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TRAINING BULLETIN

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Temporary DVROs:
What if the subject hasn't been served?
What if they don't know it exists?

CASE LAW

Pen. Code § 836(c)(2) and a Temporary Domestic Violence Restraining Order
Pen. Code § 148(a)(1) and a Suspect's Resistance to the Enforcement of a Temporary Domestic Violence Restraining Order

RULES

Upon notice of the existence of a temporary domestic violence restraining order and after given an opportunity to comply, a person violates P.C. § 148(a)(1) by resisting officers who are attempting to enforce the order by refusing to comply with the terms of the order.

FACTS

Defendant Christopher James Kenney's mother ("C.K.") decided one day in January 2021 that it was time to exercise a little "tough love" with her 29-year-old druggie son and kick him out of the house. The idea was that once he was made homeless, the defendant might voluntarily move into a residential drug rehab treatment facility.

To enforce the eviction, C.K. obtained a temporary domestic violence restraining order ("DVRO"), although the defendant (not being present) was not aware of this at the time. Pending a hearing scheduled for 15 days later, the court ordered the absent defendant to "take only personal clothing and belongings needed until the (pending) hearing and move out immediately." In an accompanying order, the San Diego County Sheriff's Department was directed to "remove" the defendant from the residence.

Upon C.K. telling the defendant to leave, he did so on Jan. 6, but returned two days later. C.K. asked him, "What are you doing here?" and then told him, "You know you could be arrested." Showing his disrespect for his mother by telling her "F—k you," and that he'd leave after taking a shower, he stomped off to his bedroom. Having to drive her grandson to school, C.K. told the defendant, "That's not how restraining orders work," and that they would talk about it when she returned. However, C.K. had a live-in boyfriend who was not as patient. Before C.K. returned, the boyfriend called the sheriff's department to report the presence of "a disorderly druggie" who was "loaded to the gills" and "not supposed to be on the property."

Source: Robert Phillips - LegalUpdates.com

He told the dispatcher there was a “restraining order out” but that “it hasn’t been served” and “he’s here for you to get him right now.”

By the time C.K. returned, the deputies were already at her house. She gave them a copy of the temporary DVRO. The deputies first checked with their records division to confirm its existence (The DVRO’s legal validity was not an issue in this case). C.K. told the deputies that the defendant had not yet been served with it. As evidenced by the bodycams worn by the deputies, one of the deputies at the scene, Deputy Evan Maldonado, knocked on the defendant’s locked bedroom door and told him through the door that he would not be arrested, but that they had a temporary DVRO they needed to serve on him. The defendant refused to open the door.

Deputy Maldonado and his partner Deputy Brett Germain explained that there was a restraining order on file that prevented him from being in the house. The defendant questioned the validity of any order that sought to prevent him from being in his own home. The deputies attempted to convince him that, “as of right now”, he was not going to be arrested, but that they needed to serve the order on him.

The defendant’s not-unexpected response (still through the locked bedroom door) was that, “(t)his was bull s—t” and “f—k you guys.” The deputies continued to try to reason with defendant, telling him to come out and “talk about it,” and submit to being served with the order so that he “can get going.” The defendant continued to argue that he was in his own home and that the deputies would have to break down the door.

Using a piece of flexible plastic, the deputies were able to get the door open (albeit with some effort) and -- after a scuffle -- arrested the defendant. He was charged in state court with resisting an executive officer with force, per P.C. § 69. He was convicted of the lesser offense of resisting, obstructing, or delaying a peace officer in the performance of his or her duties, per P.C. § 148(a). The defendant appealed.

HELD

The Fourth District Court of Appeal (Div. 1) affirmed the ruling.

The issue on appeal was whether, in arresting defendant for violating a temporary domestic violence restraining order, the deputies were “performing (their) lawful duty;” an element of P.C. § 148(a)(1) as well as P.C. § 69.

At trial, after the prosecution rested its case, defendant brought a motion to dismiss pursuant to P.C. § 1118.1, arguing that the deputies had violated the notice requirements of a DVRO; i.e., that he “had never been lawfully noticed or served.” The motion was denied by the trial court.

The defendant raised the same issue on appeal. Penal Code § 836, in subdivision (c)(2), provides the notice and service requirements for a DVRO, as well as any other court-issued protective order.

The section reads: “The person against whom a protective order has been issued shall be deemed to have notice of the order if the victim presents to the officer proof of service of the order, the officer confirms with the appropriate authorities that a true copy of the proof of service is on file, or the person against whom the protective order was issued was present at the protective order hearing or was informed by a peace officer of the contents of the protective order.”

The defendant was not present at the protective order court hearing, so that alternative can be scratched. What was left to be determined by the court was whether, under the requirements of P.C. § 836(c)(2), the defendant had been given notice of the existence of a restraining order and the opportunity to comply before being arrested.

The court held that he had. Under subdivision (c)(2) of section 836, a person who has not been served with a DVRO is nevertheless "deemed to have notice of the order" if "informed by a peace office[r] of the contents of the protective order." As evidenced by the deputies' bodycams, the defendant was told several times (albeit through a locked bedroom door) that a DVRO existed, and that under the terms of the order, defendant was not allowed to be there. "The obvious purpose of the notice requirement in section 836 is to afford the restrained person a meaningful opportunity at the scene to conform his or her conduct to law." In other words, he must then be given an opportunity to comply.

In this case, after the defendant was told police had such a DVRO, he was also told that he would not be arrested so long as he complied with the terms of the order and left the premises. The fact that he was not told about the pending hearing or that he was also prohibited from being in contact with his mother or her grandson was irrelevant. Merely being told that a DVRO existed and that it prohibited him from being in C.K.'s house, and that he was thereafter given the opportunity to comply, was held to be "adequate" to satisfy the requirements of P.C. § 836(c)(2).

It was also held to be irrelevant, for purposes of determining whether the deputies were "performing (their) lawful duty" as an element of P.C. § 148(a)(1), that C.K. had allegedly threatened the defendant some 20 other times with getting a restraining order, that Deputy Maldonado did not read the entire temporary DVRO to defendant, or that no one actually showed him the order. The fact that defendant had been told by the deputies that there was "a restraining order on file," and that as a result he was not allowed to be at the residence, was held to be legally sufficient. The trial court therefore properly denied the defendant's motion to dismiss.

There was also an issue as to whether the trial court had failed to properly instruct the jury. Specifically, the jury was not instructed that there was no duty on the part of the deputies to serve defendant with a physical, printed copy of the restraining order. In closing arguments, the defense counsel argued that such a duty existed, while the prosecution argued to the contrary. The jury expressed their confusion on this issue by asking mid-deliberations via a note to the judge whether such a duty existed; a question the trial court declined to answer.

The Appellate Court held "no harm, no foul," noting that the prosecution had been allowed to correctly argue that no such duty existed (i.e., that so long as "the defendant was informed by a peace officer of the contents of the protective order," the notice requirements of P.C. § 836(c)(2) had been met), and the jury convicted based upon that argument. The trial court's instructional error was held to be harmless beyond a reasonable doubt. The defendant's conviction, therefore, was upheld.

AUTHOR NOTES

There's really not much further discussion needed about this case; the law is clear. But because serving a DVRO is one of the duties with which law enforcement officers are occasionally entrusted, it's helpful for you to know the rules.

A person in violation of such an order must be aware that such an order exists, and then after being so informed, be given the opportunity to comply. As written into section 836(c)(2), to

arrest someone for a violation of a temporary DVRO, the officer must be able to as confirm “with the appropriate authorities” that such an order exists and then have “proof of service” on the suspect.

Only if the suspect was present at the court hearing, or “proof of service” is on file, can you assume that he or she is aware of the order and its contents. If no such proof exists, then the officer must inform that person of the contents of such an order and then give him or her a reasonable opportunity to comply. Simple enough.

But might I suggest that you err on the side of caution, as the deputies did in this case, and give the suspect the benefit of any doubt that all the elements for a lawful arrest exist.

Recognizing that the prosecution has to prove all these elements beyond a reasonable doubt, and the defendant likely will argue that the notice was insufficient, pouring it on heavier than might really be necessary can help ensure a conviction.