For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE: PEOPLE OF THE VIRGIN ISLANDS, Appellant, _____ **PEOPLE OF THE VIRGIN ISLANDS,** Plaintiff, v. **OSCAR E. ILLESCAS-GOMEZ,** Defendant.	**S. Ct. Crim. No. 2018-0006** Re: Super. Ct. Crim. No. 24/2017 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Renee Gumbs-Carty

Argued: June 12, 2018
Filed: August 30, 2018

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Su-Layne U. Walker, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellant,

Melanie L. Turnbull, Esq.
Territorial Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

SWAN, **Associate Justice**.

Appellant, the Virgin Islands Department of Justice ("D.O.J." or "Department"), seeks reversal of the Superior Court's imposition of a $3000 fine upon D.O.J. The fine was imposed because of D.O.J.'s motion to dismiss a criminal case on the morning of trial, prompted by D.O.J'.s dereliction in failing to secure a vital witness's cooperation needed in order to successfully prosecute the case. The D.O.J. further failed to secure any reasonable alternative for the witness's cooperation. The motion to dismiss was made after a jury panel was assembled for the voir dire proceeding on the day of trial.

The $3000 fine is the equivalent of the cost the court paid to jurors for attending the voir dire for jury selection. The court purportedly imposed the fine pursuant to 4 V.I.C. § 243(4) which numerates the incidental powers of the court.

The D.O.J. alleges that the Superior Court abused its discretion when it levied the fine because the fine was not imposed for any violation of a court rule. In its appellate brief, the D.O.J. further argues that the Superior Court violated the separation of powers doctrine inherent in the Revised Organic Act of 1954, which prohibits the judiciary from improvidently influencing Executive Branch decisions. However, we decline to resolve the case under the separation of powers constitutional doctrine. Lastly, the D.O.J. contends that the Superior Court's imposition of the fine did not comply with the standards for civil or criminal contempt. For the reasons elucidated below, we vacate the fine.

I. FACTS AND PROCEDURAL HISTORY

On January 24, 2017, Oscar Eduardo Illescas-Gomez was charged in a multi-count information with the crimes of second degree assault-domestic violence; third degree assault-

domestic violence; possession of a dangerous weapon with the intent to use it unlawfully; aggravated assault and battery; and disturbance of the peace. (J.A. 3). Trial was scheduled for January 2, 2018. On December 29, 2017, the parties attended the final pre-trial teleconference in which both parties asserted readiness for trial. On December 30, 2018, D.O.J. became cognizant that the victim could not be served with a subpoena, because her whereabouts were unknown. Prior to jury selection on the morning of trial, the D.O.J. moved to dismiss the case during an in-chambers pre-trial conference. The court granted the motion, but imposed a $3000 fine against the D.O.J. under 4 V.I.C. § 243(4).[1] On January 9, 2018, the court entered its order. In the order, the court severely criticized the D.O.J. for its inefficient conduct in failing to secure the victim's cooperation in Gomez's prosecution. The court noted that the D.O.J. was cognizant of the victim's uncooperativeness, because the Virgin Islands Police Department had failed to obtain a sworn statement from her. Importantly, she wrote a letter to the police authority informing of her unwillingness to cooperate with the prosecution as early as two weeks after Gomez's arrest in February 2017. The court also noted that the D.O.J. failed to retain a recantation expert or to procure a material witness warrant to compel the victim witness's court appearance. Hence, the court summarily imposed the fine to recoup the costs paid to jurors for attending the voir dire proceeding. On January 31, 2018, the D.O.J. perfected a timely appeal.

[1] "Every court shall have power . . . to compel obedience to its judgments, orders, and process, and to the orders of a judge outside of court, in all actions, or proceedings therein . . . ." 4 V.I.C. § 243(4).

II. JURISDICTION

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a). An order imposing a sanction on an attorney is not immediately appealable, unless one of two circumstances exists. One is where the sanctions order also "resolve[s] all [remaining] claims [in the litigation] with respect to all parties." *In re Rohn*, 67 V.I. 764, 767 (2017) (citing *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 205 (1999)). *See also In re Blanc*, 49 V.I. 508, 519 (V.I. 2008) (explaining where a sanction order "is inextricably intertwined with the merits of the case," it is reviewable on appeal only after the entry of an order resolving the merits of the underlying litigation, and that a sanction order cannot form the basis for an interlocutory appeal where there is "not sufficient separate from the underlying merits of the of the case.") (citing *Cunningham*, 527 U.S. at 205 and *Comuso v. Nat'l R.R. Passenger Corp.*, 267 F.3d 331, 339 (3d. Cir. 2001) (indicating that, ordinarily, sanctioned counsel is obligated to "monitor the litigation to appeal [the sanction] after the final judgment has been issued")). The other is when an order reflects a finding of contempt "against an attorney who is not a party to the litigation." *In re Moorehead*, 63 V.I. 689, 692 (V.I. 2015) (citing *In re Rogers*, 56 V.I. 325, 334 (V.I. 2012) (collecting cases)).

Here, the Superior Court's January 9, 2018 order memorialized its January 2, 2018 ruling granting the D.O.J.'s motion to dismiss the case and imposing a $3000 fine upon the D.O.J. under 4 V.I.C. § 243(4). Thus, the January 9, 2018 order, in addition to embodying the ruling sanctioning the D.O.J., also resolved all the remaining claims and defenses asserted in the underlying prosecution, despite not addressing them on the merits. Accordingly, the Superior Court's January 9, 2018 order is a final decree over which we exercise jurisdiction. *In re Rohn*, 67 V.I. at 767.

III. STANDARD OF REVIEW

In reviewing the trial court's decision, we review its factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (V.I. 2010)). Lastly, "[i]t is well-established that the Superior Court's decision to impose, or decline to impose, a sanction . . . is typically reviewed for abuse of discretion." *In re Rohn*, 67 V.I. 764, 767 (V.I. 2017). We will hold that a trial court has abused its discretion upon a finding that it has made a "decision that 'rests upon a clearly erroneous finding of fact, an errant conclusion of law[,] or an improper application of law to fact.'" *In re M.R.*, 64 V.I. 333, 334 (V.I. 2016) (citing *Stevens v. People*, 55 V.I. 550, 556 (V.I. 2011)).

IV. DISCUSSION

Although the D.O.J. asserts various arguments on appeal, we find the most compelling to be the total lack of due process afforded to it by the Superior Court before the $3000 fine was imposed.[2] While we agree that the Government has inherent authority to prosecute, dismiss, and

[2] As a general rule, due process rights do not extend to the government. *United States v. Thomas*, 684 F.3d 893, 895 (9th Cir. 2012) ("[T]he government cannot directly invoke the protections of the Due Process Clause."). In the traditional adversarial context between the Government and a private citizen-defendant, only the defendant enjoys the right to due process. *Id.* After exhaustive research, it appears to us that courts have yet to address whether the Government's lack of due process applies to court-ordered sanctions against the Government that are disconnected from an underlying case. A review of cases where the defendant has motioned the court to impose sanctions upon the Government reveals that courts' common practice is to provide the Government an opportunity to be heard. *See e.g.*, *Oaks of Mid City Resident Council v. Sebelius*, 723 F.3d 581, 583 (5th Cir. 2013) (reversing a district court order finding the government in contempt, after providing the government an opportunity to be heard); *Berne Corp. v. Gov't. of the V.I.*, 51V.I. 130, 135 (3d Cir. 2009) (reviewing district court order finding the Government of the Virgin Islands in civil contempt after first providing the Government a show cause hearing); *In re Midwest Serv. & Supply Co.*, 44 B.R. 262, 264 (D. Utah 1983) (reviewing a Bankruptcy Court order finding the Government in contempt after providing a hearing). Moreover, the concept that the Government, like any party, has the right to notice and a hearing before the Superior Court may impose sanctions comports with the Virgin Islands Rules of Civil Procedure. Pursuant to Rule 1-3(b), "No sanction, penalty or other disadvantage may be imposed for noncompliance with any requirement that is not specified in these Civil Rules, the Virgin Islands Code, or in the law of the Virgin Islands, unless the Superior Court has issued an order providing the parties in the action with actual

manage its cases, the Superior Court's order did not violate this principle. The order did not sanction the Government for dismissing the underlying case; it sanctioned the Government for assuring the Court that it was prepared to proceed with the case when, in reality, the Government had not yet secured the key witness it needed to proceed. Accordingly, we eschew resolving this case on the separation of powers principle and resolve it on the principle of the court's inherent statutory authority embedded in 4 V.I.C. § 243, and the principles of civil and criminal contempt.

"The Superior Court has both statutory and inherent powers to compel obedience to its orders by way of contempt." *In re M.R.*, 64 V.I. at 343 (V.I. 2016) (citing *In re Rogers*, 56 V.I. 325, 334 (V.I. 2012)). One way the court exercises its compliance powers is by finding perpetrators guilty of either civil or criminal contempt. *In re Meade*, 63 V.I. 681, 685 (V.I. 2015). However, before a court can impose either sanction, it must provide to alleged offender the safeguards of notice and an opportunity to be heard. *Laser v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th Cir. 2005). *See Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 570 (3rd Cir. 1985); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767 (1980); *In re Grand Jury Investigation*, 545 F.2d 385, 388 (3d Cir. 1976); *In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975); *In re Sadin*, 509 F.2d 1252, 1256 (2d. Cir. 1975)). Locally, V.I. R. CIV. P. 1-3(b) codifies this constitutional maxim.[3] Therefore, although the Superior Court has the authority to

notice of the requirement." V.I. R. CIV. P. 1-3(b) (emphasis added). Sanctions the Superior Court imposes under both its statutory and inherent authority must adhere to this notice and hearing guideline. Therefore, in this context, we find the government is entitled to due process.

[3] "No sanction, penalty, or other disadvantage may be imposed for noncompliance with any requirement that is not specified in these Civil Rules, the Virgin Islands Code, or in the law of the Virgin Islands, unless the Superior Court has issued an order providing the parties in the action with actual notice of the requirement." V.I. R. CIV. P. 1-3(b).

impose a fine on any disobedient litigant, it must first provide the offender with notice of the violation and an opportunity to explicate the offender's noncompliance.

Here, the D.O.J. argues that 4 V.I.C. § 243(4) is inapplicable because it did not violate any existing court order warranting the imposition of a penalty for civil contempt. Similarly, the D.O.J. asserts that, if the fine was imposed under criminal contempt, the Superior Court failed to provide any mechanism of due process before imposing the sanction. Thus, under either civil or criminal contempt, the fine violates established legal principles.

A. CIVIL CONTEMPT

"It is well-established that a non-dischargeable monetary fine assessed in conjunction with a contempt finding may nevertheless be civil rather than criminal when the court imposes a fine to compensate itself for the harm it suffered from the contemnor's noncompliance." *In re Meade*, 63 V.I. at 686 (citing *Walters v. Walters*, 56 V.I. 471, 476 (V.I. 2012)). *See United States v. Dowell*, 257 F.3d 694, 699-700 (7th Cir. 2001) ("[T]his court may impose a fine as a sanction for civil contempt to compensate this court for the costs associated with [the contemnor's] noncompliance."); *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 737-38 (7th Cir. 1999) ("A court's civil contempt power rests in its inherent limited authority to enforce compliance with court orders and ensure judicial proceedings are conducted in an orderly manner. To hold a party or witness in civil contempt, the district court must . . . [have] a decree . . . which sets forth . . . an unequivocal command which the party [or witness] in contempt violated.") (internal citations omitted)).

In *People v. Laurencin*, 48 V.I. 304, 305-06 (V.I. Super. Ct. 2007), the court sanctioned an attorney's absence for jury selection. After his failure to appear or file a motion to continue the

case, the court issued an order to show cause as to why the attorney should have not been held in contempt. *Id*. at 305. Although the attorney proffered several reasons for his absence at the hearing on the order to show cause, the court deemed them insufficient and imposed a $1000 fine- half the cost of empaneling the jury. The *Laurencin* court noted that it had admonished the same attorney in the past for the same conduct without imposing a sanction on him. *Id*. at 305-06.

The *Meade* court enumerated a three part test to determine civil contempt- A party's clear and convincing noncompliance with an order that was clear and unambiguous would result in civil contempt, if the party's noncompliance was not resolved through diligent attempts to comply in a reasonable manner. 63 V.I. at 685 ("A party may be held in civil contempt for failure to comply with a court order if (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner."); *see also In re Burke*, 50 V.I. 346, 352 (V.I. 2008) (same). The test requires finding all three elements to establish civil contempt.

Here, the Superior Court imposed the fine to recover the costs of empaneling the jury pool. Although the purpose of the fine aligns with the purpose of civil contempt, the facts of this case do not comport with the three part test. First, the Superior Court did not issue a clear and unambiguous order which the D.O.J. explicitly and convincingly violated. Importantly, the D.O.J. did not make a diligent attempt to reasonably correct its noncompliance because it was never noncompliant with any existing Superior Court order. The D.O.J. acted within its rights when it sought the dismissal for the case, purported because it lacked the evidence for a successful prosecution of Gomez. Accordingly, because no definitive court order existed for the D.O.J. to

violate, the fine fails to comport with the standards elucidated in *Meade* and, therefore, cannot constitute civil contempt.

Lastly, unlike in *Laurencin*, the Superior Court failed to provide notice and a hearing before it imposed the fine. More succinctly, the court failed to issue an order to show cause and subsequently hold a hearing before it imposed the $3000 fine on the D.O.J. Although it may be argued that notice of the fine and an opportunity to explain were given when D.O.J. dismissed the case, the case law suggests adequate notice requires prior notice that the court is considering imposing the sanction before its imposition. *See, Cole v. U.S. Dist. Court for Dist. of Idaho,* 366 F.3d 813, 821 (9th Cir 2004) (stating that the district court clearly erred when it disqualified an attorney from representing his client pro hac vice because the court failed to provide the attorney with notice that he might be disqualified for failing to file a required affidavit before it disqualified him.); *Laser*, 399 F.3d at 1113-14 (stating that the district court abused its discretion when it failed to notify an attorney that it was considering specific sanctions before it imposed them.). Here, the Superior Court never informed D.O.J. that it was contemplating sanctions before it imposed the fine. The court told D.O.J. of the fine and then subsequently imposed it. Therefore, even if the fine was characterized as civil contempt, it must be vacated because the court did not adhere to constitutional perquisites before its imposition.

B. CRIMINAL CONTEMPT

Criminal contempt occurs when the court vindicates its own authority through punishment. *Walters*, 56 V.I. at 476 n.1. However, before the court may impose criminal contempt, it must

afford the contemnor due process in the form of notice and a hearing. *Id*. *See Laser*, 399 F.3d at 1110 (explaining that criminal contempt may require greater procedural safeguards beyond notice and a hearing including an independent prosecutor, proof beyond a reasonable doubt, or a jury trial.); *In re Rogers*, 56 V.I. 325, 335 (V.I. 2012) (explaining that criminal contempt is a crime in the ordinary sense and criminal penalties may not be imposed on someone who has not been afforded protections that the Constitution requires for such criminal proceedings) (citing *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)). *See also Hicks v. Feiock*, 485 U.S. 624, 632 (1988) (describing some of the protections that may be required in a criminal contempt proceeding, including the assistance of counsel, the prohibition on double jeopardy, the right to present a defense, the privilege against self-incrimination, and the burden of proof beyond a reasonable doubt); *Frank v. United States*, 395 U.S. 147, 150 (1969) (explaining that a court may not impose a sentence more than six months for criminal contempt unless the defendant has a jury trial)).

In *In re Jessen*, 738 F.Supp. 960, 962-63 (W.D.N.C. 1990), the district court held that a defendant had sufficient notice of a criminal contempt charge when the court sent two notices to the defendant- one after the government's initial application to hold the defendant in contempt and an amended one following the government's request to postpone the original proceeding.

Here, the Superior Court's January 9, 2018 order states precisely that notice must be given prior to a sanction being imposed. "Among the types of costs which can be imposed on an attorney or party for needlessly exacerbating litigation expense is the fee of empaneling the jury, as *long as advance notice of this consequence has been provided*." (J.A. 10). However, the Superior Court failed to afford the D.O.J. any advance notice before it imposed the fine. The fine was imposed simultaneously when the court granted the D.O.J.'s motion to dismiss on January 2, 2018.

Accordingly, if the fine is characterized as criminal contempt, it was imposed without due process and must be vacated.

V. CONCLUSION

We acknowledge the Superior Court's desire to maintain order and punctuality within the judiciary. We also urge the D.O.J. to be more diligent in its duties and be cognizant of the needs of the cases to be timely prosecuted. However, although the court has statutory and inherent authority to ensure compliance with its orders, the fine the Superior Court imposed deprives the D.O.J. of due process as required by the Constitution and the Virgin Islands Rules of Civil Procedure. Moreover, the fine fails to meet the standards for either civil or criminal contempt. Accordingly, we remand the case with instructions to the Superior Court to vacate the $3000 fine but we do not address what may have occurred had the Superior Court followed the proper procedure before imposing the $3000 fine.

Dated this 30th day of August 2018

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court