

**NOT DESIGNATED FOR PUBLICATION**

<b>HOUSING AUTHORITY OF NEW ORLEANS</b>	*	<b>NO. 2012-CA-1102</b>
	*	
<b>VERSUS</b>	*	<b>COURT OF APPEAL</b>
	*	
<b>TERRY SYLVESTER A/K/A TERRY WARNER</b>	*	<b>FOURTH CIRCUIT</b>
		<b>STATE OF LOUISIANA</b>

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APPEAL FROM  
FIRST CITY COURT OF NEW ORLEANS  
NO. 2012-20048, SECTION "A"  
Honorable Monique G. Morial, Judge

\* \* \* \* \*

**Judge Dennis R. Bagneris, Sr.**

\* \* \* \* \*

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love,  
Judge Madeleine M. Landrieu)

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**FEBRUARY 27, 2013**

**REVERSED**

Defendant/Appellant, Terry Sylvester A/K/A Terry Warner, a public housing tenant, appeals the judgment ordering her eviction for violating the Housing Authority of New Orleans' "One-Strike Policy" prohibiting criminal activity. Finding that the evidence was insufficient to prove criminal activity, we reverse the judgment.

#### **FACTS AND PROCEDURAL HISTORY**

The appellant, Ms. Sylvester, has resided at the Iberville housing development for about fifteen years.

On or about June 1, 2012, HANO filed a Rule for Possession of Premises against Ms. Sylvester, seeking eviction for criminal activity pursuant to La. R.S. 14:35, simple battery, and La. R.S. 14:34.2, battery of a police officer. HANO alleged that Ms. Sylvester violated the lease's "One-Strike Policy" that allows for the eviction of a public housing tenant for criminal activity, without the need for a grievance hearing. The simple battery charge maintained that New Orleans Police Department officers charged and arrested Ms. Sylvester on April 18, 2011, for simple battery after officers reviewed a surveillance tape and saw Ms. Sylvester

strike a co-tenant. The battery of a police officer charge alleged that on October 18, 2011, she was arrested for battery of a police officer.

Ms. Sylvester excepted to the battery charge against the police officer on the grounds of peremption. She represented that she was initially charged with battery against a police officer in 2004, not in October, 2011. She therefore claimed that HANO could not rely on the “One-Strike Policy” to evict her for that offense because it happened beyond the seven years required to evict for criminal activity under the policy. On the merits of the offense, she denied the charge and advised that the charge had been dismissed.

In her answer, Ms. Sylvester also denied the battery charge against her co-tenant, Shonnell “Bear” Pride. She asserted that her adult daughter had an on-going dispute with Ms. Pride. Supposedly, Ms. Pride and the daughter got into an altercation and Ms. Sylvester’s grandson was nearby. Ms. Sylvester said that when she went to retrieve the grandson, Ms. Pride physically attacked her. She averred that she merely defended herself. Ms. Sylvester added that Ms. Pride sprayed Ms. Sylvester and her grandchildren with pepper spray, which necessitated medical treatment at Tulane Hospital.

Ms. Sylvester also challenged that she was arrested. Instead, she contended that she only received a citation to appear in court and paid a \$500.00 bond. When she returned to court as instructed, the charges were dismissed.

The trial on the Rule for Possession was held on June 14, 2012. The trial court questioned HANO about the alleged criminal activity in light of the fact that the charges had been dismissed. HANO advised that it was their policy to move forward with the eviction when arrests are made, notwithstanding the outcome of the arrests. When counsel for Ms. Sylvester argued that HANO still had to prove

that criminal activity occurred, the trial court stated that proof of a criminal activity was that Ms. Sylvester was “charged with a battery.” The trial court added that, “there is a presumption that if they are charged by the police, that the criminal activity occurred, until they can prove that it did not.”

The trial court also asked to see the police report and inquired about the surveillance tape referenced in the report. Both counsel concurred that the tape did not show anything insofar as it could not identify the parties or their actions. Notwithstanding, after reading the police report, the trial court stated that Ms. Sylvester had to move because based on this police report, Ms. Sylvester “was the initiator of the physical altercation.” Defense counsel objected, noting that the police report could not be admitted into evidence because the police officer was unavailable to authenticate it.

Defense counsel also requested that the defense be allowed to call a witness who could challenge the credibility of the police officer who wrote the report. The trial judge denied the request and ordered the eviction. This appeal followed.

## **DISCUSSION**

Ms. Sylvester claims that the trial court erred in 1) granting the eviction because the evidence was insufficient to show that a lease violation occurred; 2) in finding that being the subject of a police report was sufficient proof of criminal activity; 3) improperly relying upon the contents of a police report that was not introduced into evidence; and 4) depriving Ms. Sylvester of due process by not allowing her to question witnesses or present evidence. All of these assignments of error essentially challenge the sufficiency of the evidence and the process relied upon by the trial court to evict. Based upon this Court’s review of the record, we

conclude that the trial court committed legal error in finding that the arrest created a legal presumption of criminal activity and in finding that HANO presented sufficient evidence upon which to evict Ms. Sylvester for criminal activity.

We agree with Ms. Sylvester that the contents of the police report constituted inadmissible hearsay. *See* La. C.E. art. 803(8)(b)(i). And even if the police report were admissible, its probative value was undermined by HANO's counsel's concession that the surveillance video referenced in the report could not identify the parties or their actions. The trial court's reliance on the police report was clearly misplaced.

More importantly, this Court finds nothing in either state or federal jurisprudence that supports the trial court's declaration that an arrest of a public housing tenant creates a presumption of criminal activity for purposes of eviction. Established case law has long provided that public housing tenants have a constitutionally protected interest in the continued occupancy of their unit and are entitled to due process before they can be divested of that interest. *See Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). Therefore, the trial court erred as a matter of law in determining that Ms. Sylvester's arrest created a presumption of criminal activity.

Where, as in the present case, trial court legal errors have tainted the fact finding process, the verdict below is not reviewed under the manifest error standard, and if the record is complete, the appellate court may make a *de novo* review of the record and determine the preponderance of the evidence. *Urban Homeowners' Corp v. Abrams*, 1996-1237, pp. 4-5 (La. App. 4 Cir. 3/26/97), 692 So.2d 673, 675.

Here, HANO argues that although Ms. Sylvester attests that the charges against her were dismissed, HANO does not need a conviction or resolution of the alleged criminal activity in order to evict. While this may be true, HANO still has the burden to prove by a preponderance of the evidence that criminal activity occurred, the ground upon which it sought to evict Ms. Sylvester. *See Kenneth and Alicen Caluda Realty Trust v. Fifth Business L.L.C.*, 2006-608, pp. 3-4 (La. App. 5 Cir. 12/27/06), 948 So.2d 1137, 1138; *see also* La.C.C.P. art. 4701.

In viewing the record before this Court, we conclude that HANO did not meet its burden of proof. HANO did not introduce the lease or any other documentary evidence to prove that Ms. Sylvester violated the lease agreement's "One-Strike Policy." HANO did not call any witnesses, including the purported victim or police officers, to support either battery charge. Instead, it relied on an inadmissible and unreliable police report and argument of counsel.

"We are a court of record. We are powerless to act on representations of counsel where they are not supported by the record." *Houston v. Chargois*, 1998-1979, p. 4 (La. App. 4 Cir 2/24/99), 732 So.2d 71, 73. In considering the paucity of the evidence presented at trial, HANO failed to prove criminal activity on the part of Ms. Sylvester; therefore, the trial court erred in granting the Rule For Possession. Accordingly, the judgment is reversed.

**REVERSED**