

FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION**

IN THE MATTER OF)
TROY M. HORTON.) D.C. MISC. APP. NO. 2000/009
) Re: T.C. MISC. NO. 1/2000
)

On Appeal from the Territorial Court of the Virgin Islands

Considered: September 6, 2002
Filed: February 5, 2003

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **AUDREY L. THOMAS**, Judge of the Territorial Court, Division of St. Thomas and St. John, Sitting by Designation.

APPEARANCES:¹ **Harold W.L. Willocks, Esq.**
Territorial Public Defender
St. Croix, U.S. Virgin Islands
Attorney for Appellant.

OPINION OF THE COURT

PER CURIAM.

Territorial Public Defender, Troy M. Horton, Esq. ("Mr. Horton" or "appellant") is before this Court seeking review of a Judgment of Contempt entered against him by the Honorable Alphonso G. Andrews, Jr. ("Judge Andrews"). The following issues are before

¹ The Government of the Virgin Islands filed a Notice of Appearance, but stated that it would not "actively participat[e] in the defense of this case because it concerns the appeal of a decision that does not involve the Government of the Virgin Islands." The Court also recognizes that "a judge is not required to *personally* defend his/her decision when rendered in his or her judicial capacity, absent the filing of a writ of mandamus or prohibition, authorized pursuant to Fed. R. App. P. 21." *Government of the Virgin Islands v. Santiago*, 35 V.I. 130, 141 (D.V.I. App. Div. 1996) (emphasis in original). Accordingly, this appeal was decided solely on appellant's brief.

the Court:

- 1) Whether an individual attorney in the Public Defender's Office can be convicted of contempt for failure to appear in court.
- 2) Whether this criminal contempt proceeding should have been subject to summary disposition pursuant to Terr. Ct. R. 138, or subject to the procedures set forth in Terr. Ct. R. 139.
- 3) Whether appellant was entitled to representation by counsel and other due process during this criminal contempt proceeding.
- 4) Whether there was any factual basis for a contempt conviction.

For the reasons stated below, this Court will vacate the Judgment of Contempt entered against Mr. Horton on April 13, 2000 and remand for entry of an order consistent with this opinion.

I. FACTS

On April 13, 2000, Mr. Horton appeared before Judge Andrews at an advise of rights hearing in *Government of the Virgin Islands v. Mary Hamilton*, Crim. No. None/2000. Hamilton was charged with aggravated assault and battery upon a police officer and simple assault. Attorney Horton alleges that she appeared to have suffered facial trauma, and showed signs of postarrest handcuff welts. Based upon those observations, and Hamilton's statement that there was a witness to the incident who had not been named in the probable cause fact sheet, Mr. Horton moved to cross-examine

the arresting officer to determine whether there was probable cause.² Judge Andrews denied Mr. Horton's request stating:

THE COURT: Probable cause?

MR. HORTON: Yes.

THE COURT: Well, I am satisfied that there is. And in light of the repeated such requests by you in this court, which have turned out to be futile in an instance like this where probable cause is clear, I consider the request nothing more than a waste of the Court's time--

MR. HORTON: Your Honor, may I respond?

THE COURT: --therefore your request is denied.

MR. HORTON: Your Honor, does not Rule 123--

THE COURT: Sir, listen to me.

MR. HORTON: Do I not have the right to--

THE COURT: I said you may not, and you continue in responding I will consider it to be an obstruction of the Court's business.

MR. HORTON: Very well, Judge.

THE COURT: Do I make myself clear[?]

MR. HORTON: Very well, Judge.

(Appendix to Brief of Appellant Troy M. Horton ("App."), Tr. (Hamilton) at 4-5).³ Judge Andrews found that there was probable

² The Rules of the Territorial Court provide:

1. *Probable Cause Finding.* The court shall examine the complaint, arresting officer, and/or any other witnesses to the crime under oath at the Initial Appearance Hearing. The defendant may cross-examine witnesses against him. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the judge shall forthwith hold the defendant to answer the complaint. The finding of probable cause may be based upon hearsay evidence in whole or in part.

Terr. Ct. R. 123(b)(1).

³ Appellant failed to sequentially number the pages of his appendix as required by Virgin Islands Rules of Appellate Procedure 24(c), therefore, the Court is forced to refer to pages as numbered in the trial transcript. Where, as in this matter, the appendix contains transcripts of proceedings in three (3) separate cases, the need for sequential numbering is clear. To clarify which transcript is being referred to, the Court shall indicate the name of each defendant, i.e. Hamilton, James or Horton.

cause and advised Hamilton of her rights. Mr. Horton again voiced his objection stating:

MR. HORTON: For the record, your Honor, that is over defense counsel's objection, counsel not having--

THE COURT: Counsel, have a seat.

MR. HORTON: For the record--

THE COURT: In fact, you're excused.

MR. HORTON: Your Honor, I have another matter here.

THE COURT: You're excused from that case.

MR. HORTON: Very well.

(*Id.* at 7) (emphasis added). Those proceedings were concluded and Attorney Horton left the courtroom.

Judge Andrews moved on to another case (*Government of the Virgin Islands v. Newton James*, Crim. No. 77/2000) and was advised by Melvin H. Evans, Esq. ("Evans"), counsel for the Government of the Virgin Islands ("government"), that the defendant would plead guilty. Judge Andrews responded:

THE COURT: Wait a minute. Who is the defense lawyer in this case?

MR. EVANS: Mr. Horton.

THE COURT: Marshal, tell Attorney Horton to come in. (Thereupon, the marshal responded.)

THE COURT: Where is Attorney Horton?

THE MARSHAL: He said you told him that he is excused.

THE COURT: Fine, arrest him.

(App., Tr. (James) at 3.) The marshal arrested Mr. Horton and escorted him to a holding cell where he remained in custody for several hours.

Later that day, Mr. Horton was brought back to Judge Andrews'

courtroom to face summary contempt proceedings. Judge Andrews charged Mr. Horton with "misbehavior" and "disobeying an order" of the court in two instances pursuant to V.I. CODE ANN. tit. 14 § 581. The first instance noted was Mr. Horton's failure to appear to represent his client (James) during the plea hearing, and the second was his failure to comply with the Court's order, given through its marshal, to appear in court for the *James* plea. (App., Tr. (Horton) at 3.)

At the contempt hearing, Judge Andrews called Mr. Horton forward, stated the grounds for contempt, asked the marshal to state what had transpired when she went to call Mr. Horton back to the courtroom, and proceeded to enter findings of fact. After making his findings, Judge Andrews gave Attorney Horton an opportunity to respond. At that point, Chief Territorial Public Defender, Harold W.L. Willocks, Esq. ("Mr. Willocks") requested that he be allowed to address the court on Mr. Horton's behalf. Judge Andrews responded, "No. If you are here as his counsel I am denying him the right to counsel because this is a summary procedure for which he is being charged with direct contempt. He is not entitled to counsel." (*Id.* at 6.) Having been denied the right to counsel, Atty Horton stated, "I do have a response. Without confirming or denying the findings at this point, I will be seeking a Federal appeal in this matter." (*Id.* at 7.)

Judge Andrews found Mr. Horton guilty of contempt and imposed a fine of Two Hundred Fifty Dollars (\$250) to be paid by 3:00 p.m. the following day. Mr. Willocks requested that the Public Defender's ("PD's") office be allowed to submit a payment voucher on Mr. Horton's behalf. Judge Andrews denied Mr. Willocks' request stating that the fine was against Mr. Horton, not the PD's office. Finally, when asked if the court would stay its ruling until the PD's office had an opportunity to brief the matter, Judge Andrews replied:

THE COURT: Well, you gone [sic] have to file a motion just to even get to speak to the Court because I interpret your recitation as somehow, I presume, representing the defendant. If this is in some nature of appeal, or are you now asking the Court orally to stay its order? Is that what you're saying?

MR. WILLOCKS: That is correct, your Honor.

THE COURT: Your request is denied.

(*Id.* at 8-9.) This timely appeal followed.

II. DISCUSSION

A. Jurisdiction and Standards of Review

This Court has jurisdiction to review this final judgment of criminal contempt pursuant to 4 V.I.C. § 33 (1997 & Supp. 2002); Section 23A of the Revised Organic Act of 1954.⁴ We exercise plenary review of the legal issues set forth by appellant.

⁴ The Revised Organic Act of 1954 is found at 48 U.S.C. § 1613a (1994), reprinted in V.I. CODE ANN., Organic Acts, 73-177 (codified as amended) (1995 & Supp. 2000) (preceding V.I. CODE ANN. tit. 1) ["Revised Organic Act"].

Government of the Virgin Islands v. Santiago, 937 F. Supp. 1157, 1158; 35 V.I. 130, 131 (D.V.I. App. Div. 1996). Findings of fact are reviewed under a clearly erroneous standard. 4 V.I.C. § 33. "The judgment and findings of the trial court if supported by substantial evidence will not be disturbed on appeal." 3 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 715 (2d ed. 1982).

B. Whether an Individual Attorney in the Public Defender's Office can be Convicted of Contempt for Failure to Appear in Court.

In the instant matter, Judge Andrews did not hold the PD's office in contempt for its failure to appear at the *James* plea hearing. Instead, he held Mr. Horton in contempt for *his* failure to appear to represent *his* client, and for *his* refusal to return to the courtroom on Judge Andrew's request. Mr. Horton, nonetheless, makes the incredible argument that because the PD's office is appointed to defend indigent cases, and attorneys within that office are assigned by the Chief Public Defender to represent those clients, it is the PD's office, and not the employed attorney, that must appear in court. Therefore, he concludes that "[a]ny sanction to be imposed falls upon the Territorial Public Defender Office for which the *Chief* Public Defender must answer." (Brief of Appellant at 9 (emphasis in original).) Despite Mr. Horton's averment that

there is "sufficient precedent for this premise," he cites⁵ one unreported case, *Government of the Virgin Islands v. Day*, Crim. App. No. 1997/063 (D.V.I. 1998), which purportedly supports his argument. It is true that in *Day*, with circumstances different to those presented here, the Honorable Thomas K. Moore issued two (2) orders to show cause why the PD's office should not be held in contempt for its failure to represent the defendant as ordered by the Court. Nonetheless, it is clear that the Federal Rules of Criminal Procedure (FED. R. CRIM. P. 42),⁶ the Rules of the Territorial Court (Terr. Ct. R. 138-140), and the Virgin Islands Code (14 V.I.C. §§ 581 et seq.) allow for sanctions against individual attorneys who show a willful disregard of the court's authority. This Court finds no merit in Mr. Horton's argument given the circumstances of this case.

C. Whether Summary Disposition was Appropriate.

⁵ Appellant's citation (*Gov't v. Day*, Unreported, D.V.I. (1998)) fails to comply with the Virgin Islands Rules of Appellate Procedure which provide that:

Citations to federal decisions that have not been formally reported shall identify the court, docket number, and date, or refer to the electronically transmitted decision. . . . Any decision cited by counsel that is not retrievable in hard copy form in the District Court of the Virgin Islands library must be provided as part of the appendix.

V.I. R. App. P. 22(i).

⁶ "The Practice and Procedure in the Territorial Court shall be governed by the Rules of the Territorial Court and, to the extent not inconsistent therewith, by the . . . Federal Rules of Criminal Procedure" Terr. Ct. R. 7.

The Rules of the Territorial Court set forth the procedures for contempt proceedings as follows:

Rule 138. Summary Disposition

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was *committed in the actual presence of the court*, or in all instances of failure to obey a summons or subpoena of the court if properly served. The order of a contempt shall recite the facts and shall be signed by the judge and entered of record after the defendant is given an opportunity to be heard.

Terr. Ct. R. 138 (emphasis added). Rule 138, unlike Federal Rule of Criminal Procedure 42, allows for summary disposition in "instances of failure to obey a summons or subpoena of the court if properly served." (*Id.*)⁷ In *Santiago*, this Court held that:

A fair reading of the Federal Rules of Criminal Procedure and the Territorial Court Rules disclose no inconsistencies regarding criminal contempt procedures. Neither Fed. R. Crim. P. 42(a) nor Terr. Ct. R. 138 permits summary contempt proceedings if the contempt was *not* committed in the *actual presence* of the court. Rule 42 does, however permit the judge to act summarily when the contempt involves disrespect to or criticism of the judge, provided it occurs *in the judge's presence*.

To evoke the rule governing summary criminal contempt, the contempt must not only be committed directly under the eye or within the view of the court,

⁷ A summons "shall be signed by the judge or attested in his name and signed by the person empowered by law to take complaints and shall be directed to the defendant named in the complaint and shall describe the offense charged in the complaint. The summons shall require the defendant to appear before the court in which the complaint is made at a time and place stated therein and inform the defendant that if he fails to so appear a warrant will issued for his arrest." Terr. Ct. R. 122; see also Terr. Ct. R. 23.

but must be an open threat to the orderly procedure of the court and a flagrant defiance of the person and presence of the judge before the public. Moreover, in the rare instances in which summary contempt proceedings are appropriate, the judge must prepare a certificate, asserting that he saw or heard the conduct constituting the contempt and it was committed in the actual presence of the court. The certificate, or order of contempt, must recite the facts constituting the contempt and must be signed by the judge and entered of record.

Santiago, 35 V.I. at 137-38 (citations omitted) (emphasis in original).

Although Judge Andrews found that Mr. Horton's conduct "resulted in unnecessary embarrassment to the Court in the presence of numerous citizens as well as police officers in the courtroom," (App., Tr. (Horton) at 4-6), Mr. Horton's allegedly "contemptuous behavior" did not occur in the judge's presence. Instead, the allegedly contumacious conduct occurred outside the courtroom, and in the presence of a marshal who then had to relay Mr. Horton's response to the judge. Moreover, Judge Andrews did not "certif[y] that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court" as required by Rule 138. Case law makes it clear that "[s]ummary adjudication of indirect contempts is prohibited, and criminal contempt sanctions are entitled to full criminal process." *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 833 (1994). Accordingly, Mr. Horton should have been accorded the due

process protections of Rule 139 which provides:

Rule 139. Disposition; notice and hearing

(a) Form of notice, how given. A criminal contempt, except as provided in Rule 138 shall be prosecuted on notice, and if it occurs in a cause it shall be prosecuted in the cause in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged. The notice may be given orally by the judge in open court in the presence of the person charged with contempt, or by an order to show cause or an order of arrest.

(b) Bail. If the person charged with contempt gives to the clerk of the court in which the contempt is being prosecuted, a good and sufficient bond or cash deposit in lieu thereof for his appearance at the hearing, approved by the judge of the court, he shall be admitted to bail pending the hearing.

(c) Designation of prosecutor. The court may designate as the prosecutor of the proceedings, the Attorney General of the Virgin Islands, or any other attorney of this territory.

(d) Disqualification of judge. Except as provided in Rule 138, if the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the consent of the person charged with contempt.

(e) Pleas. Where an order to show cause is made, the person charged with contempt may, not later than one day before the return day of the order, or within such time as the court may allow, serve an answer or an answering affidavit, or he may plead orally at the hearing.--Amended Oct. 14, 1994, eff. Nov. 16, 1994.

Terr. Ct. R. 139. This Court finds that Judge Andrews' failure to follow the procedures set forth in Rule 139 constitutes reversible

error. See, e.g., *Santiago*, 35 V.I. at 137-39 (citing *Cooke v. U.S.*, 267 U.S. 517 (1925)).

D. Whether Mr. Horton was Entitled to be Represented by Counsel in the Proceedings Below.

Judge Andrews maintained that this was a summary proceeding, and denied repeated requests by Mr. Willocks to appear as counsel for Mr. Horton. Mr. Horton argues that the right to counsel in a criminal contempt proceeding is protected by the Sixth Amendment to the United States Constitution, and that he was denied that right in this case.

The Supreme Court of the United States has held that in situations where alleged contempts have been committed outside the court's presence, criminal procedural protections such as the right to counsel are "necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." *Bagwell*, 512 U.S. at 834. Likewise, the Court of Appeals for the Third Circuit has held that "[d]ue process requires that a potential contemnor be given notice and a hearing regardless of whether the contempt is civil or criminal in nature. These customary procedural safeguards ensure that the parties or *their attorneys* have an opportunity to explain the conduct deemed deficient before the fine is imposed and that a record will be available to facilitate appellate review." *Newton v. A.C. & S.*,

Inc., 918 F.2d 1121, 1127 (3d Cir. 1990) (internal citations omitted) (emphasis added). We, therefore, find that Mr. Horton should have been allowed the representation of counsel.

E. Whether there was any factual basis for a contempt conviction.

Judge Andrews brought criminal contempt proceedings against Mr. Horton pursuant to 14 V.I.C. § 581.⁸ The character of criminal contempt is punitive, and its purpose is to vindicate the authority of the Court. See *Bagwell*, 512 U.S. at 827-28. "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine imprisonment or both. . . . Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical--protection of the institutions of our government and enforcement of their mandates." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

The crux of Mr. Horton's argument is that Judge Andrews excused him from the *James* matter at the close of the *Hamilton*

⁸ Section 581 provides that:

Every court of the Virgin Islands shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as -

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of its officers in their official transactions; or

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

14 V.I.C. § 581.

advise of rights when he said:

MR. HORTON: Your Honor, I have another matter here.

THE COURT: You're excused from that case.

(App., Tr. (Hamilton) at 7). Mr. Horton, therefore, argues that his failure to appear in court, and response when approached by the marshal cannot be deemed willful and contumacious defiance of the court.

Judge Andrews was clearly annoyed by Mr. Horton's conduct in the *Hamilton* advise of rights. It is conceivable that when Mr. Horton said, "Your Honor, I have another matter here," the judge believed he meant another issue to address in the *Hamilton* case, and reiterated that he was excused. Both Mr. Horton and Judge Andrews spoke ambiguously, with both referring to different cases. During the contempt proceedings, Judge Andrews made it clear that he had only intended to excuse Mr. Horton from the *Hamilton* case, and entered the following findings of fact:

The Court finds that you, Troy Horton, failed to appear and that your conduct, which the Court classifies as misbehavior as well as disobedience of this Court's order, occurred in the Court's presence.

The Court finds that you were told that you were excused immediately after the case preceding this one, this one being James, after which you told the Court that you had another case. The Court informed you that you were excused from this case, meaning the preceding case.

The Court then observed you leave the courtroom and sent the marshal to retrieve you. And the Court further finds that you were informed by the marshal that the

Court requested your appearance in the court and that, nevertheless, you failed to appear and told the marshal that--you said that you were excused, as represented to the Court not only today, now, but earlier upon the return of the marshal.

And upon being so informed by the marshal the Court issued an order for your arrest for your contemptuous behavior. The Court further finds that your *conduct was impermissible since you were aware that you were assigned to the case; that is, Government vs. James*, and also because you were advised by the marshal to return to court.

The Court additionally finds that as a lawyer you knew or that you should have known what the consequences of your conduct would be. And that your *conduct was clearly willful and intentional* as the Court noted your demeanor which expressed, your earlier demeanor that is, complete dissatisfaction with this Court's denial of your request in the immediately preceding case to call an arresting officer as a witness so you could cross-examine him.

The Court finds your *conduct to be derogatory and obstructive to the Court's operation because as a result of that the Court had to pass the James case and eventually delay the plea hearing because of your failure to appear, and also while the marshal had to attempt to retrieve you twice. That resulted in unnecessary embarrassment to the Court in the presence of numerous citizens as well as police officers in the courtroom.*

(App., Tr. (Horton) at 4-6 (emphasis added).)

Whatever Judge Andrews' intent when he said, "You're excused from that case," it does not require a stretch of the imagination to see how Mr. Horton could reasonably believe that he had been excused from the *James* case. The Court is also troubled by the fact that Judge Andrews did not give Mr. Horton an opportunity to

comment until after he had entered his findings of fact on the record. (App., Tr. (Horton) at 4.) Under Virgin Islands law, a finding of fact is "clearly erroneous" when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Georges v. Government of the Virgin Islands*, 119 F. Supp. 2d 514, 519-20 (D.V.I. App. Div. 2000) (citing *Marsh v. Marsh*, 33 V.I. 102, 105-06 (D.V.I. App. Div. 1995)); 4 V.I.C. § 33. Given the ambiguity here, Judge Andrews' finding that Mr. Horton's conduct was a willful and intentional obstruction of the court's operation, sufficient to warrant the imposition of a punitive fine, was clearly erroneous.

III. CONCLUSION

For the reasons stated, the Judgment of Contempt entered against Mr. Horton shall be vacated and this matter remanded for the entry of an appropriate order.

DATED this 5 day of February 2003.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

/s/

By: Deputy Clerk

FOR PUBLICATION

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APPEARANCES: **Harold W.L. Willocks, Esq.**
Territorial Public Defender
St. Croix, U.S. Virgin Islands
Attorney for Appellant.

ORDER OF THE COURT

PER CURIAM.

AND NOW this 5 day of February 2003, having considered appellant's brief and appendix, and for the reasons set forth in the Court's accompanying opinion of even date, it is hereby

ORDERED AND ADJUDGED that appellant's Judgment of Contempt is **VACATED**, and finally

ORDERED that this matter is **REMANDED** for an appropriate order.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

/s/

By: Deputy Clerk

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