IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

APPELLATE DIVISION (CIVIL) 'AY'
Case No.: 502011CA008776XXXXMB
L.T.: 502008SC009703XXXXSB

THERESA RIVERNIDER,

Appellant(s),

v.

STERLING VILLAGES OF PALM BEACH LAKES CONDOMINIUM ASSOCIATION, INC., and STEVEN MEYER, and DONALD HANNIGAN,

Appellee(s).

_____/

Opinion filed: JAN - 9 2013

Appeal from the County Court in and for Palm Beach County, Judge Janis Keyser.

For Appellant: Jerome F. Skrandel, P.A.
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For Appellee: Steven Meyer, Esq.
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PER CURIAM.

Petitioner, Theresa Rivernider, seeks to prohibit the trial court from conducting further indirect criminal contempt proceedings. The trial court entered an order to show caused based upon a motion and affidavit filed by Rivernider's tenant, Mr. Hannigan. Rivernider's petition is based upon two arguments: 1) the allegations in the trial court's Order to Show Cause are facially insufficient to support a charge of indirect criminal contempt against her; and 2) the trial court lacks jurisdiction to proceed with the indirect criminal contempt proceeding based upon the

principle of double jeopardy. We agree Mr. Hannigan's affidavit is legally insufficient pursuant to Florida Rule of Criminal Procedure 3.840 and grant the Petition for Writ of Prohibition.

Respondent Sterling Villages of Palm Beach Lakes Condominium ("Sterling") filed suit against Theresa Rivernider for failure to pay monthly condominium maintenance fees. Judgment was entered for Sterling, and it successfully moved the trial court for a writ of continuing garnishment directing Rivernider's tenant, Donald Hannigan, to pay his rent directly to Sterling. Sterling later moved to hold Rivernider in contempt of court, alleging that Rivernider's property manager, Mr. Laporte, had threatened Mr. Hannigan and told him not to pay Sterling rent pursuant to the order of garnishment, and had twice intentionally vandalized the air conditioning unit. The court granted the motion and Rivernider appealed to this Court. We reversed, finding that the trial court did not follow the procedure required by Florida Rule of Criminal Procedure 3.840 and that it also failed to apply the "beyond a reasonable doubt" standard.

On remand, Mr. Hannigan filed the Motion for Issuance of Order to Show Cause Why Defendant, Theresa Rivernider, Should Not Be Held in Contempt of Court and Sanctioned, the subject of our current review. His affidavit is based upon the same general facts as Sterling's prior motion. Mr. Hannigan's motion – not the affidavit – further stated that "Upon information and belief, [Rivernider] has given her tacit or express permission to Mr. Laporte to engage in the criminal conduct described above." Based upon Mr. Harrigan's affidavit, the trial court entered an Order to Show Cause, finding that "there is a prime facie showing that [Teresa Rivernider] may have willfully and intentionally violated the Court's prior entry of the final judgment of garnishment against the garnishee, DONALD J. HANNIGAN, entered on March 6, 2009."

Sufficiency of the Order to Show Cause

Florida Rule of Criminal Procedure 3.840 provides for the prosecution of indirect criminal contempt in the following manner:

> (a) Order to Show Cause. The judge ... on *affidavit* of any person having knowledge of the facts, may issue and sign an order directed to the defendant, stating the *essential facts constituting the criminal contempt* charged and requiring the defendant to appear before the court to show cause why the defendant should not be held in contempt of court.

(emphasis added). Although the affidavit clearly recites the alleged wrongful acts of *Mr. Laporte*, the only facts in the affidavit concerning *Rivernider* establish: 1) she owned the condominium, 2) Mr. Laporte was her property manager, and 3) she told Mr. Hannigan that she would not permit him to live in the unit unless he paid rent to Mr. Laporte. Rivernider argues that the affidavit fails to recite any acts that support the trial court's entry of an order to show cause.

Given Mr. Laporte's alleged actions in this case, the trial court likely believed that Mr. Laporte acted upon Rivernider's direction; however, there is no sworn allegation that he did so. Although the facts in the affidavit are likely sufficient to establish an agency relationship between Rivernider and Mr. Laporte, they are not sufficient to establish Rivernider's criminal contempt based upon Mr. Laporte's acts. A contemnor must have personal knowledge of the grounds of contempt. *Shelley v. District Court of Appeal*, 350 So. 2d 471 (Fla. 1977); *In re Broward County State Attorney's Office*, 577 So. 2d 967 (Fla. 4th DCA 1991) (holding that contempt will not lie against the State Attorney himself under a "captain-of-the-ship" theory). Although the unsworn motion states "Upon information and belief, [Rivernider] has given her tacit or express permission to Mr. Laporte to engage in the criminal conduct described above," there is no such sworn statement in the affidavit. Florida Rule of Criminal Procedure 3.840(a)

requires the Order to Show Cause to be based upon an affidavit with the essential facts of the contempt. The unsworn statement in the motion therefore cannot be considered.[1]

In *Eubanks v. Agner*, Eubanks was an attorney representing Robinson in a felony case. 636 So. 2d 596 (Fla. 1st DCA 1994). When the matter was called for trial and Robinson failed to appear, Eubanks was held in contempt after he refused to inform the police where he had seen his client that day. The court reversed the contempt, and noted that "the order to show cause is the charging document" and rejected the respondent's attempts to "inject possible factual scenarios into this proceeding which suggest that [petitioner] might have had information regarding Robinson's intentions prior to trial." *Id.* at 598. In this case, Sterling is similarly arguing that the order to show cause is legally sufficient due to facts not reflected in the order to show cause; specifically, that Rivernider directed Mr. Laporte to destroy Mr. Hannigan's air conditioner and/or threaten him to prevent his compliance with the garnishment order.

In *Lewis v. Nical of Palm Beach, Inc.*, 959 So. 2d 745 (Fla. 4th DCA 2007), the court reversed an order of indirect criminal contempt against Nical that was a consequence of his lawyer's issuance of a subpoena. The court agreed that Nical could not be held in criminal contempt "as there was no evidence that Nical or its officers and/or shareholders had any involvement in its lawyers' decision to issue the subpoena." *Lewis v. Nical of Palm Beach, Inc.*, 959 So. 2d 745 (Fla. 4th DCA 2007). Similarly, in this case the affidavit lacks any allegation that Rivernider had any involvement in Mr. Laporte's decision to destroy Mr. Hannigan's air conditioner. However, in *Lewis* an evidentiary hearing was held, whereas the instant case simply seeks review of the trial court's order to show cause. Nevertheless, as noted previously, the

[1] The Court notes that, even if the statement were under oath, it would likely be insufficient. An affidavit, the statements of which are alleged on information and belief, is insufficient in any instance where one is required to make affidavit as to the substantive truth of facts stated, and not merely as to good faith. *Hahn v. Frederick*, 66 So. 2d 823 (Fla. 1953).

order to show cause is the charging document and must contain the essential facts constituting the contempt.

Rivernider argues that she cannot be held in contempt on these facts because she was not a party to the garnishment order. Although she was not a "party" to the garnishment order, she is clearly a party to the litigation. Regardless, even nonparties can be held in contempt if they knowingly interfere with a court order. *Doe v. Watson*, 507 So. 2d 1164, 1165 (Fla. 5th DCA 1987). She also argues that because Mr. Hannigan did in fact pay his rent to Sterling, any alleged attempt to interefere with the garnishment order was unsuccessful and therefore cannot constitute contempt. If no order has been violated, contempt can only be found if the conduct is calculated to embarrass, hinder, or obstruct the court in the administration of justice or calculated to lessen the court's authority and dignity. *Eubanks v. Agner*, 636 So. 2d 596 (Fla. 1st DCA 1994), citing *Justice v. State*, 400 So. 2d 1037 (Fla. 1st DCA 1981). Furthermore, it must be demonstrated that the contemnor acted with knowledge of what is expected of her. *Id.* As previously noted, the affidavit fails to state that Rivernider "acted," in a manner sufficient to allege criminal contempt. Accordingly, we find that the affidavit was insufficient to charge Rivernider with criminal contempt. We do not find that it would be impossible under the facts of this case for Mr. Hannigan to allege sufficient facts to establish contempt, therefore we deny the Petition insofar as it seeks a writ of mandamus.

Double Jeopardy

Rivernider argues that the Double Jeopardy Clause of the United State Constitution prohibits the trial court from holding a new indirect criminal contempt hearing due to the prior contempt order that was reversed. That order was reversed, in part, because the trial court incorrectly applied the "clear and convincing" evidentiary standard, rather than the "beyond a

reasonable doubt" standard. *Rivernider v. Sterling Villages of Palm Beach Lakes Condo. Ass'n*, 17 Fla. L. Weekly Supp. 426b (Fla. 15th Cir. Ct. 2010). A defendant in criminal contempt proceedings is entitled to the protection of the Double Jeopardy Clause of the United States Constitution. *Lascaibar v. Lascaibar*, 773 So. 2d 1236 (Fla. 3d DCA 2000). A "ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." *Id.*, citing *United States v. Scott*, 437 U.S. 82 (1978). "*It is acquittal that prevents retrial* even if legal error was committed at the trial." *Id.* (emphasis added).

Neither the trial court nor this appellate court ever ruled - either explicitly or implicitly - that the evidence was insufficient to convict Rivernider under the "beyond a reasonable doubt" standard. *C.f. id.* ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a *ruling by a court that the evidence is insufficient to convict*, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.") (emphasis added). In the prior contempt proceeding, the trial court applied the wrong standard but made no comment or ruling indicating that the evidence was *merely* or *only* clear and convincing. In fact, the trial court stated:

> "I do find – and if you want to know the standard – *I do find by an overwhelming preponderance of the evidence, and I find the evidence to be far beyond clear and convincing* of this case, including a videotape of her son-in-law literally covering his tracks walking away from destroying the air-conditioning unit."

If anything, "far beyond clear and convincing" likely constitutes "beyond a reasonable doubt," which undercuts Rivernider's argument. Regardless, it is clear that the trial court did not make any statements or rulings that the evidence in this case was insufficient to convict Rivernider beyond a reasonable doubt.

Accordingly, the Petition for Writ of Prohibition is **GRANTED** and the Order to Show Cause is **QUASHED**. The alternative Petition for Writ of Mandamus is **DENIED**.

Rivernider's Rule 9.400 Motion for Attorney's Fees and Costs is **DENIED** and Sterling's Motion for Appellate Attorney's Fees and Costs is **DENIED** in accordance with our contemporaneous opinion in *Rivernider v. Sterling Villages of Palm Beach Lakes Condo. Ass'n*, 502009AP000022XXXXMB.

HAFELE and COX, JJ., concur. CROW, J., dissents.

CROW, J.

I would deny the Petition for Writ of Prohibition. I find that the affidavit is sufficient to satisfy the requirements of Florida Rule of Criminal Procedure 3.840(a) and that the trial court should proceed with the evidentiary hearing.