



Coordinated and Consistent Enforcement of Violations of Orders of Protection Can be a Crucial Tool in Stopping Domestic Violence

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Diligent enforcement of orders of protection can play an important role in decreasing future domestic violence and holding defendants accountable for their actions.

According to data analyzed by the NYS Division of Criminal Justice Services,¹ for the year 2008, there were 91 intimate partner homicides reported statewide. This figure represents an alarming 25% increase from 2007. Counties outside of New York City experienced a 45% increase.

While research indicates that homicides represent less than one half of one percent of all the family violence that is committed,² there is no reliable way to predict which case will become a homicide. Experts have found that domestic violence often consists of a pattern of behavior which escalates in severity. By the time victims have taken the strides to obtain either a civil or criminal order of protection, they have usually already been subjected to violence that has been spiraling upward. Many victims do not report the first time they are abused but, instead, experience numerous assaults or other types of abuse before they contact the police or petition for a protective order.³

As the above research demonstrates, cases in which a victim obtained either a civil order of protection or called the police, resulting in a criminal order, are cases in which the abuser's behavior has already increased in severity. In addition, defendants who choose to disregard a court order demonstrate that their behavior is more difficult to control than those who respect a court order. Repeated violations of orders of protections must be taken seriously, as they are an indication both that violence is increasing, potentially to a lethal state, and that it is being committed by a person with little respect for the rule of law.

Combined efforts from prosecutors, police and the courts can ensure the consistent enforcement of orders of protection.

Initial Investigations – Establish the Existence of an Order of Protection

During the initial and subsequent stages of *every* domestic violence investigation, it is crucial to identify whether an order of protection is in effect. Some ways to make this determination include:

- Ask the victim in every domestic violence case if there is an order of protection. This information is required, pursuant to CPL § 140.10(5), when police are completing the Domestic Incident Report (DIR). Be aware, that if the offender was recently arraigned, the victim may not be aware of the existence of an order because she was not present when it was issued, so don't stop there.
- Check the order of protection registry. Executive Law § 221-a established the computerized order of protection registry which is available to all law enforcement through NYSPIN.
- Obtain a copy of the order of protection from the victim, if available.⁴

When a victim states that an order of protection exists but does not have a copy and it does not appear in the registry,⁵ it is important to try to obtain information about the order from the victim. Inquire about when any arrest took place, the issuing court, date of issuance and the expiration date. If it is a Family Court order, also ask if she knows the name and agency of the law enforcement officer that served the order. This information could assist in verifying the existence of an order of protection.

Prosecutors should work with local courts to ensure they

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are promptly entering all orders into the registry and sharing copies of orders of protection with all local law enforcement and prosecutors.

The first step to effective enforcement of an order of protection in every case is to identify if an order of protection exists and gather all relevant evidence to establish a violation of an order.

Mandatory Arrest

Many states, like New York, recognized the importance of prosecuting violations of orders of protections by establishing mandatory arrest statutes. In New York, mandatory arrest applies when a defendant violates a stay away from the person provision or commits a family offense in violation of a valid order of protection.⁶ It is important to remind police that under CPL § 140.10(4)(c), “no cause of action for damages shall arise in favor of any person by reason of any arrest made” pursuant to mandatory arrest. Conversely, courts *have* held police departments liable when they responded to a scene and did not make an arrest upon a violation of an order of protection.⁷

When victims receive an order of protection, they are typically instructed by police and prosecutors that the defendant will be arrested if he violates any provision of the order. Studies have indicated that victims’ confidence in police and law enforcement response can lead to more reports of violence.⁸ Therefore, it is important when appropriate and reasonable cause exists, that police and prosecutors follow through with this promised action. Similar research has demonstrated “that victims who reported prior victimization and thought the criminal justice response was insufficient or endangered them are less likely to report subsequent victimizations.”⁹ Arrests in violation of order of protection cases could lead to increased reporting of violence, keeping both the victim and society safe from future harm.

Charging Considerations

The high rate of recidivism in domestic violence cases unfortunately means that there is a likelihood that some defendants are going to violate the terms and conditions of an order of protection. The charges available under criminal contempt in the second¹⁰ and first degree,¹¹ provide prosecutors with a unique opportunity for leverage while holding defendants accountable for their actions. When the existence of a valid order of protection is determined, many acts that only constitute misdemeanors in the absence of an order of protection, such as various menacing and harassment

charges,¹² can be enhanced by the addition of an E felony charge of criminal contempt in the first degree. Prosecutors can use the ability to bring both the misdemeanor charge for the underlying conduct and the felony charge for the violation, along with applicable stalking charges, as leverage in holding the defendant accountable for his criminal conduct.

In other cases there may only be a single violation that does not rise to the E felony level, but can still be charged under criminal contempt in the second degree. The establishment of a policy that charges contempt in the second degree for all violations of orders of protections will lay the groundwork for future prosecutions under contempt in the first degree pursuant to PL § 215.51(c). Consistent charging and convictions on criminal contempt in the second degree also assists with future bail applications and requests for surety hearings¹³ to determine if the defendant has forced the victim into posting bail.

Aggressive charging on both the felony and the misdemeanor contempt charges can play a critical role in reducing future recidivism.

Evidence-Based Prosecutions

There are many reasons why a victim may not cooperate with the criminal justice system. As a result, many prosecutors have proceeded with evidence-based prosecutions. While, it can be difficult to proceed on some specific charges without the victim’s testimony, contempt charges are strong candidates for a successful evidence-based prosecution. The court in *People v Gellineau* stated that the legislature’s major purpose in creating criminal contempt in the first degree “. . . was to prevent the great cost of domestic violence to society as a whole, and not only to the victim.”¹⁴

The court in *People v Wood* held that the elements of criminal contempt are twofold: (1) knowledge of an existing court order, and (2) willful violation of that order.¹⁵ In these cases, the first element is established without the victim through the testimony of court and law enforcement personnel. The second element, willful violation of that order, can, in many cases, be proven without the testimony of the victim. Some examples of evidence that can be elicited in these types of cases to establish the violation include:

- The defendant’s presence at the victim’s home when the police respond. Statements by the defendant at the time of arrest. Photographs of the defendant’s belongings or the defendant

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himself at the home of the victim.

- Telephone records and/or recorded telephone conversations from jail can establish the violation. Many jails now routinely record all incarcerated defendant telephone calls.
- Third party witnesses or surveillance video (possibly available at a place of employment, public place or commercial location) can establish the defendant's violation of the stay away from the home, school, or employment provisions of the order.

Forensic or subpoenaed internet provider computer records could be utilized to establish e-mail correspondence from the defendant to the victim in violation of an order of protection.

A common defense in these cases is that the victim invited the defendant to a location. Prosecutors attempting to conduct an evidence-based prosecution may be even more susceptible to this type of defense. However, it is important to remember that a victim cannot violate an order of protection, a defendant is the only one bound by the order of protection, regardless of any alleged invitation. The court in *People v Van Guilder* rejected such defense stating, "express invitation to defendant to resume cohabitation-in violation of the orders of protection-provides no defense."¹⁶

Conclusion

Consistent collaborative efforts of police and prosecutors can ensure the proper enforcement of orders of protection, which, in conjunction with victim advocate involvement, can enhance the safety of victims of domestic violence, reduce recidivism, and strengthen the ability of police and prosecutors to combat this crime.

(Endnotes)

¹ Matthew Fetzer and Adriana Fernandez-Lanier, *Domestic Homicide in New York State, 2008*, NYS Division of Criminal Justice Services, October 2009

² Family Violence Statistics, Bureau of Justice Statistics (June 2005) ("Of the approximately 3.5 million violent crimes committed against family members between 1998 and 2002, the most serious crime – murder - made up less than 1% (.03)"). Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf> (p. 8, accessed 12/11/09).

³ Klein, A. R., *Practical Implications of Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, US Department of Justice, National Institute of Justice (NCJ22572)(June 2009)(ch 2, sec 2), available at <http://www.ojp.usdoj.gov/nij>.

⁴ Victims may never have received a copy of the order of protection or may have misplaced the order of protection due to relocation.

⁵ There are occasions when an order of protection may be validly issued by a court and served on the defendant, but may not have been entered into the order of protection registry.

⁶ CPL § 140.10(4)(b) (i) & (ii)

⁷ See *Mastroianni v County of Suffolk*, 91 NY 2d 198 (1997) (Police responded to a call from the victim stating that the defendant had violated an order of protection against her by entering her home and throwing her furniture out of the house. Police located the defendant next door, but did not make an arrest for the violation of an order of protection. The defendant later stabbed the victim to death. The court denied summary judgment, stating that although "generally" a municipality may not be held liable for injuries resulting from failure to provide police protection, in this case there was a special relationship between the victim and the county, and there was a breach of duty owed to the victim.

⁸ Klein, A. R., *Practical Implications of Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, at ch 2, sec 4

⁹ *Id.*

¹⁰ PL § 215.50(3)

¹¹ PL § 215.51(b) and (c)

¹² Donnino, Practice Commentary, McKinney's Cons Laws of NY, Penal Law § 215.51, 1998 delineates the misdemeanor charges represented in Criminal Contempt in the First Degree as follows: 215.51(b): (i) Menacing 2 [120.14(1)]; (ii) Menacing 2 [120.14(2)]; (iii) Aggravated Harassment 2 [240.30(1)]; (iv) Aggravated harassment 2[240.30(2)]; (v) Harassment 2 [240.26(1)]; (vi) Menacing 3 [120.15].

¹³ CPL § 520.30(1)

¹⁴ See *People v Gellineau*, 178 Misc 2d 790, 796, 681 NYS2d 729, 733 (Kings County 1998)

¹⁵ See *People v Wood*, 260 AD2d 102, 698 NYS2d 122 (4th Dept 1999)

¹⁶ See *People v Van Guilder*, 29 AD3d 1226, 1228, 815 NYS2d 337, 339 (3d Dept 2006) ★