

SC99794

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI *EX REL.*

BETTY GROOMS

Petitioner/Relator,

v.

JUDGE STEVEN A. PRIVETTE

Respondent.

Petition for a Writ of Prohibition
from Oregon County Case No. 22AM-CC00024
and
Missouri Court of Appeals, Southern District, Case No. SD37707

BRIEF OF PETITIONER/RELATOR BETTY GROOMS

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JURISDICTIONAL STATEMENT

This is a petition for a writ of prohibition directed to the Respondent's attempts to hold Betty Grooms ("Betty"), the elected Clerk of the Circuit Court, in contempt of court for allegedly violating the Respondent's non-judicial administrative orders to compile a spreadsheet of criminal case information.

The Missouri Court of Appeals, Southern District, denied Betty's Petition for writs of mandamus and prohibition, filed there, on September 20, 2022. This Court issued its preliminary writ of prohibition on November 1, 2022.

This Court has general appellate jurisdiction under Mo. Const. Art. V, §3. This Court also has jurisdiction to hear this Petition for a writ of prohibition under Mo. Const. Art. V, §4.1, which provides: "The Supreme Court and districts of the Court of Appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the Supreme Court which may make appropriate delegations of this power."

STATEMENT OF FACTS

Exhibits 1 through 10 have been filed with this Court, comprising pages 1 through 60. References to the exhibits will be to the exhibit number and to page numbers within the sixty-page total.

On May 26, 2022 Judge Privette issued a non-judicial administrative order requiring Betty to prepare a spreadsheet of all criminal cases disposed of in Oregon County from January 1, 2019 to the present, to include the style and case number of each case, the date a complete cost bill was prepared, the date the cost bill was properly certified and filed

with the Office of the State Court Administrator (“OSCA”), and the expected amount of state reimbursement (Ex 8, p. 24 of the Exhibits).

On July 27, 2022 Judge Privette issued another non-judicial administrative order requiring Betty to show cause why she should not be held in contempt of court for allegedly violating the non-judicial administrative Order of May 26, 2022 (Ex 8, pp. 25-26). Betty had previously submitted a list of cost bills in criminal cases listing the case numbers, the names of the parties, the amount of the cost bills, the current balance due, the date the cost bills were submitted and the date payment was received (Ex 8, pp. 27-30). That spreadsheet was not acceptable to Judge Privette.

On August 5, 2022, Judge Privette appointed Heath Hardman, Assistant Prosecuting Attorney for Howell County, to prosecute the contempt citation against Betty (Ex 8, p. 31). During this period, Betty made two more attempts to comply with Judge Privette’s non-judicial administrative order to provide a spreadsheet of the criminal cases, with cost bills dated, and the amounts expected (One effort is included in Ex. 8, pp. 32-58). Some of the spreadsheets indicated the amounts of the cost bills and the fact that no payment had been received by the county (Ex 8, p. 29), or that Betty had not yet received a board bill from the Sheriff’s office (Ex 8, p. 30).

Judge Privette issued a Show Cause Order requiring Betty to appear before him and show cause why she should not be held in contempt of court, on August 29, 2022 (Ex 7, p. 1). On August 29, 2022, Heath Hardman filed the Motion for Contempt, attaching five exhibits (Ex 8, pp. 19-58). The docket report identified the Motion for Contempt as a “Motion for Civil Contempt” (Ex. 1, p. 2).

On September 2, 2022 Betty's attorney entered an appearance (Ex. 3, p. 5), filed a Motion to Dismiss (Ex 4, pp. 7-9) and a Motion for Change of Judge (Ex. 5, pp. 10-14), along with Betty's Affidavit (Ex. 5, p. 15).

On September 6, 2022 Judge Privette overruled Betty's Motion for Change of Judge, and Motion to Dismiss, and granted her Motion for a Continuance, rescheduling the case for hearing on September 19, 2022 (Ex. 1, p. 1).

Betty then filed a Petition for writs of prohibition and mandamus with the Missouri Court of Appeals, Southern District, which issued a Stop Order on September 12, 2022 (Ex. 9, p. 60), then quashed the Stop Order and denied the Petition for a writ of prohibition on September 20, 2022 (Ex. 10, p. 60).

Betty filed her Petition for writs of prohibition and mandamus with the Supreme Court on September 23, 2022, along with a list of exhibits and Suggestions of Law. After a Response by the Respondent, this Court issued its preliminary writ of prohibition on November 1, 2022, after which Respondent filed his Return on November 23, 2022.

POINTS RELIED ON

- I. A permanent writ of prohibition should issue prohibiting Judge Privette from prosecuting the contempt motion, because Judge Privette lacked authority and subject matter jurisdiction to hold Betty Grooms in contempt of court, in that there is no statutory or constitutional authority to enforce non-judicial administrative orders by contempt, and the Court's inherent contempt authority is limited to enforcement of judicial orders
 - *State ex rel. Barron v. Beger*, _____ S.W. 3d _____, 2022 WL 17475760 (Mo. banc 2022)
 - *Smith v. Pace*, 313 S.W. 3d 124 (Mo. banc 2010).
 - *State ex rel. Pulitzer Pub. Co. v. Coleman*, 152 S.W. 2d 640 (Mo. banc 1941)
 - *Osborne v. Owsley*, 264 S.W. 2d 332 (Mo. banc 1954)

- II. A permanent writ of prohibition should issue to prevent Judge Privette from hearing the contempt motion, because he is the chief witness and chief complaining party, barring him from also acting as the judge, and because he was required to grant Betty Grooms' timely Motion for Change of Judge pursuant to RSMo. §476.180, Supreme Court Rule 51.05, Supreme Court Rule 32.07 and Code of Judicial Conduct 2-2.11(a)(1), (2), (3), (4) and (5)
- RSMo. §476.180
 - Supreme Court Rule 51.05
 - Supreme Court Rule 32.07(a)
 - Code of Judicial Conduct Rule 2-2.11(A)

ORAL ARGUMENT REQUESTED

Petitioner/Relator Betty Grooms requests oral argument on her Petition for a writ of prohibition.

ARGUMENT

- I. **A permanent writ of prohibition should issue prohibiting Judge Privette from prosecuting the contempt motion, because Judge Privette lacked authority and subject matter jurisdiction to hold Betty Grooms in contempt of court, in that there is no statutory or constitutional authority to enforce non-judicial administrative orders by contempt, and the Court's inherent contempt authority is limited to enforcement of judicial orders**

A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted. *State ex rel. Key Insurance Company v. Marco A. Roldan*, 587 S.W.3d 638, 641 (Mo. banc 2019); *State ex rel. Barron v. Beger*, _____ S.W. 3d _____, 2022 WL 17475760 (Mo. banc December 6, 2022).

Respondent has focused on the merits of his claim that Betty failed to comply with his non-judicial administrative Order to prepare a spreadsheet. Should the parties ever have a hearing on the merits of those claims, Betty will dispute the assertions made by Judge Privette in his return and response filed with this Court. However, the purpose of the writ application is to determine whether Judge Privette had the authority and jurisdiction to hold Betty in contempt of court for allegedly violating his non-judicial administrative Order, and whether he was required to grant the Motion for Change of Judge.

Judge Privette has failed to cite any authority which permits a circuit judge to enforce his non-judicial administrative Orders through contempt proceedings. The dangers that would be created by such authority are obvious. Every employee of the court system subject to Judge Privette's general administrative authority under RSMo. 478.240 would work in fear of contempt proceedings. Vendors of office equipment could be held in contempt of court for failing to deliver equipment on time, or for failing to perform repairs required by their contracts. Judge Privette's interpretation of his contempt authority would make presiding judges absolute rulers of their circuits. It has already been determined that the administrative authority of the presiding judge (1) does not include the authority to disqualify other judges from hearing a certain case, (2) does not include the authority to transfer library funds for another use, and (3) does not include the authority to indefinitely suspend the Clerk of the Circuit Court. *Allsberry v. Flynn*, 628 S.W. 3d 392, 396-97.

Administrative authority is distinct from judicial authority. Judicial immunity does not extend to administrative Orders. *Allsberry v. Flynn* at p.398.

The inherent authority of any court to punish for contempt is limited to performance of the court’s judicial function, which is “the trying and determining of cases in controversy.” *Smith v. Pace*, 313 S.W. 3d 124, 130 (Mo. banc 2010). “The courts’ inherent power includes ‘those incidental powers [that] are necessary and proper to [ensure] the performance’ of the courts’ judicial function under the Constitution----‘the trying and determining cases in controversy’ ” . *Id.* The power to punish for contempt is conditioned upon the necessity of safeguarding the function of the court as a judicial tribunal. *State ex rel. Pulitzer Pub. Co. v. Coleman*, 152 S.W. 2d 640, 646-47 (Mo. banc 1941). “ The judicial power granted to the courts by the Constitution is the power to perform what is generally recognized as the judicial function----the trying and determining of cases in controversy. It includes those incidental powers which are necessary and proper to the performance of that function. The power to punish civil contempts, as above defined, is, for example, necessary to the existence of a court of equity, and the power to punish as contemnors those who actively interfere with the functioning of any court is equally necessary for its existence.” *Id.*

In *Osborne v. Owsley*, 264 S.W. 2d 332, 333-34 (Mo. banc 1954) this Court ruled that a prosecution for criminal contempt is not itself a criminal case but a proceeding inherent in the court----a proceeding *sui juris* (of one’s own right), holding: “***the power to punish for contempt is derived from the Constitution and is a part of the inherent judicial power of the courts—a power to perform what is generally recognized as the judicial function.” *Id.*

The general administrative authority of the presiding judge is distinct from her/his judicial authority. Violations of judicial Orders and judgments may be punished by civil or criminal contempt proceedings, for either direct or indirect contempt. Alleged violations of non-judicial administrative Orders of the presiding judge, or any judge, may not be punished by contempt proceedings. There is no inherent authority to enforce non-judicial administrative Orders through contempt proceedings. By definition, non-judicial administrative Orders are not the result of contested hearings conducted in accordance with constitutional due process rights.

There are two classes of contempt---civil and criminal, each class having two sub-categories---direct and indirect. Criminal contempt is punitive in nature and acts to protect, preserve and vindicate the authority and dignity of the judicial system and to deter future defiance. *State ex rel. Chassaing v. Mummert*, 887 S.W. 2d 573, 578 (Mo. banc 1994); *Smith v. Pace*, 313 S.W. 3d 124, 130 (Mo. banc 2010). Civil contempt is intended to benefit a party for whom relief has been granted by coercing compliance. *Id.* Here Judge Privette seeks to use contempt proceedings to coerce Betty into preparing a spreadsheet that meets the requirements of his non-judicial administrative Order. A direct contempt occurs in the immediate presence of the court or so near as to interrupt its proceedings while indirect or constructive contempt arises from an act outside the court that tends to degrade or make impotent the authority of the court or to impede or embarrass the administration of justice.

The Motion for Contempt was not designated as a criminal contempt motion as required by Supreme Court Rule 36.01(b) which provides “***and shall state the essential facts constituting the criminal contempt charged and describe it as such.” RSMo. §476.110

(3) provides the court with power to punish, as criminal contempt, persons guilty of “willful disobedience of any *process or order lawfully issued* or made by it” (emphasis added). RSMo. §476.150 provides “that nothing contained in RSMo. §476.110 to §476.140 shall be construed to extend to any proceeding against parties or officers, as for contempt, for the purpose of enforcing any civil right or remedy.”

Irrespective of whether this Court concludes that the Motion for Contempt is for civil contempt or for criminal contempt, there is no authority to enforce non-judicial administrative Orders by contempt proceedings. Under Judge Privette’s theory, Betty could be fined or imprisoned for failing to prepare a spreadsheet of court costs in criminal cases for four years in the manner ordered by Judge Privette.

Judge Privette lacked authority and jurisdiction to hold Betty in contempt for allegedly failing to comply with his non-judicial administrative Order.

II. A permanent writ of prohibition should issue to prevent Judge Privette from hearing the contempt motion, because he is the chief witness and chief complaining party, barring him from also acting as the judge, and because he was required to grant Betty Grooms’ timely Motion for Change of Judge pursuant to RSMo. §476.180, Supreme Court Rule 51.05, Supreme Court Rule 32.07 and Code of Judicial Conduct 2-2.11(a)(1), (2), (3), (4) and (5)

RSMo. §476.180 provides: “No judge of any court of record, who is interested in any suit *** shall, without the express consent of the parties thereto, sit on the trial or determination thereof.” Judge Privette is the chief complaining party, the chief complaining witness, and the judge deciding the case. He is an interested party and therefore cannot act as the judge. This is not a continuation of an underlying case. The contempt motion is the original case.

Supreme Court Rule 51.05 provides (a) that “a change of judge shall be ordered in any civil action upon the timely filing of a written application therefor by a party”, provided (b) “the application is filed within 60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer”. Subsection (e) provides “the judge shall promptly sustain a timely application for change of judge upon its presentation.” Judge Privette was obligated to grant the motion for change of judge even if it failed to establish just cause for the change. Subsection (a) provides: “the application need not allege or prove any cause for such change of judge and need not be verified.” In the event this Court concludes that the Motion for Contempt is a motion for criminal contempt, Supreme Court Rule 32.07(a) provides: “***a change of judge shall be ordered in any criminal proceeding upon the timely filing of a written application therefor by any party. The applicant need not allege or prove any reason for such change. The application need not be verified and may be signed by any party or any attorney for any party.”

Judge Privette was also required to grant the motion for a change of judge under Code of Judicial Conduct Rules 2-2.11(A)(1), (2), (3), (4) and (5). Rule 2-2.11(A) provides that a judge shall recuse himself from any proceeding in which the judge’s impartiality might reasonably be questioned, including, but not limited to any of the following circumstances:

- (1) the judge has a personal bias or prejudice or knowledge of facts that are in dispute that would preclude the judge from being fair and impartial;

- (2) a judge knows that the judge's spouse has more than a de minimis interest that could be substantially affected by the proceeding or is likely to be a material witness;
- (3) the judge knows that the judge's spouse has an economic interest in the subject matter in controversy;
- (4) the judge, while a judge, has made a public statement that commits or appears to commit the judge to reach a particular result in the proceeding; and
- (5) the judge served in governmental employment, and in such capacity participated personally and substantially as a public official concerning the proceeding or was a material witness concerning the matter.

Judge Privette clearly participated in this matter as a public official before the contempt motion was filed and is a material witness.

Judge Privette claims that the motion for a contempt order is for criminal contempt, not civil contempt. However, the motion for contempt fails to describe it as a motion for criminal contempt, as required by Supreme Court Rule 36.01(b), and he acknowledges that the contempt motion is being used to coerce Betty, not punish her.

The cases holding that a change of judge is not permitted in a contempt proceeding are premised on the existence of an underlying judicial proceeding which resulted in the judgment or order that the alleged contemnor violated. While ruling that Supreme Court Rule 51.05 did not apply in a contempt hearing, the Western District, in *Grissom v. Grissom*, 886 S.W.2d 47, 55 (Mo.App. W.D. 1994), ruled that Rule 51.05 applies to an independent suit with new issues, new parties and new relief, while a contempt proceeding "is not a separate suit. It is the court's enforcement of its prior judgment." See also *Reeves v. Moreland*, 577 S.W.2d 125, 130 (Mo.App. E.D. 1979) where the court ruled that the

contemnor had not cited any rule or statute that permitted disqualification of the judge in a criminal contempt proceeding, stating that if the contemnor's argument were accepted, a judge could not sit in any contempt proceeding involving a contemnor who was named as a defendant in the underlying restraining order, because the judge would have personal knowledge that the contemnor had acknowledge of the order.

That line of cases is premised on the existence of an underlying case resulting in a judicial Order or judgment.

In the case *sub judice*, there was no underlying case, and the motion for a contempt Order is the original case.

As a matter of law, Judge Privette was obligated to grant the Motion for Change of Judge. The Motion for Contempt is actually a motion for civil contempt based on the relief it is seeking (to coerce Betty to prepare a spreadsheet that complies with Judge Privette's non-judicial administrative Order) and because it was not designated as a motion for criminal contempt as required by Supreme Court Rule 36.01(b). Rule 51.01 applies. Supreme Court Rule 32.07(a) applies if this is a case for criminal contempt. RSMo. 476.180 applies. Code of Judicial Conduct Rules 2-2.11(A)(1), (2), (3), (4) and (5) apply.

Judge Privette is required to grant the Motion for Change of Judge. He had no discretion to deny it.

CONCLUSION

FOR THE FOREGOING REASONS, Petitioner/Relator Betty Grooms, respectfully moves the Court to make the preliminary writ of prohibition absolute and permanent.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Rule 84.06(c), Respondent’s Brief: (1) complies with the limitations contained in Rule 84.06(b); (2) was prepared using Microsoft Word in Times New Roman 13-point font; (3) contains 3438 words, determined by Microsoft Word; (4) was electronically served on all counsel of record through the CM/ECF system; and (5) was separately served via email, this 23rd day of December, 2022, on the interested parties noted below:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies a true copy of Respondent’s Brief was electronically filed and was served on all counsel of record electronically through Case.net and a separate copy was sent via email.

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