. For this same reason the
25 council decided not to include any provision making

1 the acts punishable by a punitive sanction also
2 punishable as a crime." That's from the Statutes
3 Annotated notes.

4 Also, Miss Schneider talks about
5 legislative, the legislative intent, legislative
6 history, but offers no persuasive authority or
7 authority on that except her own opinion. Now, if
8 we would -- she tries to distinguish *Carpenter*.
9 *State v. Carpenter*, 179 Wis. 2d 838 at 841,
10 specifically states that "Between the enactment of
11 sec. 939.12, Stats., in 1955" -- which is what is a
12 crime -- "see sec. 1, ch. 696, Laws of 1955, and
13 the legislature's overhaul of the contempt statutes
14 in 1979, see ch. 257, Laws of 1979, the supreme
15 court held that" conviction -- or that -- "contempt
16 of court is not a crime." There it is again.

17 THE COURT: What were you reading from
18 there?

19 MR. PARKER: Right out of *State v.*
20 *Carpenter*, 179 Wis. 2d 838, at 841. That's all I
21 have to say. I don't want to beat a horse to death
22 here, Your Honor.

23 THE COURT: Thank you.

24 MS. SCHNEIDER: If I might just --

25 THE COURT: No. I'm just looking at

1 my copy of *Carpenter* here, I'm just trying to find
2 out where it says that.

3 MR. PARKER: Is that the Westlaw one?

4 THE COURT: The one you supplied in
5 the brief.

6 MR. PARKER: May I approach?

7 THE COURT: Sure.

8 MR. PARKER: I am showing you a copy
9 out of the Wisconsin Reports, 841.

10 THE COURT: Where does it say it's not
11 a crime?

12 MR. PARKER: (Indicating.)

13 THE COURT: All right, yes. Let me
14 just find that in here. I have it. Thank you.
15 And they cite *State ex rel. Jenkins v. Fayne* there,
16 correct?

17 MR. PARKER: Yes, Your Honor.

18 THE COURT: They go on to say, on page
19 842, citing from the *McGee* case, and they adopt
20 that here, they say "Chapter 785 Stats.,
21 specifically does not draw civil and criminal
22 contempt designations. Contempt proceedings are
23 *sui generis*" -- According -- now it is me talking,
24 not quoting here anymore -- but according to the
25 Webster Collegiate Dictionary, most recent edition,

1 "sui generis" means "unique, peculiar, or of its
2 own kind." Now, the court goes on: "Contempt
3 proceedings are *sui generis* and are neither civil
4 actions nor criminal prosecutions within the
5 ordinary meaning of those terms.... We hold that
6 contempt procedures fall outside the ambit of
7 sec. 808.04(3)," which is what they were dealing
8 with there.

9 The Court goes on. It says, "McGee
10 was decided long after the contempt laws were
11 revised in 1979. Despite the revisions, we
12 concluded that a contempt of court subject to
13 punitive sanctions is not a crime."

14 That's very important here today.
15 Ms. Schneider, did the State monitor conversations
16 between the defendant and Kenneth Hudson during the
17 time when this court order under 940.47 was in
18 place?

19 MS. SCHNEIDER: Your Honor, there were
20 so many calls from Mr. Hudson's cell to others, I
21 know the jail keeps a log of those, we were not
22 going up every day and I don't even believe every
23 week, we could not, to monitor them. I know there
24 came a time after Miss Scharenbroch was advised in
25 November that she was to discontinue contact; that

1 then in January and February Mr. Malchow did go up
2 and listen to portions of calls that were -- the
3 jail tracks attempts --

4 THE COURT: Excuse me. When were
5 those calls made that he listened to?

6 MS. SCHNEIDER: There were some calls
7 in January, and some calls in February.

8 THE COURT: None of them before
9 November?

10 MS. SCHNEIDER: I can't tell. I know
11 that Investigator Malchow went up there, there were
12 numerous calls made not only to Miss Scharenbroch,
13 but also Montana and other parties. I don't think
14 physically he could have listened to them all, so
15 whether or not he did, I know there were times when
16 he would go up, but I don't think he went up and
17 listened to every call. He could not, physically.
18 He'd still be there.

19 THE COURT: Miss Schneider, did the
20 State know that this defendant was meeting in the
21 county jail with Kenneth Hudson during the time
22 that this court order under 940.47 was in place?

23 MS. SCHNEIDER: We advised her in
24 November that she was to discontinue contact. I
25 believe in mid-February we became aware there were

1 three occasions in January where she did visit
2 Mr. Hudson: January 3rd, 10th and the 23rd.

3 THE COURT: Did she visit with
4 Mr. Hudson anytime before November in the jail?

5 MS. SCHNEIDER: Yes.

6 THE COURT: How many times?

7 MR. PARKER: Seventeen, Your Honor.

8 THE COURT: Why was that allowed to go
9 on, Miss Schneider?

10 MS. SCHNEIDER: Your Honor, I can't
11 give an explanation. I can tell the Court we
12 cannot enforce -- That would be like asking the
13 State to, when the Court revokes someone's driver's
14 license, to follow them out and arrest them
15 immediately after they violate. There were several
16 people who were not allowed to visit Mr. Hudson who
17 may have visited him, and I believe there was
18 another individual who at one time may have visited
19 him.

20 THE COURT: Don't you give that
21 information to the Sheriff's Department?

22 MS. SCHNEIDER: We do. I can't tell
23 the Court when that was given. I know it was given
24 sometime in February, and then the visits did
25 discontinue.

1 THE COURT: In a case the magnitude of
2 the Kenneth Hudson case, wouldn't the State
3 normally have personal communication with the
4 Sheriff's Department to ensure that they had a list
5 of people that were not to have contact, that he
6 was not to have contact with?

7 MS. SCHNEIDER: I know the Sheriff's
8 Department was aware of the order and the orders
9 for the individuals who he was not to call. Asking
10 the Sheriff's Department to monitor even someone
11 like Kenneth Hudson would expend a lot of
12 resources.

13 THE COURT: Excuse me, Miss Schneider.
14 Doesn't the jail have a list of permissible
15 visitors?

16 MS. SCHNEIDER: I believe they would.

17 THE COURT: Okay. What other
18 measures, Miss Schneider, could have been taken to
19 ensure that Kenneth Hudson not have contact with
20 Miss Scharenbroch, for example, by telephone, in
21 person, or in writing?

22 MS. SCHNEIDER: Well, in writing, I
23 guess the jail staff could have monitored every
24 letter that was sent out from Mr. Hudson's cell.
25 Calls, there could have been a block to calls. Not

1 knowing every location Miss Scharenbroch may have
2 been at, I don't know if that ever would have been
3 accomplished, it would have had to block every
4 family member, every friend, every employment where
5 she had employment to try and stop that or prohibit
6 that.

7 THE COURT: After violation of this
8 court order was discovered that, in fact, Kenneth
9 Hudson was violating that, why would he have
10 telephone privileges at all, Miss Schneider?

11 MS. SCHNEIDER: I can point to
12 specific notes that at times Mr. Hudson was
13 wavering on representing himself and contacting
14 New York for family members who may be trying to
15 arrange for attorneys, and I know when attorney and
16 defendant negotiations were falling apart the Court
17 specifically ordered him to have phone privileges
18 so that he could try and attempt to contact an
19 attorney, work with the defense investigator.

20 THE COURT: All right. Thank you.

21 MS. SCHNEIDER: Can I just add one
22 more thing?

23 THE COURT: Sure.

24 MS. SCHNEIDER: 940.47 points us to
25 the penalties under 785. When you look at for the

1 procedure under 785.03(1)(b), Nonsummary Procedure,
2 punitive sanction, it specifically says, "The
3 district attorney of a county, attorney general or
4 special prosecutor ... may seek the imposition of a
5 punitive sanction by issuing a complaint charging a
6 person with contempt of court and reciting the
7 sanction ... to be imposed."

8 That's what we've done. We've issued
9 a complaint. I know there may be some issues
10 because it says misdemeanor, and that makes people
11 think -- but, as I explained, it's a procedure
12 that's done in our office to distinguish those
13 crimes that are punishable by more than one year
14 and those that are less than one year.

15 THE COURT: There are more problems
16 than that, Miss Schneider, and those are these:
17 Number one, it is quite clearly, no matter what
18 procedure is used to charge the punitive sanction
19 under contempt of court then it is not a crime, and
20 this Complaint charges Miss Scharenbroch as a party
21 to the crime under 939.05.

22 My reading of all of this is that that
23 cannot occur. If it is not a crime she cannot be
24 charged with party to the crime. I have reviewed
25 every document which has been submitted to this

1 Court, I have read the Statutes, I didn't know of
2 the Committee Notes that Mr. Parker just recited
3 here in court because those were not included in
4 any of the documents, but my conclusion is this:
5 that clearly under *State v. Carpenter*, contempt of
6 court is not a crime.

7 Now, under 940.48 entitled Violation
8 of court orders," it states: "Whoever violates an
9 order issued under s. 940.47 may be punished as
10 follows:"

11 First of all, under subsection (1):
12 "... the person may be prosecuted under ss. 940.42
13 to 940.45." -- any of the intimidation of victim or
14 witness statutes. That's a crime, specifically
15 spelled out, in the criminal code in the State of
16 Wisconsin.

17 Subsection (2): "As a contempt of
18 court under ch. 785." If it's punished -- if it is
19 charged and prosecuted as a contempt of court under
20 Chapter 785, the law is clear for this Court that
21 it is not a crime. Therefore, there cannot be
22 misdemeanor language in this Complaint, there
23 cannot be party to the crime language in this
24 Complaint, it is not a crime.

25 Certainly this Court is concerned

1 about what happened here, as Mr. Parker points out,
2 the order that was entered under 940.47 went
3 directly to Mr. Hudson's conduct. That's to whom
4 the order was imposed. Under 940.47, subsection
5 (4), the order may actually be imposed on other
6 persons. It says in, subsection (4): "An order
7 that any person described in sub. (1) or (2) have
8 no communication with any specified witness or any
9 victim, except through an attorney under such
10 reasonable restrictions as the court may impose."
11 That was not asked for here by the State, it was
12 not granted by the Court Commissioner.

13 Now, one of those people under
14 subsection (1) or (2), subsection (1) talks about
15 the defendant, but subsection (2) talks about
16 "... a person before the court other than a
17 defendant, including, but not limited to, a
18 subpoenaed witness or other person entering the
19 courtroom of the court ..."

20 Now, at that time when these orders
21 were issued, Miss Scharenbroch was not a subpoenaed
22 witness, but certainly she was identified in the
23 Criminal Complaint, and an order could have been
24 sought, because it is not limited. So an order
25 could have been sought. But if you look at

1 subsection (4), it says: "An order that any person
2 described in sub. (1) or (2) have no communication
3 with any specified witness or any victim ..."

4 Now, does that not include the defendant? It
5 doesn't specifically say the defendant. So could
6 the State have sought an order that said Miss
7 Scharenbroch and every other witness and victim in
8 that Complaint not have any contact with
9 Mr. Hudson? I don't know. It doesn't specifically
10 say that, and I have no case law to guide this
11 court, but there are provisions for court orders
12 for other persons involved in the case that they
13 not have any contact with any other specified
14 witnesses or victims. So the legislature here in
15 drafting and in passing legislation thought of some
16 things, but I don't think they thought of all
17 things, and what we have here is a very strange
18 situation.

19 Now, Mr. Hudson can be prosecuted for
20 the 1,434 calls to someone who was specified in
21 that order that he have no contact with. The
22 question is: Is there any way, shape or form that
23 Miss Scharenbroch can be prosecuted? Now, I ask
24 these questions about whether or not the State was
25 engaged in any monitoring of these conversations.

1 It doesn't appear, from what I know here, that they
2 were actively engaged in utilizing Miss Scharen-
3 broch as a source of information. I don't know
4 anything about that. I ask about what other
5 measures could have been taken to ensure that
6 Kenneth Hudson not make this kind of contact,
7 because I'm concerned that in the future there be
8 an adequate way so that actions that occurred in
9 this case don't happen. That has to be left for
10 the legislature, because right now, under the
11 analysis that this Court has made, this is not a
12 crime and Ms. Scharenbroch cannot be prosecuted as
13 a party to the crime; and, therefore, she cannot be
14 prosecuted for contempt of court, either, under
15 947 -- excuse me -- 940.47 or 940.48, as this order
16 did not apply to her. This order applied to
17 Kenneth Hudson.

18 On that basis, this Court dismisses
19 the charges against Miss Scharenbroch. This matter
20 is adjourned.

21 MR. PARKER: Thank you, Your Honor.

22 Your Honor, when they arrested her she
23 had to post a \$2,500 cash bond. Can that be
24 returned?

25 THE COURT: That is ordered returned.

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Thank you.

MR. PARKER: Thank you.

PROCEEDINGS CONCLUDED: 10:45 A.M.

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STATE OF WISCONSIN)

) SS:


COUNTY OF OUTAGAMIE)

I, PAULETTE L. NORBY, RMR, CRR, do certify that these proceedings were taken before me at the Outagamie County Justice Center, Appleton, Wisconsin, on the 17th day of May, 2001.

That the appearances were as noted initially.

That the foregoing proceedings are true and correct as reflected by my original machine shorthand notes taken at said time and place.

Dated this 29th day of May, 2001.



PAULETTE L. NORBY, RMR, CRR