IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

RICHARD KEITH ALAN, II,

Appellant,

v.

CASE NO. 1D08-3012

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed May 26, 2010.

An appeal from the Circuit Court for Leon County.
Kathleen F. Dekker, Judge.

Richard Keith Alan II, pro se, West Palm Beach.

Bill McCollum, Attorney General, and Michael T. Kennett, Assistant Attorney General, Tallahassee, for Appellee.

HAWKES, C.J.

Richard Keith Alan, II, appeals a judgment of indirect criminal contempt and his resulting incarceration. Because the trial court did not abuse its discretion or otherwise err in adjudicating and sentencing Mr. Alan, we affirm its ruling.

## Facts

The day after her selection to the jury in a proceeding in which Mr. Alan served as defense counsel, one of the jurors asked the court to excuse her from further participation in the proceeding, claiming to have a medical condition that prevented her continued presence on the jury. As a result, the court excused the juror and substituted an alternate juror in her place. Immediately after the juror was excused from the jury, Mr. Alan accused her of having been "tampered with" and made an oral request that the court permit him to obtain her medical records. The court expressly denied this request calling it "nothing short of outrageous."

At the close of trial, Mr. Alan filed a document entitled "[Defendant's] Motion for New Trial, Notice of Intent to Interview Jurors, and Request for Extension of Time to File Motion for Permission to Interview Jurors." Two days after filing the motion (and without receiving authorization from the court), Mr. Alan contacted the juror via telephone.

The juror testified to the content of that conversation as follows:

> [Mr. Alan] told me that he had got permission from the Judge to contact me and to contact some other jurors. And basically he said he had a couple of more questions to ask me. And some of the questions he wanted to find out about my medical information . . .
>
> He wanted to get my medical records. But I told him that he couldn't get my medical records. But the Judge could

> get my medical records. I would give the Judge permission to get my medical records, but I didn't feel that he had permission to get my medical records . . . So, I wasn't comfortable with him getting my medical records.
>
> Yes, [the phone call upset me]. I was crying, and I went in the restroom. Because my son was there and it was – I was just like so upset and – because I didn't mind the Judge getting my medical records. I had no problem with her getting them.
>
> The only thing I came up [to the courthouse] to see, did he have permission from the Judge. Because I had told Mr. Alan that I was going to come up here to see if he had permission from the Judge.

Upon learning the nature of Mr. Alan's contact with the juror, the court charged him with criminal contempt for willfully and knowingly contacting her "without court authorization in violation of the Court's ruling." Mr. Alan was adjudicated guilty and sentenced to five months and twenty-nine days in jail.

## Applicable Statutes

Both the Rules Regulating the Florida Bar and the Florida Rules of Criminal Procedure set forth the specific procedures an attorney must follow if he wishes to communicate with a juror.

Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar provides:

A lawyer shall not:

> (4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court. (emphasis added).

Florida Rule of Criminal Procedure 3.575 provides:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview. (emphasis added).

Pursuant to these rules, attorneys who suspect juror misconduct are permitted to interview individual jurors, but may do so only after they file a notice of intent to interview and the presiding court enters an order authorizing the interview. See Ramirez v. State, 922 So. 2d 385 (Fla. 1st DCA 2006) (explaining the dichotomy between Rule 4-3.5(d)(4) and Rule 3.575). An attorney who interviews a juror regarding suspected juror misconduct without receiving prior authorization from the presiding court risks facing criminal contempt charges. Id.; see also §38.22 Fla. Stat. (2008) (stating Florida courts have inherent authority to punish contempts against it "whether such contempts be direct, indirect, or constructive"); and see Aaron v. State, 345 So. 2d 641, 642-43 (Fla. 1977) (holding such inherent authority enables courts to "maintain order and dignity in court proceedings, and to punish acts which obstruct the administration of justice").

**Analysis**

Mr. Alan made an oral request that the court permit him to obtain the juror's medical records. The court expressly denied this request, calling it "nothing short of outrageous." Despite the court's express denial, Mr. Alan proceeded to undermine the court's authority by (1) contacting the juror in an effort to obtain her medical records; (2) falsely representing to the juror that he had obtained a court order permitting juror interviews; (3) falsely claiming the juror was required to turn over her medical records to him; and (4) generally harassing the juror to the

point that she deemed it necessary to bring his actions to the court's attention. Clearly, the court's statement that Mr. Alan's request was "outrageous" and therefore denied, taken in context, relates directly to Mr. Alan's ability to seek the juror's medical records. Such facts, when read in conjuncture with rule 3.575, Florida Rules of Criminal Procedure, indicate the court was well within its authority to hold Mr. Alan in criminal contempt for his actions.[1]

Moreover, although Mr. Alan filed a document titled "[Defendant's] Motion for New Trial, Notice of Intent to Interview Jurors, and Request for Extension of Time to File Motion for Permission to Interview Jurors"; the circuit court did not, at any time, enter an order granting him permission to interview any juror. In fact, the record indicates the motion contained neither a legal nor factual basis for his request to interview the juror. This is demonstrated by the circuit court's denial of the motion, in which the court stated:

> [The motion] is completely confusing and incomplete as to [the juror]. It never names her. A general description of a juror with no name or time or date of anticipated interview under the criminal rule, does not meet the terms or spirit of the rule of professional conduct.

1 Courts are granted great discretion in their inherent power to punish those who commit contempt. Orr v. Orr, 192 So. 466 (Fla. 1939). While this Court might not have entered the same sentence, we are not free to reweigh evidence and make such a determination absent a clear abuse of that discretion. The circuit court's sentence was not totally disproportional to the actions for which Mr. Alan was held in contempt. Citizens showing up for jury duty need to be protected from harassment and unnecessary invasions into their privacy.

> Moreover, the rule requires the lawyer have a reason to believe grounds for a challenge exist. No such grounds were alleged, nor do they exist. [Mr. Alan] does not even appear to request an interview of the juror described in his motion.

## Conclusion

Because the record supports the circuit court's decision to hold Mr. Alan in criminal contempt for improperly interviewing the juror, we affirm the trial court's ruling finding Mr. Alan guilty of criminal contempt.

AFFIRMED.

WOLF, J., CONCURS; BENTON, J., CONCURS IN PART AND DISSENTS IN PART.

BENTON, J., concurring in part and dissenting in part.

We review contempt orders for abuse of discretion. See Thomas v. State, 752 So. 2d 679, 685 (Fla. 1st DCA 2000). But a "'judge cannot base contempt upon noncompliance with something an order does not say.' Under such circumstances, the standard of review is legal error, not abuse of discretion." DeMello v. Buckman, 914 So. 2d 1090, 1093 (Fla. 4th DCA 2005) (quoting Keitel v. Keitel, 716 So. 2d 842, 845 (Fla. 4th DCA 1998)).

More than a year after appellant appeared as defense counsel in a criminal trial, the circuit court found him in contempt of court, and sentenced him to five months and twenty-nine days in jail. In my view, except insofar as it rests on defense counsel's a) getting to court late the day the criminal trial began and b) misrepresenting a court order in the course of a post-trial telephone call, the adjudication of contempt should be reversed, and the case should be remanded for resentencing.

The day the criminal trial began appellant was an hour and thirteen minutes late for court because he decided to go personally to another court (this one) in an (unsuccessful) effort to block the start of trial. The trial judge was well within her rights to adjudicate him in contempt for this deliberate tardiness. See State v. Harwood, 488 So. 2d 901, 902 (Fla. 5th DCA 1986) (concluding that if "the court was of the opinion that the failure of the assistant state attorney to appear on time

was an offense against the authority or dignity of the court, the procedure prescribed by Florida Rule of Criminal Procedure 3.830 for direct criminal contempt should have been followed"); James v. State, 385 So. 2d 1145 (Fla. 3d DCA 1980) (noting that failure of counsel to appear at a regularly set trial court hearing he had a duty to attend could constitute a direct criminal contempt); see also Smith v. State, 954 So. 2d 1191, 1194 (Fla. 3d DCA 2007) ("[D]irect criminal contempt may be based upon . . . an act which is facially contemptuous.").

But the conduct that the learned trial judge seems to have found most deserving of punishment—and which became the basis for four of the five separate contempt specifications she drew—occurred in the course of a telephone call that defense counsel made, after the criminal trial in which he represented one of the defendants was over, to a woman who did not serve on the jury, although she had been initially selected. At oral argument, the state conceded that the predicate for two of the specifications based on the telephone call had inadequate support in the record.

Upon learning of the telephone call, the trial judge charged Mr. Alan with indirect criminal contempt, on the following grounds:

> a. Defendant wilfully and knowingly contacted Juror Gwendolyn Wiggins without court authorization in violation of the Court's ruling.
>
> b. Defendant wilfully and knowingly misrepresented to Juror Gwendolyn Wiggins that he had

> the Court's permission or order which allowed him to interrogate Ms. Wiggins.
>
> c. Defendant wilfully and knowingly interrogated Juror Wiggins against her will, or failed to cease contact when she clearly expressed her participation in the interrogation was not free and voluntary.
>
> d. Defendant wilfully and knowingly sought production from Juror Wiggins[] of her medical records or interrogated her further about them, in direct contravention of the Court's ruling.
>
> . . . .
>
> e. Defendant wilfully and knowingly failed to appear timely for trial with his client on 12/11/06 at 9:00 a.m.

(Emphasis supplied.) The final specification (e), added almost as an afterthought,[2] was the only one not based on the telephone call.

The trial judge found that Mr. Alan misrepresented to Ms. Wiggins that he had express judicial permission to contact her regarding her medical records. Such an intentional misstatement constitutes indirect criminal contempt.[3] See Ex parte Crews, 173 So. 275, 278-79 (Fla. 1937) (concluding that an information charging that Mr. Crews approached a defendant and "represented and pretended" that he "could influence the decision and judgment of the court by [] payment of money"

[2] The specification charging Mr. Alan with failure to appear timely with his client on the first day of trial could have been the basis for a finding of direct criminal contempt at the time, see State v. Harwood, 488 So. 2d 901, 902 (Fla. 5th DCA 1986), but the trial judge did not treat it as contempt of court until after learning of Mr. Alan's telephone call to the venireperson.

[3] The specification that Mr. Alan interrogated the venireperson against her will appears to be another way of alleging that he misrepresented his authority.

sufficiently alleged contempt); Eubanks v. Agner, 636 So. 2d 596, 598 (Fla. 1st DCA 1994) ("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.").

One species of "indirect criminal contempt concerns conduct that has occurred outside the presence of the judge that violates a court order." Via v. State, 633 So. 2d 1198, 1198 (Fla. 2d DCA 1994)). See also K.M. v. State, 962 So. 2d 969, 970 (Fla. 4th DCA 2007) (disposition listing juvenile's probation requirements was not a "valid court order" that could support finding juvenile in indirect criminal contempt after juvenile's arrest for violating probation by breaching curfew); M.W. v. Lofthiem, 855 So. 2d 683, 685 (Fla. 2d DCA 2003) ("Neither does M.W.'s admission to prior use of marijuana constitute indirect criminal contempt unless the use violated a valid court order that was in effect at the time he used the drug."); Shields v. Shields, 636 So. 2d 169, 170 (Fla. 2d DCA 1994) ("In an indirect criminal contempt proceeding, the movant must prove, beyond a reasonable doubt, that the defendant willfully violated the court order."). Accord Baker v. United States, 891 A. 2d 208, 215 (D.C. Cir. 2006) ("We . . . hold that the elements of criminal contempt in these circumstances may be satisfied upon a showing of: (1) conduct committed in the presence of the court that disrupts the orderly administration of justice; or (2) willful disobedience of a court order,

committed outside the presence of the court." (emphasis in original)).

The court order violated need not have been reduced to writing. Indirect criminal contempt can be based on noncompliance with an oral order when "an individual acknowledges understanding a court order, and disobedience of it." First Midwest Bank/Danville v. Hoagland, 613 N.E. 2d 277, 284 (Ill. App. Ct. 1993) (cautioning courts to "use extreme caution in holding an individual in indirect civil contempt of court based upon the violation of a court order not found in the court record" because "[h]olding an individual in contempt of court is a drastic remedy, especially where the sanction involves incarceration of the alleged contemnor").

Appellant was found guilty of two specifications in the present case which alleged he violated a court order.4 When—after the prospective juror mentioned various medical problems—the trial court allowed a belated "back strike" and excused her, defense counsel voiced the (apparently groundless) suspicion that she had been "tampered with," and moved for a three-hour "stay" in order to obtain her

[4] Incidentally, it is not clear that a court order is ever required in order for counsel to speak to a venireperson excused from jury service. A court order is not even required for counsel to speak to a juror once the trial is over if counsel follows "the alternative procedure under Rule Regulating The Florida Bar 4-3.5(d)(4), which allows an attorney with 'reason to believe that grounds for such challenge may exist' to interview a juror or jurors to determine whether the verdict may be subject to legal challenge after merely 'fil[ing] in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed.'" Ramirez v. State, 922 So. 2d 386, 389 (Fla. 1st DCA 2006).

medical records. The trial judge ruled that defense counsel's "claim and request . . . is nothing short of outrageous, and that is denied." But the trial court did not order defense counsel not to contact the prospective juror or any other venireperson. Since the only request addressed to the court was for a "stay" or continuance of the proceeding, the request for a "stay" or continuance was the only request that was denied. At oral argument, the State conceded that the trial court's ruling did not, if intended to prohibit contact, constitute an order "express enough to survive scrutiny on appeal."

Since the evidence did not prove beyond a reasonable doubt that appellant violated a court order, he was improperly adjudicated in contempt on that basis. Because other grounds were proven, the case should be remanded for resentencing[5] as punishment for only those grounds that were proven.

[5] A remand for resentencing would make it unnecessary to reach Mr. Alan's contention that the trial court abused its discretion in imposing the sentence now under review for reasons extraneous to the case.