Circuit Court for Baltimore County
Case No. 03-C-17-005437

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1409

November Term, 2020

MELISSA JERRO-HENCKEN

v.

JOHN HENCKEN

Fader, C.J.,
Zic,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: December 27, 2021

We are asked to determine whether the Circuit Court for Baltimore County erred when it held the appellant, Melissa Jerro-Hencken, in constructive civil contempt for failing to make five items of personal property available to the appellee, John Hencken, as ordered by the court's judgment of absolute divorce. Because the circuit court did not satisfy the requirements of Rule 15-206(e) to conduct an on-the-record examination of Ms. Jerro-Hencken and determine whether she had knowingly and voluntarily waived her right to counsel, we must reverse.

BACKGROUND

Ms. Jerro-Hencken was granted a divorce from Mr. Hencken by a judgment of absolute divorce entered on March 13, 2020. Two provisions of the judgment that concern five items of personal property are relevant here. First, in dividing the parties' non-marital property, the court provided: "Father shall keep the Civil War era cavalry sabre, two small oil paintings of street scenes, and gold family crest ring." Second, in dividing the parties' marital property, the court provided: "Father shall keep the Gypsy painting within a gold frame." We will refer to these five items collectively as the "Items."

In June 2020, Mr. Hencken filed a petition for contempt in which he asserted that Ms. Jerro-Hencken had willfully disobeyed the divorce judgment by failing to turn over, among other things, the Items. Mr. Hencken asked that the court find Ms. Jerro-Hencken in contempt and "[i]ssue an Order incarcerating [her] until [she] purges herself by disclosing the whereabouts of the missing items and return[s] them to their rightful owner[.]"

The court issued a show cause order, which included the advisements required by Rule 15-206(c)(2)(C) when incarceration is sought, including that Ms. Jerro-Hencken had a right to a lawyer, benefits of having a lawyer, the potential availability of representation by the Public Defender, and a warning that if she were to appear at the hearing without counsel "the judge may find that you have waived your right to a lawyer, and the hearing may be held with you unrepresented by a lawyer." In August 2020, Ms. Jerro-Hencken, who was self-represented at the time, filed a response to Mr. Hencken's petition.

The court held a hearing on Mr. Hencken's petition, along with other matters, in December 2020. Ms. Jerro-Hencken appeared without counsel, which the court referenced only twice. First, at the outset of the hearing, the court asked, "you are representing yourself in this proceeding, correct?" to which Ms. Jerro-Hencken responded, "Yes, sir." Then, after a brief break later in the proceeding, the court again asked, "[y]ou are representing yourself in this, in this matter, correct?" and Ms. Jerro-Hencken responded, "Correct." The court did not make any inquiry into whether Ms. Jerro-Hencken was aware of her right to counsel, whether she intended to waive that right, or whether any such waiver was knowing and voluntary.

At the hearing, Mr. Hencken presented testimony from two witnesses: (1) the trustee appointed to sell the marital home, who testified that the Items were in the home at the time of the divorce and that Ms. Jerro-Hencken was the only person with access to the house; and (2) Mr. Hencken, who testified that he had not received the Items and believed

that Ms. Jerro-Hencken still had them. Ms. Jerro-Hencken did not testify or present any other evidence.

Following the hearing, the court held Ms. Jerro-Hencken in contempt. The court concluded that Ms. Jerro-Hencken had possession or control over the Items and that her failure to provide Mr. Hencken with access to them violated the divorce judgment. The court ordered Ms. Jerro-Hencken to turn the Items over to Mr. Hencken or his counsel by January 18, 2021 and provided that if she did not, "the Court will hold further hearings on the issue of damages and/or incarceration of Ms. Jerro-Hencken for Contempt of Court."

On January 11, 2021, Ms. Jerro-Hencken, newly represented by limited purpose counsel, filed a motion to alter or amend pursuant to Rule 2-534. In the motion, Ms. Jerro-Hencken requested that the contempt order be set aside both because she was prejudiced by being self-represented at the hearing and she was unable to comply with the order because she did not have the Items. On February 10, 2021, the court denied Ms. Jerro-Hencken's motion. Ms. Jerro-Hencken filed this timely appeal two days later.

DISCUSSION

"[T]his Court will not disturb a contempt order absent an abuse of discretion or a clearly erroneous finding of fact upon which the contempt was imposed." *Kowalczyk v. Bresler*, 231 Md. App. 203, 209 (2016). A trial court abuses its discretion when its decision encompasses an error of law, *Schlotzhauer v. Morton*, 224 Md. App. 72, 84-85 (2015), which this Court reviews without deference, *Walter v. Gunter*, 367 Md. 386, 392 (2002).

Ms. Jerro-Hencken raises three issues on appeal. First, she argues that she was denied the right to counsel when the court did not make the required inquiries into whether she (1) received notice of that right and (2) knowingly and voluntarily waived that right. Second, she contends that the contempt order was deficient. Third, she argues that the judgment of absolute divorce was too vague to form the basis for a finding of contempt. Because the circuit court did not satisfy the requirements of Rule 15-206(e) concerning waiver of counsel and because the order of contempt does not include a sanction and proper purge provision, we will reverse.

I. THE CIRCUIT COURT DID NOT COMPLY WITH THE REQUIREMENTS OF RULE 15-206(E).

As an initial matter, we must confront Mr. Hencken's contention that Ms. Jerro-Hencken failed to preserve her right-to-counsel argument by not raising it before the circuit court. "Ordinarily, the appellate court will not decide any . . . issue [other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]" *Johnson v. State*, 457 Md. 513, 527 (2018) (quoting Md. Rule 8-131(a)) (alteration in original). However, where the issue is waiver of a litigant's fundamental right to counsel, a court is "required to ensure that any waiver of the right is knowing and voluntary," regardless of whether the litigant raises that issue. *Smallwood v. State*, 237 Md. App. 389, 397 (2018). That is because "the right to counsel is 'absolute and can only be foregone by the defendant's affirmative intelligent and knowing waiver.'" *Id.* (quoting *Robinson v. State*, 410 Md. 91, 107 (2009)) (internal quotation marks omitted). In other words, in contrast with most other issues that arise in litigation, a litigant with a right to

counsel loses that right only by an express, knowing, and voluntary waiver of it, not just by failing to make an affirmative demand for it. As we will discuss, the record does not reflect any such waiver by Ms. Jerro-Hencken and, accordingly, we do not think she has failed to preserve her right to raise the issue on appeal. Moreover, "even if not preserved, we would choose to exercise our discretion under Rule 8-131(a) to consider [Ms. Jerro-Hencken's] claim." *Smallwood*, 237 Md. App. at 398.

Rule 15-206(e) provides a procedure that courts must follow when an alleged contemnor who faces the possibility of incarceration appears at a contempt proceeding without counsel. First, as applicable here, the court must "make certain" that the alleged contemnor received a notice that incarceration was being sought and of the attendant right to counsel, complete with the language provided in 15-206(c)(2)(C). Md. Rule 15-206(e)(2)(A). Second, "if the alleged contemnor indicates a desire to waive counsel, the court shall determine, after an examination of the alleged contemnor on the record, that the waiver is knowing and voluntary." Md. Rule 15-206(e)(2)(B). Third, "[i]f the alleged contemnor indicates a desire to have counsel" and the court verifies that the required notice was received, the court must "permit the alleged contemnor to explain the appearance without counsel," and determine whether "there is a meritorious reason for the alleged contemnor's appearance without counsel." Md. Rule 15-206(e)(2)(C). If so, the court must continue the action and advise the litigant of the need to obtain counsel. *Id.* If not, "the court may determine that the alleged contemnor has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing." *Id.*

Here, the court did not make any express inquiry into whether Ms. Jerro-Hencken received the required notice or desired to waive her right to counsel. Nonetheless, solely for the sake of argument, we will assume that: (1) the court implicitly ascertained that Ms. Jerro-Hencken had received the required notice; (2) the court implicitly ascertained that Ms. Jerro-Hencken desired to waive counsel; and (3) the court was permitted to make both of those findings implicitly. Even so, the court did not comply with the requirements of Rule 15-206(e)(2)(B) that it conduct an examination of Ms. Jerro-Hencken on the record and, based on that examination, determine that her waiver of counsel was knowing and voluntary. The sole discussion of Ms. Jerro-Hencken's self-represented status at the hearing was the two occasions on which the court confirmed that Ms. Jerro-Hencken was representing herself that day. The court did not inquire as to whether Ms. Jerro-Hencken desired to represent herself, did not ask any questions designed to elicit whether her self-representation was a knowing and voluntary decision, and did not make any determination on the record that any waiver was knowing and voluntary.

Mr. Hencken makes three alternative arguments as to why we should nonetheless conclude that the court complied with Rule 15-206(e): (1) the court could determine that Ms. Jerro-Hencken's waiver was knowing and voluntary by looking at the context in which the proceeding occurred, including that she had previously had counsel in the divorce proceeding; (2) the court could determine that Ms. Jerro-Hencken's waiver was knowing and voluntary because she appeared after receiving a notice from the court stating that appearing without counsel could constitute a waiver of the right to counsel; and (3) the

court conducted a sufficient on-the-record examination before determining that Ms. Jerro-Hencken had waived the right to counsel.

Mr. Hencken's contention that context could establish a knowing and voluntary waiver of the right to counsel is inconsistent with the language of the rule. "Rule 15-206(e) provides that an alleged contemnor . . . has to make a waiver, on the record, that is knowing and voluntary if the alleged contemnor proceeds without counsel." *Zetty v. Piatt*, 365 Md. 141, 160 (2001). The plain language of the Rule requires that the examination occur "on the record" and that the court make a determination that a waiver is knowing and voluntary. Absent compliance with those requirements, a contempt proceeding where incarceration is sought may not continue. *See Redmond v. Redmond*, 123 Md. App. 405, 417 (1998) (holding that "it is clear that [the contemnor] never waived his right to counsel, and that the contempt proceedings were therefore conducted in violation of that right").

Moreover, even if context from prior proceedings in a case could obviate the need to conduct an on-the-record examination of whether a waiver of counsel was knowing and voluntary, Mr. Hencken has not identified any such context here. That Ms. Jerro-Hencken had counsel at other stages of her divorce case—stages at which no one was seeking her incarceration—may suggest that she was generally aware of the value of counsel, but it does not establish that her mere presence without counsel at the contempt proceeding—at which someone was seeking her incarceration—constituted a knowing and voluntary waiver of her right in that proceeding.

Mr. Hencken's two remaining arguments fair no better. First, the plain text of Rule 15-206(e) mandates both that the court confirm that an alleged contemnor received the required notice and that the court establish on the record that a waiver of the right is knowing and voluntary. Mr. Hencken's contention that we should conclude that Ms. Jerro-Hencken's receipt of the notice alone could provide the basis for a determination that she had made a knowing and voluntary waiver of her right is inconsistent with the plain language of the rule. Second, the court's two questions confirming that Ms. Jerro-Hencken was representing herself are not a substitute even for confirming that she desired to represent herself, much less that she had made a knowing and voluntary waiver of her right to do otherwise.

Because the court did not conduct the on-the-record examination required by Rule 15-206(e)(2)(C) or determine that Ms. Jerro-Hencken had knowingly and voluntarily waived her right to counsel, we must reverse the circuit court's contempt order and remand for further proceedings.

II. THE CIRCUIT COURT ERRED IN ISSUING AN ORDER OF CONSTRUCTIVE CIVIL CONTEMPT WITHOUT A SANCTION.

For guidance on remand, we will also address Ms. Jerro-Hencken's second contention, which is that the court erred in issuing an order of constructive civil contempt that did not include a proper purge provision that provided an opportunity to avoid a sanction imposed to coerce compliance. In our recent decision in *Breona C. v. Rodney D.*, we held that "[a]n order holding a person in constructive civil contempt must satisfy certain basic requirements, including that it must: (1) impose a sanction; [and] (2) include a purge

provision that gives the contemnor the opportunity to avoid the sanction by taking specific action of which the contemnor is reasonably capable[.]" No. 299, Sept. Term 2021, slip op. at 1 (Md. Ct. Spec. App. Nov. 17, 2021).

Here, as discussed, the order of contempt did not impose any sanction on Ms. Jerro-Hencken and, as a result, did not include a proper purge provision that gave her the opportunity to avoid any such sanction. Mr. Hencken argues alternatively that the threat of future contempt proceedings itself constituted a sanction and that Ms. Jerro-Hencken cannot properly be heard to complain about the absence of a sanction, as it was to her benefit. We disagree on both points. A threat of future sanctions is a threat, not a sanction. And the absence of a sanction and, thereby, a proper purge provision, renders the order an improper civil contempt order that cannot be affirmed.[1] For that reason as well, we would have been required to reverse the circuit court's order of constructive civil contempt.

III. THE CIRCUIT COURT'S JUDGMENT OF ABSOLUTE DIVORCE WAS NOT SO VAGUE AS TO REQUIRE FURTHER PROCEEDINGS BEFORE A FINDING OF CONTEMPT COULD BE MADE.

Also for guidance on remand, we will address Ms. Jerro-Hencken's contention that the court could not properly find her in contempt of the divorce judgment because that

[1] We find less merit in Ms. Jerro-Hencken's contentions that the order lacked a proper purge provision because it did not contain the word "purge" and that it "sets out no affirmative act in [Ms. Jerro-Hencken's] power that would allow her to avoid being in contempt[.]" Although using the word "purge" to identify a purge provision certainly promotes clarity, we do not think it is a magic word that must be included if an order is otherwise clear. And here, the affirmative act required of Ms. Jerro-Hencken was clear: returning the Items to Mr. Hencken.

judgment did not impose any affirmative obligations on her with respect to the Items. Instead, she claims, the court was first required to hold additional proceedings, issue a new order to clarify what was required of Ms. Jerro-Hencken, and only if she failed to comply with that order could the court hold her in contempt. Mr. Hencken responds that because Ms. Jerro-Hencken had exclusive use and possession of the marital home at the time of their separation and divorce, and because the Items were at all times in the marital home, the order plainly instructs the only party with access to the property, Ms. Jerro-Hencken, to make the Items available to Mr. Hencken. We agree with Mr. Hencken.

"Before a party may be held in contempt of a court order, the order must be sufficiently definite, certain, and specific in its terms so that the party may understand precisely what conduct the order requires." *Droney v. Droney*, 102 Md. App. 672, 684 (1995). "Maryland courts will resolve any omissions or ambiguities in an order . . . in favor of a person charged with contempt on the basis of that order." *Chesapeake Outdoor Enters., Inc. v. Baltimore*, 89 Md. App. 54, 79 n.22 (1991). If, however, the order "clearly communicates" what conduct is required of the alleged contemnor, a finding of contempt may properly result. *See Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 450 (2008).

The requirements of the divorce judgment are not vague or ambiguous. In dividing the parties' marital and non-marital property, the judgment identified five items that Mr. Hencken was to keep. If Ms. Jerro-Hencken was in possession of those items, as the

court found she was,[2] the judgment clearly required her to turn them over to Mr. Hencken. No further proceedings or orders were required to clarify that.[3]

CONCLUSION

We hold that the trial court erred when it did not comply with the requirements of Rule 15-206(e)(2)(B) that it conduct an examination of Ms. Jerro-Hencken on the record and, based on that examination, determine that her waiver of counsel was knowing and voluntary. Accordingly, we will reverse the order of contempt and remand for further proceedings. In light of our decision to reverse the contempt order, we will also reverse the court's counsel fee order.

CONTEMPT AND COUNSEL FEE ORDERS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED; COSTS TO BE PAID BY APPELLEE.

[2] Although the court found that Ms. Jerro-Hencken was in possession of the Items, it did so only in the proceeding in which she was unrepresented without a proper determination that she had knowingly and voluntarily waived her right to counsel. As a result of our reversal of the contempt order, the court's factual findings made in support of it are vacated and are not binding on remand.

[3] Ms. Jerro-Hencken asks this Court to remand with instructions to transfer this matter to another judge. Absent a showing of bias, parties may not expect their case to be transferred on remand simply because they do not agree with the judge's rulings. *See Att'y Grievance Comm'n of Maryland v. Shaw*, 363 Md. 1, 11 (2001). Ms. Jerro-Hencken has not identified any basis of support for her request for this Court to direct the reassignment of this case and we decline to do so.