



STATE OF MICHIGAN
IN THE 6th JUDICIAL CIRCUIT

JUDGE LEO BOWMAN
MICHAEL, THEOD v FIFTY TWO THI

THEODORE MICHAEL, ERIK ROOSEN, and ALL
UNNAMED INDIVIDUALS CHARGED
WITH OR ON PROBATION FOR MINOR IN POSSESSION OF
ALCOHOL IN THE 48th DISTRICT COURT and the
52-3 DISTRICT COURT,

Plaintiffs,

v.

THE 52-3 DISTRICT COURT and THE 48th DISTRICT
COURT,

Defendants.

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Case No.
Hon.

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"There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint or than as stated herein."

"There are criminal charges pending in various stages as to each individual Plaintiff in the class."

**COMPLAINT FOR DECLARATORY RELIEF, SUPERINTENDING CONTROL,
AND RELIEF UNDER MCR 3.303**

Now comes the Plaintiffs, by and through their counsel, and for a cause of action against the above named Defendants, alleges and shows to the Court as follows:

INTRODUCTION

1. This Complaint is an action seeking superintending control and declaratory injunctive relief against the named Defendants.

2. Specifically, the Plaintiffs are seeking a complete bar of the Defendants' practice of sentencing to jail or bringing contempt of court charges against Minor in Possession of Alcohol probationers who violate terms of their probation.

JURISDICTION

3. Plaintiff MICHAEL is a Michigan resident who has been sentenced and is on probation for Minor in Possession of Alcohol (hereafter "MIP") under the judicial supervision of the 52-3 District Court in Rochester Hills, Oakland County, Michigan.
4. Plaintiff MICHAEL has also filed a Claim of Appeal in the Oakland County Circuit Court, disputing the authority of the 52-3rd District Court to sentence him to jail for a conviction of contempt of court stemming from a violation of his non-jailable MIP probation.
5. Plaintiff ROOSEN is a Michigan resident who is on probation for MIP under the 48th District Court in Bloomfield Township, Oakland County, Michigan.
6. Plaintiff ROOSEN is scheduled to appear before the Court on April 9, 2009, to show cause why he should not be held in contempt of court for an alleged probation violation.
7. All UNNAMED MINORS involved and at risk for illegal incarceration or contempt are under the probation of the Defendants for MIP-related charges.
8. The factual allegations contained in this Complaint took place and are still taking place within Oakland County, Michigan.
9. Jurisdiction is proper in the 6th Circuit Court of Oakland County for the reasons that the claims brought are equitable in nature and are otherwise within the jurisdiction of the court pursuant to MCL §600.601.

10. Venue is proper in the 6th Circuit Court pursuant to MCL §600.1601 et.al. for the reason that the Defendants' activities which give rise to this cause of action took place and are still taking place in Oakland County.

STATEMENT OF FACTS

Plaintiff MICHAEL

11. On June 2, 2008, Plaintiff MICHAEL was sentenced by the 52-3 District Court to Probation for a violation of Auburn Hills City Ordinance Sec. 46-242, commonly known as Minor In Possession of Alcohol (hereafter "MIP").
12. According to the Ordinance, the penalty for this second MIP conviction is: "...a fine of not more than \$200.00 and may be ordered to participate in substance abuse prevention or substance abuse treatment and rehabilitation services and may be ordered to perform community service and to undergo substance abuse screening and assessment at his or her own expense. The person is also subject to sanctions against his or her operator's or chauffeur's license"
13. Pursuant to his punishment, MICHAEL was placed on probation.
14. On January 30, 2009, MICHAEL appeared before the 52-3rd Court to show cause why he should not be held in contempt of court for violating probation.
15. The Court was without authority to charge MICHAEL with contempt.
16. Counsel for MICHAEL filed a Motion to Dismiss the contempt charge.
(See **Exhibit 1**, Motion to Dismiss)

17. On March 2, 2009, the Court denied the Motion to Dismiss. (See **Exhibit 2**, 52-3rd Opinion and Order of the Court)¹
18. Over Counsel's objection, the Court conducted a hearing on contempt.
19. After the hearing, MICHAEL was found in contempt of court for violating provisions of his probation, and sentenced to three days incarceration.
20. On March 3, 2009, Mr. Amberg filed a Claim of Appeal in the Oakland County Circuit Court in regards to the MICHAEL case.

Plaintiff ROOSEN

21. On July 8, 2008, Plaintiff ROOSEN was in the 48th District Court sentenced to Probation for MIP.
22. At some time in late December or early January, ROOSEN allegedly violated his probation by missing two alcohol tests and failing to go to a probation appointment.
23. ROOSEN had a valid reason for missing these tests.
24. ROOSEN contacted the probation department to reschedule the appointment.
25. Nevertheless, ROOSEN was ordered to appear before the Court to show cause why he should not be held in contempt of court for violating probation.
26. At the probation counter, the court employee asked if ROOSEN wanted a lawyer. However, during this conversation, nothing was provided to ROOSEN to indicate what he was charged with, what evidence the probation department had against him, and what possible sentences he could possibly receive.

¹ The 48th District Court has also filed an opinion in regard to the District Court's Contempt Powers. (See **Exhibit 3**, 48th District Court's Opinion)

27. ROOSEN was then told to go and sit in the court and wait for his name to be called.
28. Once called, ROOSEN stood at the podium as the Court repeated his rights, as he had done for the many people who were sentenced prior to ROOSEN.
29. As Plaintiff ROOSEN will attest, he was confused as to what was happening.
30. The Court told ROOSEN that he could possibly go to jail for up to 93 days if he was found guilty of the contempt charge.
31. ROOSEN was found guilty of contempt.
32. At sentencing, the Court informed ROOSEN that another probation violation would result in his incarceration.
33. On February 21, 2009, ROOSEN allegedly missed another alcohol test.
34. Subsequently, ROOSEN received another order to show cause why he should not be held in contempt of court. This hearing has been scheduled for April 9, 2009.

All UNNAMED Plaintiffs

35. Mr. Amberg's office is located in Keego Harbor, Oakland County Michigan.
36. As a practicing attorney who concentrates his practice in Criminal Defense, Mr. Amberg frequently appears in both the 48th District Court and the 52-3 District Court.
37. Mr. Amberg has personally witnessed the 48th District Court and the 52-3rd District Court bring MIP probation violators up on contempt charges.
38. Mr. Amberg has also seen these MIP defendants receive jail sentences for the contempt violations.

39. Mr. Amberg believes that this practice of bringing contempt charges against probation violators is a widespread problem that has sent many minors to jail.
40. The Oakland County Circuit Court previously has dealt with the appellate issues of jailing MIP violators or charging MIP violators with criminal contempt for violating probation and has ruled that the practice is unlawful.
41. Nevertheless, Defendants continue to defy the Circuit Court and continue to bring criminal contempt charges unlawfully.
42. Specifically, the 6th Circuit Court has found both the use of contempt powers in MIP probation violation cases, as well as sentencing MIP violators to jail, is illegal. (See **Exhibit 4**, 6th Circuit Court Opinion)
43. In many cases, UNNAMED Plaintiffs' either waive counsel or have ineffective assistance of counsel when they are pressured into entering guilty pleas to contempts of court and are immediately sentenced to jail.
44. Therefore, Mr. Amberg and Mr. Williams, as counsel for Plaintiffs, as concerned attorneys, and as citizens of Oakland County, believe that these practices have resulted in a serious and tragic injustice, and cruel and unusual punishment on Michigan citizens, occurring almost daily.

CLASS STATUS

45. Pursuant to MCR 3.501 the conditions required for the maintenance of a class action are present in this action, specifically the following:
 - A. The class is so numerous that joinder of all members is impracticable.
 - B. There are common questions of law or fact that predominate over questions affecting only individual members.

- C. The claims and defenses of the representative Plaintiffs are typical of the claims and defenses of the class.
- D. The representative Plaintiffs will fairly and adequately assert and protect the interests of the class.
- E. The maintenance of the class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.
- F. The Michigan Supreme Court has previously ruled that class action is an expedient and sensible method for correcting policies affecting the statutory rights of numerous persons. *Cahill v. Fifteenth District Judge*, 393 Mich 137 (1974)

46. The members of the class in this case are all defendants who have been charged with violating an MIP statute or ordinance within the jurisdictions of the 48th and 52-3 District Courts.

**COUNT ONE
SUPERINTENDING CONTROL**

- 47. Plaintiffs incorporate by reference paragraphs 1-46.
- 48. The Oakland County Circuit Court has the jurisdiction to issue superintending control orders upon the 48th and 52-3rd District Courts. See MCR 3.302(D); MCL §600.615.
- 49. The Defendants' procedures of bringing probation violation charges as contempt of court charges is general court policy and practice.
- 50. This policy and practice is unlawful.
- 51. This policy and practice must be stopped.
- 52. The Defendants' procedures of sending MIP probation violators to jail for non-jailable MIP offenses is a general court policy and practice.

53. This policy and practice is unlawful.
54. This policy and practice must be stopped.
55. Plaintiffs believe many members of the class do not have the legal knowledge of financial ability to protect themselves and appeal from Defendants' unlawful policies and practices.
56. Further, there are many UNNAMED Plaintiffs who are believed to be either incarcerated or facing incarceration, such as Plaintiff ROOSEN.
57. Additionally, appeals to the Circuit Court have not posed an adequate remedy in this matter because the Defendants have indicated they do not agree with certain 6th Circuit Court Judge's holdings regarding the use of their contempt powers. (**Exhibit 2, Exhibit 3**)
58. Plaintiffs' Counsel knows of no instance where a City or Township prosecutor appealed the ruling of the Circuit Court in regard to this issue.
59. Because the Defendants continue to defy law as well as rulings from their own Circuit Court, the Circuit Court's superintending control is necessary to stop the tragic injustice that takes place every time a class member is brought before the Defendants' Court on Contempt of Court charges.
60. Defendants' unlawful actions regarding contempt, and regarding sending MIP violators to jail, must be stopped immediately, as unlawful incarceration is both morally disturbing and a violation of the Plaintiffs' 6th Amendment Rights against cruel and unusual punishment.

**COUNT TWO
DECLARATORY JUDGMENT**

61. Plaintiffs incorporate by reference paragraphs 1-60.
62. This court has power under MCR 2.605 to adjudicate the matters at issue and enter its judgment declaring the rights of all parties to this action.

63. According to MCL § 771.4 “[i]f a probation order is revoked, **the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.**” (emphasis supplied)
64. According to the Michigan Supreme Court, “violation of probation is not a crime, and a ruling that probation has been violated is not a new conviction. If a judge finds that a probationer violated his probation by committing an offense, the probationer is neither burdened with a new conviction nor exposed to punishment other than that to which he was already exposed.” *People v. Kaczmarek*, 464 Mich 478, 482-83; 628 NW2d 484 (2001)(external citations omitted)
65. Further, the Michigan Court of Appeals has held that “the sentence imposed upon a probation violation must be in accordance with the permissible sentence for the underlying offense itself.” *People v. Vancil*, 186 Mich App 665, 666; 465 NW2d 49 (1991)
66. The Michigan Supreme Court has found that: “When interpreting a statute, it is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute. It is the role of the judiciary to interpret, not write, the law. If the statutory language is clear and unambiguous, the statute is enforced as written. Judicial construction is neither necessary nor permitted because it is presumed that the Legislature intended the clear meaning it expressed.” *People v. Schaefer*, 473 Mich. 418, 430-431; 703 N.W.2d 774 (2005) (internal footnotes omitted).

67. The clear reading of these statutes and ordinances is very clear that the Legislature, Township Boards, and City Councils do not want MIP violators to go to jail.
68. Although not binding on this Court, California, New Jersey, Florida, The District of Colombia, and Alaska have all found this practice to be illegal.
69. In addition to this clear statutory language, persuasive and binding precedent, the Oakland County 6th Circuit recently ruled on a case with facts similar to all Plaintiffs in an opinion stating that "[b]ecause jail is not an authorized penalty for a first offense of minor in possession, the trial court has no authority to sentence Defendant to jail." (**Exhibit 4**)
70. It is noted though that the Circuit Court contemplated this by stating that "the trial court may not utilize its contempt powers to impose jail time for a violation of probation. By sentencing the Defendant to jail for contempt, the trial court would be violating the principle that a probation violation in and of itself does not amount to a new crime." (See **Exhibit 4**)
71. It is further noted that Oakland County Circuit Court has granted a stay of sentence pending appeal for an MIP case involving similar facts.
72. Defendants have issued opinions denouncing the Circuit Court rulings regarding contempt and jail issues.
73. As a result, the Defendant District Courts are defying the rulings of the Oakland County Circuit Court, a court of higher authority.
74. This defiance by Defendants continually results in unlawful incarcerations and unlawful contempt convictions for Michigan citizens and Oakland County Citizens.

75. Under these facts, there is an actual controversy between the parties, and continued appeals from the District Courts will be avoided if all of these issues are determined by this court at one time.
76. It is necessary for this court to adjudicate and declare the rights of the parties to this action in order to ensure that no further MIP probation violators be unlawfully incarcerated or unlawfully convicted of contempt.

WHEREFORE, for the reasons discussed above, the Plaintiffs pray for the following relief:

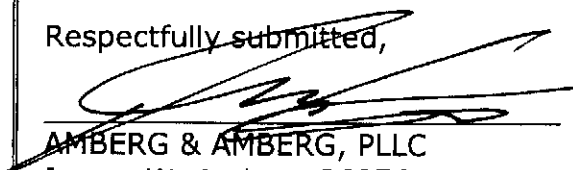
- A. that the Honorable Court authorize the certification of a class for all Plaintiffs similarly situated;
- B. that this Honorable Court immediately take superintending control over all cases in the 48th District Court and the 52-3rd District Court involving MIP charges for the purposes of stopping the practice of illegal incarceration of MIP violators;
- C. that this Honorable Court immediately take superintending control over all cases in the 48th District Court and the 52-3rd District Court involving MIP charges in which Contempt of Court charges are brought against MIP violators;
- D. that this Honorable Court declare that the actions of the Defendants, and each of them whether acting jointly or alone as complained of herein, were and are unlawful and in violation of statute, case law, Oakland County Circuit Court rulings, and constitute a violation of the Due Process and Equal protection Clauses of the 5th and 14th Amendments to the constitution of the State of Michigan and the Unites States of America and 6th Amendment rights prohibiting cruel and unusual punishment;

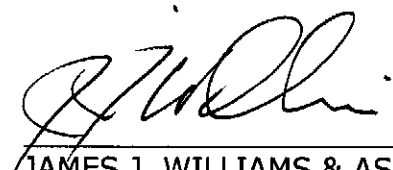
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- E. that this Honorable Court permanently enjoin the Defendants and their predecessors, and all others acting in concert with them from holding the Plaintiffs, and all other persons similarly situated, in contempt of court for violating the terms and conditions of their probation, and further, from allowing any amount of incarceration whatsoever for said violation(s);
- F. that this Honorable Court order any other relief it deems just and proper in its equity and good conscience;
- G. that the Court order the Defendant District Courts to pay those actual attorney fees and costs required to be expended in having been required to bring this action.

Respectfully submitted,


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