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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KELLY M. BRYAN,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G042970

(Super. Ct. No. 09HF1564)

O P I N I O N

Original proceedings; petition for a writ of certiorari to challenge an order of the Superior Court of Orange County, Matthew S. Anderson, Judge. Petition granted.

Law Offices of Ronald Richards & Associates and Ronald Richards for  
Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Matthew Lockhart, Deputy District Attorney, for Real Party in Interest.

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Petitioner Kelly Bryan, a pregnant woman, was called to testify at the preliminary hearing of her husband, who was charged with a violation of Penal Code section 273.5 (inflicting corporal injury on spouse or cohabitant), a felony. Bryan refused. The court found her in contempt on two consecutive days, and imposed two separate contempt fines of \$1,000 each. Because the order is not sufficiently particular in describing the alleged contempt and because the court failed to immunize Bryan prior to finding her in contempt in accordance with the procedures set forth in Penal Code section 1324, we grant Bryan's petition for writ of certiorari.

## FACTS

When called to testify about the crime allegedly committed by her husband, Bryan asserted her rights under the Fifth Amendment of the United States Constitution to not incriminate herself. The prosecutor stated, "Your Honor, I think, then, the People are going to offer use immunity. I have the documents prepared." The prosecutor had not previously talked to Bryan's counsel about this issue.

After a recess, counsel for Bryan stated: "My client is not going to testify in this case per her wishes. I understand that there was an agreement regarding immunity. She doesn't want to sign an immunity agreement. I understand we're supposed to have a hearing regarding the immunity agreement. She doesn't want to go into that immunity agreement or be involved in it. Basically wants to just exercise her right not to testify and invoke . . . Code of Civil Procedure [section] 1219, [subdivision]

(b).”<sup>1</sup> In response to questioning by the court, counsel indicated Bryan was aware of the potential consequences of contempt, namely a fine and/or community service.

After Bryan continued to refuse to answer questions, the court (orally) ordered her to answer the questions and indicated a refusal to do so would result in a contempt citation. The court observed, “All right. . . . I’ve received no offer of proof as to any incriminatory information that could be revealed. But I do know that before you retook the stand today, there were some discussions, I assume, . . . regarding a grant of immunity?” When informed that its understanding was correct, the court continued: “Under those circumstances, there is really no reason to conduct an immunity hearing. The court would normally issue an order to show cause in order to establish whether there was a basis for an immunity. But we’re really past that because if the witness is refusing to answer any questions being propound[ed], the only question is really contempt . . . . [¶] And so I do intend . . . to issue a contempt citation, which would be conducted immediately. This is a direct contempt of the court. It’s a refusal to comply with an immediate order of the court, which is to comply with these proceedings and answer questions legitimately propounded to the witness.”

After being satisfied that Bryan was the alleged victim of her husband’s domestic abuse, the court indicated it was “somewhat limited in what sanctions can be imposed. And she can’t be incarcerated at this point, which might happen to a different type of witness, the law does not allow that. [¶] But it does allow for the imposition of sanctions, monetary and community service sanctions can be imposed. The court is required to delay the imposition of that sentence by three days.”

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<sup>1</sup> Code of Civil Procedure section 1219, subdivision (b), provides: “Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault or domestic violence crime for contempt when the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime.”

The court asked counsel for Bryan: “Are you requiring or requesting a hearing on the contempt at this point, or are you simply going to concede that contempt exists?” Counsel for Bryan replied, “I will concede to the court, your Honor, that it exists.” The prosecutor requested the maximum penalty of \$1,000 and that Bryan be ordered back to court the next day. The prosecutor also indicated she would request an additional contempt citation under Code of Civil Procedure sections 1218 and 1219 if the witness continued to refuse to testify. The court imposed a \$1,000 fine and ordered Bryan to appear the next day.

The court’s unsigned minute order from November 30, 2009 stated in relevant part: “Witness, Kelly Bryan, sworn and testified”; “Witness, Kelly Bryan, asserts her 5th amendment right not to testify”; “Witness ordered to answer questions. Witness refuses to answer questions. Witness states she understand[s] consequences of not testifying”; “Witness refuses immunity”; “Counsel for witness concedes that contempt exists”; “Motion by People to impose maximum sanctions allowable per Code of Civil Procedure sections 1218 and 1219”; “Motion granted”; “Contempt hearing waived. Witness cited for contempt, \$1,000”; “Witness to pay \$1,000 per day sanction. Imposition of sanction is delayed for 3 days per law”; “Witness to pay \$1,000 sanction by 12-3-09”; and “Witness, Kelly Bryan, ordered to return 12-1-09 at 9:00 a.m.”

Bryan appeared as ordered on December 1, 2009. Bryan again refused to testify and the court found her to be in contempt of court. In response to the court’s description of the prior hearing — that counsel “simply conceded that the contempt citation should proceed” — counsel for Bryan stated, “Same position today, your honor.” The court imposed an additional \$1,000 fine. The court again noted the prosecutor’s request to grant immunity in the case. The court added: “You do need to understand that failure to make those fine payments is punishable by a separate contempt citation potentially for which you could be placed in custody.”

The court's unsigned minute order from December 1, 2009 stated in relevant part: "Witness, Kelly Bryan, sworn and testified"; "Witness Kelly Bryan invokes her 5th amendment rights. Witness ordered to answer questions. Witness refuses to answer questions. Witness states she understands consequences of not testifying"; "Witness refuses immunity"; "Counsel for witness concedes t[ha]t contempt exists"; "Motion by People to impose maximum sanctions allowed per Code of Civil Procedure[] sections 1218 and 1219"; "Motion granted"; "Witness to pay \$1,000 per day sanction. Imposition of sanction is delayed for 3 days per law"; "Witness to pay \$1,000 sanction by 12/4/09"; "Witness excused"; "Witness ordered to remain in the Courtroom"; "Attorney for Witness [moves] the Court to lower the sanction amount imposed by the Court"; "Motion denied"; "Motion by People to order witness to return this afternoon, denied"; "Motion by People to order witness to return tomorrow morning, denied"; "Witness Kelly Bryan ordered to return on 12/14/2009 at 8:30 AM in Department C5"; and "Motion by Defense for Witness Kelly Bryan not to be required to appear in Department C5 on 12/14/09, denied."

## DISCUSSION

"[P]resumptions or intendments may not be indulged in support of the [contempt] order. The findings and judgment are strictly construed to favor the accused." (*Blake v. Municipal Court* (1956) 144 Cal.App.2d 131, 136.)

Bryan identifies three grounds for relief in her petition: (1) the court's orders lacked specific findings sufficient to justify contempt citations; (2) the second contempt citation was improper because it was based on the same act of contempt as the first citation; and (3) fining Bryan \$2,000 is tantamount to undermining the policy embodied by Code of Civil Procedure section 1219, subdivision (b), in that the court

threatened a pregnant, financially-strapped woman with jail time if she did not pay the fine.

We agree with Bryan's first asserted ground for relief and therefore need not reach the other two contentions. "When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he or she be punished as therein prescribed." (Code Civ. Proc., § 1211, subd. (a).) A minute order may be sufficient to satisfy this requirement. (See *In re Rosen* (1973) 31 Cal.App.3d 71, 72, disapproved on other grounds in *Boysaw v. Superior Court* (2000) 23 Cal.4th 215, 221 (*Boysaw*).) The order adjudging a witness to be guilty of contempt need not recite "magic" words, such as "immediate view and presence of the court." (*Boysaw, supra*, 23 Cal.4th at pp. 220-221.) But the order ""is valid only if it recites facts with sufficient particularity to demonstrate on its face that petitioner's conduct constituted a legal contempt."" ( *In re D.W.* (2004) 123 Cal.App.4th 491, 500.)

The court's orders in this case fail to demonstrate facially that Bryan's conduct constituted contempt. The orders do not: (1) provide any background to allow a reviewing court to determine the context of the questioning; (2) identify the questions asked of Bryan that triggered her assertion of the right against self-incrimination; (3) indicate whether the court found Bryan's privilege to be applicable (if so, why; and if not, why not); (4) indicate whether the court actually immunized Bryan against the use of her testimony against her in a future proceeding (if so, why; and if not, why not); or (5) describe the chronology of the hearing (if immunity was ordered, did the refusal to answer questions come after such order). Facts constituting contempt have not been stated adequately in the orders. We decline to hold that counsel's concession that

“contempt exists” eliminates the requirement that a contempt citation include a sufficiently particular order.

There is another fundamental issue with regard to the contempt citations that is worth discussing. Although the record is not entirely clear, it appears the trial court considered Bryan’s refusal to enter into an immunity agreement with the prosecutor to be a sufficient reason to compel her testimony. Accordingly, in granting an order to show cause, we asked the parties to respond to the following additional questions: “Was petitioner granted immunity? If so, what was the scope of the immunity granted? If no immunity was granted, is there any other ground for denying petitioner her Fifth Amendment right not to testify?” We turn to these issues.

The Evidence Code describes the privilege against self-incrimination and the evidentiary burden of establishing such a privilege. “To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.” (Evid. Code, § 940.) “Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.” (Evid. Code, § 404.)

The Penal Code sets forth specific processes for compelling testimony under a grant of immunity in a felony case when a witness refuses to testify based on the privilege against self-incrimination. “In any felony proceeding . . . if a person refuses to answer a question . . . on the ground that he or she may be incriminated thereby, and if the district attorney of the county or any other prosecuting agency in writing requests the court, in and for that county, to order that person to answer the question . . . a judge shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered . . . and the court shall order the question

answered . . . unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he or she would have been privileged to withhold the answer given or the evidence produced by him or her, no testimony or other information compelled under the order or any information directly or indirectly derived from the testimony or other information may be used against the witness in any criminal case. But he or she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer . . . in accordance with the order.” (Pen. Code, § 1324.)<sup>2</sup>

There is no indication anywhere in the record that the process prescribed by statute for granting immunity was followed for compelling the testimony of Bryan, a witness in a felony case who refused to answer a question based on her Fifth Amendment right against self-incrimination. Rather than a written motion, the prosecutor orally asked the court to compel Bryan to testify.<sup>3</sup> Rather than setting a separate Penal Code section

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<sup>2</sup> The Penal Code does not provide a procedure for compelling testimony from a witness in a misdemeanor case, but instead authorizes courts to review and, if appropriate, approve voluntary immunity agreements between a witness and the prosecution. “In any misdemeanor proceeding in any court, if a person refuses to answer a question . . . on the ground that he may be incriminated thereby, the person may agree in writing . . . to testify voluntarily pursuant to this section. Upon written request . . . the court having jurisdiction of the proceeding shall approve such written agreement, unless the court finds that to do so would be clearly contrary to the public interest. If, after court approval of such agreement, and if, but for this section, the person would have been privileged to withhold the answer given . . . that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with such agreement, he answered . . . but he may, nevertheless, be prosecuted or be subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering . . . .” (Pen. Code, § 1324.1.)

<sup>3</sup> The People submit with their return a copy of unsigned, unfiled papers (including a petition for an order compelling testimony of a witness pursuant to Penal Code section 1324). The People imply in the return that the normal processes would



1324 hearing, the court extracted a concession from Bryan's counsel that she was in contempt for refusing to answer questions despite the prosecution's offer of use immunity as described in certain documents presented to Bryan.

The question presented, then, is whether Bryan's counsel could and did waive the right to have a separate hearing, based on a written request, to adjudicate whether Bryan should be ordered to answer the prosecutor's questions. The People assert that in light of counsel's apparent acquiescence in the court's short cut, a separate hearing was unnecessary. But where an order to compel testimony is based on a grant of immunity, a refusal to testify in a felony case pursuant to a claim of the privilege against self-incrimination is subject to the additional process of Penal Code section 1324, not merely Code of Civil Procedure section 1211, subdivision (a). It is clear that the People and the court did not comply with Penal Code section 1324 and thereby properly immunize Bryan against future prosecution. Absent ordering Bryan to testify *pursuant to Penal Code section 1324*, Bryan was not in contempt for resting on her asserted privilege against self-incrimination.

It is not clear from the record exactly what Bryan's counsel waived or agreed to in response to the court's questioning. It appears Bryan waived a hearing on whether contempt occurred. But there was no waiver of a hearing to determine whether the privilege applied and whether immunity should be given to Bryan. The court erred, perhaps because it confused the prosecutor's offer of a written immunity agreement (contemplated under Penal Code section 1324.1 as a voluntary arrangement between a witness and the prosecution) with the process required in felony cases under Penal Code section 1324. But even if the court had the misdemeanor procedure in mind, the witness testimony under the immunity agreement is given voluntarily, not under compulsion.

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have been followed had Bryan's counsel not "sandbagged" the issue by agreeing Bryan was in contempt.

## DISPOSITION

For the reasons set forth herein, the petition for writ of certiorari is granted. The matter is remanded to the Orange County Superior Court with directions to vacate and set aside its orders of November 30 and December 1, 2009, insofar as the court held Bryan in contempt of court and imposed fines of \$1,000 on each day. Petitioner shall recover her costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.