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DIVISION ONE

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NO. 61027-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE,

Petitioner,

v.

ROBERT MAY,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAR 3 PM 4:02

RESPONSE TO CITY'S MOTION FOR
DISCRETIONARY REVIEW

Reply to Response

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I. IDENTITY OF RESPONDENT

Robert May, respondent in this court and appellant in the King County Superior Court and defendant in the Seattle Municipal Court responds to the City's motion for discretionary review.

II. DECISION

The City seeks review of the King County Superior Court decision granting May's appeal and reversing his conviction for violation of a domestic violence protection order.

III. ISSUES PRESENTED FOR REVIEW

1. May was charged with violating a permanent protection order issued by the King County Superior Court issued pursuant to RCW 26.50. The order does not contain on its face the requisite finding for a permanent order that May was "likely to resume acts of domestic violence against the petitioner" or her family when the order expires. The superior court file contained no such finding either. Did the municipal court error by failing to suppress the order as inapplicable to the prosecution? If the order is not applicable, then is the evidence insufficient to support the conviction?

2. The predicate protection order only warned May that a violation of the order is a crime under RCW 26.50 and RCW 10.31.100, but not SMC

12A.06.180. The evidence is insufficient to support a conviction for the crime of violating the provisions of a no-contact order pursuant to RCW 26.50.110(1). The municipal code is broader and includes conduct which does not violate state law. Was May denied due process when the City prosecuted him under the City code without fair warning?

IV. STATEMENT OF THE CASE

Robert May was charged in Seattle Municipal Court No. 471005 with violating the restraint provisions of a domestic violence protection order issued pursuant to RCW 26.50, an alleged violation of SMC 12A.08.180. CP (Complaint). The predicate order was issued on December 30, 1996 by the King County Superior Court in *Douglass v. May*, No. 94-5-03704-9 SEA. CP (Defendant's Statement On Submittal). The order purported to be a permanent order issued pursuant to RCW 26.50.060(2) but did not contain the findings required by that statute, i.e., that "the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires." Appendix 2.¹ A search of the superior court file –when finally located– did

¹The order contains only the following boilerplate, conditional language: THIS ORDER FOR PROTECTION IS PERMANENT. If the duration of this order exceeds one year, the court finds that an order of less than one year will be insufficient to prevent further acts of domestic violence. Appendix 1.

not turn up any written findings or any record that such a finding was made when the superior court issued the permanent order. VRP 20.

Also, the order contained only the following warning regarding criminal prosecution.

WARNING TO RESPONDENT: Violation of the provisions of this order with actual notice of its terms is [a] criminal offense under chapter 26.50 RCW and 10.31.100 RCW and will subject the violator to arrest.

Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36.011 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

Appendix 1.

May challenged the validity of the predicate protection order, asserting that the superior court did not have authority to issue a permanent order because the findings required by the statute for issuance of a permanent order were not made. VRP 1-4, 5-16, 17-18, 19-22. *See* CP (Defendant's Memorandum In Support Of Motion To Suppress, Defendant's Supplemental Memorandum In Support Of Motion to Suppress). The court file which would have contained any such findings was initially missing, but then was

found. VRP 20; CP (Defendant's Supplemental Memorandum In Support Of Motion To Suppress). Nonetheless, the superior court file did not contain any separate order or findings required by the statute for issuance of a permanent order pursuant to RCW 26.50.060(2).

May's challenge to the applicability of the protection order was first heard on February 7, 2007. At the time of that hearing, the relevant portion of the superior court file could not be located and, thus, it could not be determined whether any findings not reflected on the face of the order were made. VRP 6. The fact that no such finding was made or was justified is supported by Judge Barnett's subsequent finding that May had not engaged in any criminal behavior or acts of domestic violence. CP (Defendant's Supplemental Memorandum In Support Of Motion To Suppress, Appendix 4). The City argued that the challenge was an impermissible collateral attack. VRP 9. The municipal court properly rejected that argument, noting that the Washington Supreme Court's recent decision in *State v. Miller*, 156 Wn.2d 23 (2005) required the trial court to determine whether a protection order was issued in compliance with applicable statute in the prosecution of a violation of the order. VRP 10. But the municipal court shifted the burden to the defendant to prove that the order was void or voidable because—in her

opinion— the *Miller* decision did not assign the burden of proof at all. VRP 10. Thus, the court concluded that the “burden in showing that there is some problem with the court’s finding that the order is permanent. That burden has to be on the defense. And the defense has not been able to find evidence that the court made an inappropriate finding.” VRP 10. The court denied the motion, giving May leave to move for reconsideration if additional information was discovered. VRP 10-11, 12.

The municipal court revisited this issue after the relevant volume of the superior court action was located and additional documentation was presented by both parties. VRP 19-22. May’s counsel was able to confirm that the superior court file did not contain any record that the court made the requisite finding for issuance of a permanent order pursuant to RCW 26.50.060(2). VRP 19-20. In response to the defense motion, the City presented to the municipal court voluminous materials from the superior court file, which included the various petitions and claims that Ms. Douglass had made against May in that proceeding. The City never claimed that within these numerous page was evidence of the finding required by RCW 26.50.060(2) for issuance of a permanent order. Instead, the City rested on its supplemental brief which cited to several cases involving direct appellate

review of protection orders issued pursuant to RCW 26.50. CP (Response to Motion to Suppress Supplemental).

The municipal court held that RCW 26.50.060(2) “doesn’t require any specific findings as part of the statutory scheme for granting a permanent order.” VRP 21. The trial court then went on to find –after a review of the voluminous materials from the superior court file– the superior court did not appear to have abused its discretion in issuing the order. VRP 21. The municipal judge ultimately denied the motion because she believed the boilerplate language in the predicate order was found to be a sufficient basis for issuance of a permanent order, citing *Spence v. Kaminski*, 103 Wn.App. 325 (2000). VRP 22. The municipal judge found that any failure to make a specific factual finding does not require exclusion of the order.

However, this court would not find that that type of error is, if it is an error, is of the nature that the court should exclude this order in terms of its gate keeping function. It’s clear that the type of error that the court is to consider is part of its gate keeper functions are errors of another level where the order is of such that it should not be considered by a jury because there’s something so fundamentally wrong with the order that the court should not allow the matter to go to the jury. The fact that the court [inaudible] there maybe some argument which is not clear given the Spence case that there should be an actual recitation of the reasons for the order being permanent in and of the statute does not so require. Its certainly not the type of error, if it is an error that the Miller case requires.

VRP 22.

The court later entertained a motion to dismiss brought by May pro se. The municipal court denied the motion and found May guilty of two counts of violation of a domestic violence protection order under SMC 12A.06.180 on stipulated facts. VRP 34, 37-38.

May appealed and the King County Superior Court reversed. That court held that boilerplate language on the face of the order did not satisfy the statutory prerequisite for issuance of a permanent order. Appendix A to City's Motion for Discretionary Review.

V. WHY REVIEW SHOULD BE DENIED

The King County Superior Court decision does not conflict with either *City of Seattle v. Edwards*, 87 Wn.App. 305, 941 P.2d 697 (1997) or *Spence v. Kaminski*, 103 Wn.App. 324, 12 P.3d 1030 (2000). Rather, the superior court's decision on May's RALJ appeal is supported by those decisions and *State v. Miller*, 156 Wn.2d 23, 24, 123 P.3d 827 (2005). This court should deny review.

In the event, the court grants review then May asks this court to address the constitutional issue that he raised in his RALJ appeal. May's was denied due process because the protection order criminal prosecution warning did not inform him that he could be prosecuted under the broader

Seattle Municipal Code provision. The court can affirm on any grounds supported by the law and the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.3d 610 (2000).

VI. ARGUMENT & AUTHORITY

1. **The Protection Order Was Not Applicable Because The Order Was Not Issued In Compliance With The Governing Statute. Specifically, the Issuing Court Failed to Make the Factual Finding Required By RCW 26.50.060(2).**

The validity or applicability of the predicate protection order must be established by the prosecution or the case must be dismissed. State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (Dec. 1, 2005), overruling State v. Edwards, and State v. Marking, insofar as inconsistent (but affirming the results).

We hold that the “existence” of a no-contact order is an element of the crime of violation such an order. However, the “validity” of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court’s gate-keeping function. The trial judge should not permit an invalid, vague, or otherwise *inapplicable* no-contact order to be admitted into evidence.

Miller, 156 Wn.2d at 24. The predicate order may be invalid or inapplicable for a number of reasons. See City of Seattle v. Edwards, 87 Wn.App. 305, 308, 941 P.2d 697 (1997) (order vague as to expiration date or event); State v. Marking, 100 Wn.App. 506, 512, 997 P.2d 461 (2000) (warning on order was insufficient rendering order invalid); *Cf.* State v. Esquivel, 132 Wn.App.

316 (2006) (warnings not required by the law of another jurisdiction for a foreign protection order—here a tribal order-- need not appear to be valid for purposes of prosecution); State v. Sutherland, 114 Wn.App. 133, 135, 56 P.3d 613 (2002) (warning on order was sufficient); State v. Snapp, 119 Wn.App. 614, 624-25, 82 P.3d 252 (2004) (validity of no contact order must be proved when challenged).

The *Miller* court set out an illustrative list of challenges to the validity or “applicability” of the predicate order (as opposed to impermissible collateral attacks). Miller, 156 Wn.2d at 31.

While we are inclined to believe that the Court of Appeals reached appropriate results in *Marking* and *Edwards*, issues relating to the validity of a court order (such as

- whether the court granting the order was authorized to do so,
- whether the order was adequate on its face, and
- whether the order complied with the underlying statutes)

are uniquely within the province of the court. Collectively, we refer to these issues as applying to the “applicability” of the order to the crime charged. An order is not *applicable* to the charged crime if it is not issued by a

- competent court,
- is not statutorily sufficient,
- is vague or inadequate on its face, or
- otherwise will not support a conviction of violating the order.

The court, as part of its gate-keeping function, should

determine as a threshold matter whether the order is alleged to be violated is applicable and will support the crime charged. Note 4. Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed.

Note 4. We do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge.

This same analysis was employed in State v. Turner, 118 Wn.App. 135, 138 (2003).

We address three questions: (1) Under what statute was the order against Rickey issued? (2) Did the order meet the requirements of the statute at the time it was issued? (3) Assuming that the order met all of the requirements of the statute under which it was issued, can it serve as the basis for a criminal prosecution?

Cf. State v. Joy, 128 Wn.App. 160, 114 P.3d 1228 (2005) (challenge to protection order was a collateral attack where Joy asserted that the permanent protection order [as opposed to a TRO] was erroneously issued pursuant to RCW 26.50 because there was insufficient evidence to support the statutory prerequisites of imminent harm or stalking).

Written no contact orders --that are enforced by criminal prosecution-- are creatures of statute. Whether a protection order can be the predicate for a criminal prosecution is determined by reference to the particular statute conferring the authority to issue and set the terms of the order. Marking, 100

Wn.App. at 509-510 (validity of protection order turns on compliance with the statute); Edwards, 87 Wn.App. at 308 (authorizing statute, RCW 26.50.060(2), permitted permanent orders and orders for fixed terms); State v. Anaya, 95 Wn.App. 751, 754-60, 976 P.2d 1251 (1999) (no statutory authority for protection order issued under RCW 10.99.040 to survive dismissal of the charges [now codified at RCW 10.99.040(3)]); *Cf.* State v. Schultz, 146 Wn.2d 540, 548 (2002) (where defendant is convicted, trial court may issue a new no-contact order or extend the one issued pretrial). Challenging the validity or applicability of the predicate order in a criminal prosecution for violating that order is not a collateral attack. Miller, *supra*.²

The King County Superior Court's decision does not qualify for review. It is the municipal court's ruling conflicts the controlling authorities.

The municipal court erred in denying May's motion to exclude the protection order in two respects. First, the court impermissibly shifted the

²The question here is not whether the order is void or voidable. The question is whether the issuing court complied with the governing statute. Nonetheless, if the issuing court exceeded its statutory authority then the order may be subject to collateral attack. An order is void when the court has lacks authority to enter the particular order involved. Doe v. Fife Municipal Court, 74 Wn.App. 444, 449, 874 P.2d 182 (1994). A void order is one that "exceeds . . . statutory authority" as opposed to one that is simply issued in error. Doe, 74 Wn.App. at 450, quoting Marley v. Dept. Labor & Indus., 72 Wn.App. 326, 334, 864 P.2d 960 (1993). A void order may be attacked at any time. A void order -unlike a merely erroneous one- cannot be enforced "if the court . . . lacks the inherent power to make or enter the particular order involved." State v. Breazeale, 144 Wn.2d 829, 841, 31 P.3d 1155 (2001), quoting State v. Turner, 98 Wn.2d 731, 739, 658 P.2d 658 (1983) (internal citations omitted).

burden to establish the applicability of the order –in other words, its admissibility– to the defense. While the *Miller* court did not expressly state that the prosecution bears the burden of establishing the admissibility or applicability of the evidence against the accused, there is no authority to shift that responsibility to the defense. *Miller* did not hold that the defense is in any way responsible for establishing the applicability or inapplicability of the predicate order. The prosecution bears the burden to prove the elements of the offense and is the proponent of the inculpatory evidence. Generally where the validity of an underlying order or administrative action is at issue in a criminal prosecution, the government bears the burden to prove the validity of the predicate action. See State v. Snapp, 119 Wn.App. 614, 625 (2004); City of Redmond v. Moore, 151 Wn.2d 664 (2004) (in DWLS prosecution the government must prove that the underlying suspension complies with due process). While *Snapp*, relies on cases disapproved in part by the *Miller* decision, *Miller* says nothing that relieves the prosecution of its duty to present evidence of an applicable predicate order. It is axiomatic that the proponent of the evidence bears the burden to establish its admissibility or applicability.

The existence and validity of the protection order is essential to the

prosecution. Miller, supra. The culpable act necessary to establish the violation of a no-contact order is determined by the scope of the predicate order. The no-contact order is essential to prosecute the violation of the order. A conviction cannot be obtained without producing the order as it will identify the protected person or location and any allowance for contact or the expiration date. City of Seattle v. Termain, 124 Wn.App. 798, 804 (2004). Thus, the burden to establish that the order is “applicable” when challenged under *Miller* falls squarely with the prosecution and is consistent with the constitutional principle that the government bears the burden of proof in all criminal prosecutions.

Second, the municipal court erred by holding that the boilerplate language on the face of the order was sufficient to establish the applicability of the order. At this point, the municipal court relied primarily on *Spence v. Kaminski*. That reliance was misplaced. The King County Superior Court’s decision does not conflict with *Spence*.

Spence was a direct appeal challenging an order issued pursuant to RCW 26.50. *Spence* challenged the order on several constitutional grounds, but the primary question before the court was whether due process requires the court to find a recent act of domestic violence before issuing a protection

order. Spence. 103 Wn.App. At 328 (the answer was no). The section apparently relied upon by the municipal court holds that the language on the pre-printed form –which is similar to that used in this case– were sufficiently stated findings to support the issuance of the order. But in *Spence*, the court was engaged in a full appellate review of the record below. Based on that record, the court found a sufficient factual basis for issuance of the order and that the trial court did not abuse its discretion in doing so. Id. at 331-32. *Spence* does not control here because there was a record of the findings made in support the judge’s decision to check the box indicating that the order was permanent. In short, the trial court in *Spence* complied with the statutory mandate to make the requisite finding of fact and the factual record supported that finding. *Spence* is also distinguishable because the order in that case contained additional hand written findings that supported the issuance of a permanent order. Id. at 329 (“the long history of allegations back to . . . 1992 have been investigated by law enforcement[,] ICPS or others. All this court can determine is that Mr. Kaminski has threatened Ms. Spence in the past and she is afraid of him.”)

In contrast, in this case there was no record that the superior court made the statutorily required finding before issuing the permanent order in

this case. The boilerplate on the face of the order is not sufficient to demonstrate that the order was issued in compliance with the statute. This is exactly the type of defect that *Miller* identified as rendering the protection order inapplicable for purposes of criminal prosecution. Miller, supra (the order is not applicable if it is not statutorily sufficient or not adequate on its face; such an order will not support a conviction of violating the order). Under *Miller*, the order is inapplicable and should not have been admitted. Without the protection order, the evidence is insufficient.

Moreover, the purported boilerplate “finding” on the face of the order does not address all of the specific findings of fact the statute requires prior to the issuance of a permanent order. In determining whether the appropriate findings have been made, this court should be mindful of the fact that this order is *permanent* and prevents May from seeing his child. Thus, strict compliance with the statute is required because it implicates May’s fundamental right to parent his child. See State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001).

Before an order of more than one year can be entered, the issuing court must find that

the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner’s family or household

members or minor children when the order expires

RCW 26.50.060(2). The boilerplate language in the order merely finds that “an order of less than one year is insufficient to prevent further acts of domestic violence.” Appendix 1. This abbreviated finding does no more than state why the order is being issued in the first place, the prevent future acts of domestic violence. It does not go beyond that to establish that such acts are expected to resume upon the expiration of a one year order. The boilerplate does not specifically find the resumption of domestic violence upon the expiration of the one year period. The language seems to state that a longer order may have deterrent effect during the one year period. But in any event, there is no specific finding as required by the statute that a permanent order is necessary because the court found that domestic violence will resume upon the expiration of the initial one year period.

2. **May Was Denied Due Process Because He Was Only Given Notice That A Violation Of The Order Is A Crime Under State Law. Where the Conduct In This Case Did Not Constitute A Violation Of State Law And May Was Not Given Notice That A Violation Of The Order Would Be Prosecuted Under The City Code, The Prosecution Violated May’s Right To Due Process.**

In the event that this court grants review, May asks this court to review the issue presented here.

The predicate order did not warn May that a violation is a crime under the Seattle Municipal Code. The legend on the order only warned him that a violation of the order is a crime under state law, specifically RCW 26.50 and RCW 10.31.100. (The former does not define a crime, but only sets out the authority for warrantless arrests.) The conduct established by the stipulated facts does not establish a violation of the state law, RCW 26.50.110(1), as explained further below. Thus, the warning on the protection order in this case was incomplete and confusing such as to mislead May. See State v. Wilson, 117 Wn.App. 1, 12-15, 75 P.3d 573 (2003) (affirming conviction for violation of no contact order). The warnings on the face of the order were also affirmatively misleading. See State v. Minor, 174 P.3d 1162 (January 17, 2008) (held that predicate offense court's failure to check box indicating felony firearm prohibition on order affirmatively misled defendant). May's right to due process –fair notice of what conduct is prohibited– was been violated.

In *Wilson* the defendant was charged under RCW 26.50.110(1) with violating a protection order that was apparently issued as a condition of pre-trial release by the Seattle Municipal Court. The court held that “where statutory notice is required but not given, a due process violation may occur.”

Wilson, 117 Wn.App. at 12. In that case, the predicate protection order warned the defendant that a violation of the order constituted a crime under both state law and the Seattle Municipal Code and the court held that the warning was constitutionally sufficient.

But the court noted that the failure to give a proper warning on the face of the protection order may violate due process.

Finally, although ignorance of the law is generally no defense, a small exception exists where a court fails to give statutorily required notice of prohibited conduct and actively misleads a defendant as to the status of the law. In *State v. Leavitt*, a court failed to give a defendant the statutorily required written notice that his firearm restrictions would last longer than one year, issued an order that seemed to imply that the ban would last only one year, and allowed the defendant to retain his concealed weapons permit. Thus, when the defendant was later convicted of violating the court order after repossessing his firearms after a year had passed, the Court of Appeals reversed finding that his due process rights were violated.

Wilson, 117 Wn.App. at 13.

May was actively misled by the warning which referenced only the state law criminalizing the violation of the order where his conduct did not violate that law (see below). He could not have found out about the broader the municipal code by looking up RCW 26.50.110(1) because that statute does not reference the Seattle code in particular or municipal codes in general. See State v. Sutherland, 114 Wn.App. 133, 136, 56 P.2d 613 (2002)

(order is not invalid where the warning legend referenced RCW 10.99 which in turn specifically references RCW 26.50.110, the criminal sanctions for violations of such orders).

If, as asserted below, May's conduct did not violate the state law and he had no notice that his conduct would be tested against the broader City code, then the order does not sufficiently apprise him of what is prohibited. *See City of Seattle v. Edwards*, 87 Wn.App. 305, 308, 941 P.3d 697 (1997) (protection order was vague as to its expiration date) "We cannot allow a conviction to stand where the State has not given fair notice of the proscribed conduct." *Id.*

An individual's right to due process of law under the Fourteenth Amendment and Wash. Const. art. 1, § 3 includes the fundamental notions of fair notice and equal application of the laws. Born out of these considerations, the "void-for-vagueness" doctrine requires that a penal statute define the criminal offense: (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) in a manner that does not encourage arbitrary or discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 31 L.Ed.2d 110, 92 S. Ct. 839, 843 (1972).

Based on the stipulated fact, May did not violate RCW 26.50.110(1).

That statute provides:

Whenever an order is granted under this chapter, chapter 7.90, 10.99, . . . and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, . . . specifically indicating that violation will be a crime, ***for which an arrest is required under RCW 10.31.100(2)(a)*** . . . is a gross misdemeanor . . .

The statute does not criminalize conduct unless it includes one of the following acts: (1) acts or threats of violence, (2) going onto the grounds of or entering a residence, workplace, school, or day care, or (3) knowingly coming within, or knowingly remaining within, a specified distance of a location identified in the no-contact order. This language mimics the language of RCW 10.31.100(2)(a), which mandates the arrest of a person if there is probable cause to believe that:

An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, . . . restraining the person and the person has violated the terms of the order restraining the person *from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location*

(emphasis added). Only violations that fall within this italicized portion are

criminal. Others are mere violations that may be subject to a finding of contempt at the court's discretion. In fact, the Legislature recently amended RCW 26.50.110, effective July 22, 2007, to read that any "willful violation of a no-contact provision of a court order is a criminal offense and shall be enforced[.]" Substitute H.B. 1642 § 1 (as passed by the House Feb. 28, 2007).³

Assuming the truth of the City's evidence, May's violation of the no-contact order was not criminal. Nothing in the stipulated facts indicates that May's conduct involved an act or threat of violence towards the protected party, going onto the grounds of or entering a residence, workplace, or school of Douglass, or knowingly coming within or knowingly remaining within, a specified distance of a *location* listed on the no-contact order. Therefore, May did not violate RCW 26.50.110, for which an arrest was required under RCW 10.31.100, and could not be prosecuted under RCW 26.50.

The comparable City code provision is broader than the state law. SMC 12A.06.180 does not contain the limiting phrase "for which an arrest

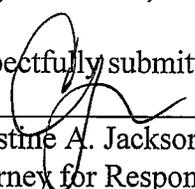
³This court has two cases under consideration involving this same challenge to the scope of the criminal liability set out in RCW 26.50.110(1). State v. Donald Williams, No. 59536-9-I and State v. Leo Bunker, 59322-6-I. In addition, Division II of this court already heard oral argument and has a decision in pending in State v. Dean Hogan, No. 35534-5-II. There the State appealed from the superior court's decision vacating Hogan's guilty plea to felony violations of RCW 26.50.110. According to appellate counsel in that case, the charges were based on several visits that the protected party made to Hogan while he was in jail.

is required under RCW 10.31.100(2).” Appendix 2. Thus, the City code criminalizes a broader range of conduct than the state law. May had no notice that he would be held to the City’s standard when the warning specifically referenced only the state law. As applied to the particular facts of this case, the specific reference in the protection order is an ambiguous and must then be construed in his favor. If a crucial provision is ambiguous, the rule of lenity requires it to be interpreted in favor of the accused absent evidence of intent to the contrary. State v. Van Woerden, 93 Wn.App. 110, 116-17, 967 P.2d 13 (1998). May did not have fair notice that his conduct would be measured against the City code when his conduct did not violate the state law of which he was particularly warned. As a result, under the particular facts of this case, May did not receive fair notice of the prohibited conduct and the prosecution violated his right to due process.

VII. CONCLUSION

The City’s motion for discretionary review should be denied. If the court does grant review, May asks the court to address the issue raised here.

Respectfully submitted this 3rd day of March, 2008,



Christine A. Jackson #17192
Attorney for Respondent

APPENDIX 1

**CERTIFIED
COPY**

ISSUE 7
R

SUPERIOR COURT OF WASHINGTON KING COUNTY

1 Desiree L. Douglass 6-20-61
2 Petitioner DOB

96 DEC-30--PM 4: 27
NO. 94-5-03704-9 SEA

3 Robert J. May 9-10-53
4 Respondent DOB

SUPERIOR COURT CLERK
SEATTLE, WA AMENDED
ORDER FOR PROTECTION
(ORPRT) (Children)
(Clerks Action Required)

5 Notice of this hearing was served on the respondent by personal service.

6 Minors addressed in this order:

7 Dominick May-Douglass 6-22-93
8 Name DOB

9 Based upon the petition, testimony, and case record, the court finds that the respondent committed
10 domestic violence as defined in RCW 26.50.010, and IT IS THEREFORE ORDERED THAT:

11 a. Respondent is RESTRAINED from causing physical harm, bodily injury, assault,
12 including sexual assault, and from molesting, harassing, threatening, or stalking the petitioner and
the minors named above.

13 b. Respondent is RESTRAINED from coming near and from having any contact whatsoever,
14 in person or through others, directly or indirectly with petitioner except by telephone regarding
child for emergency purposes only.

15 c. Respondent is EXCLUDED from entering petitioner's residence. At present petitioner's
16 address is the following: 1709 15th Avenue South, Seattle, WA.

17 d. Respondent is RESTRAINED from entering petitioner's place of employment.

18 e. Petitioner is GRANTED the temporary care, custody, and control of the minor named
19 above. *in accordance with the Parent Plan Order 01/11/01*

20 f. Respondent is RESTRAINED from interfering with petitioner's physical or legal custody
of the minor named above.

21 ~~g. Respondent is RESTRAINED from removing from the state the minors named above.~~ *2*

22 h. The respondent will be allowed visitations as follows : visitation as per parenting plan in
23 paternity order - Section III - 3.1 a, b., c. (preschool schedule). Petitioner may request
24 modification of visitation if respondent fails to comply with treatment or counseling as ordered by
the court.

25 i. OTHER: Respondent is RESTRAINED from coming within 500 feet of petitioner's
26 residence.

AMENDED ORDER FOR PROTECTION - 1 - 07479 - 0

APPENDIX 2

RCW 26.50.110

Violation of order — Penalties.

*** CHANGE IN 2007 *** (SEE 1642-S.SL) ***

(1) Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020: The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

[2006 c 138 § 25; 2000 c 119 § 24; 1996 c 248 § 16; 1995 c 246 § 14; 1992 c 86 § 5; 1991 c 301 § 6; 1984 c 263 § 12.]

Notes:

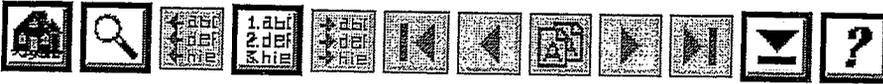
Short title -- 2006 c 138: See RCW 7.90.900.

Application -- 2000 c 119: See note following RCW 26.50.021.

Severability -- 1995 c 246: See note following RCW 26.50.010.

Finding -- 1991 c 301: See note following RCW 10.99.020.

Violation of order protecting vulnerable adult: RCW 74.34.145.



Seattle Municipal Code

Information retrieved May 31, 2007 6:18 AM

Title 12A - CRIMINAL CODE

Subtitle I Criminal Code

Chapter 12A.06 - Offenses Against Persons

SMC 12A.06.180 Violation -- Penalty -- Contempt.

A. Whenever an order is granted under this chapter, RCW Chapter 10.99, 26.09, 26.10, 26.26, 26.50 or 74.34 or an equivalent ordinance by this court or any court of competent jurisdiction or there is a valid foreign protection order as defined in RCW 26.52.020 and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime is a gross misdemeanor. Upon conviction, and in addition to any other penalties provided by law, the court may require that the convicted person submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services and the terms under which the monitoring shall be performed. The court may require that the convicted person pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

B. A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order that restrains the person or excludes the person from a residence, workplace, school, or day care or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

C. A violation of an order issued under this chapter, RCW Chapter 10.99, 26.09, 26.10, 26.26, 26.50 or 74.34 or an equivalent ordinance by this court or any court of competent jurisdiction or of a valid foreign protection order as defined in RCW 26.52.020 shall also constitute contempt of court, and is subject to the penalties prescribed by law.

D. Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order issued under this chapter, RCW Chapter 10.99, 26.09, 26.10, 26.26, 26.50 or 74.34 or an equivalent ordinance by this court or any court of competent jurisdiction or a valid foreign protection order as defined in RCW 26.52.020, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen (14)

days why the respondent should not be found in contempt of court and punished accordingly.

E. When a party alleging a violation of an order for protection states that the party is unable to afford private counsel and asks the City Attorney for assistance, the City Attorney shall initiate and prosecute a contempt proceeding if there is probable cause to believe that the violation occurred. In this action, the court may require the violator of the order to pay the costs incurred in bringing the action, including a reasonable attorney's fee.

F. Any proceeding under this chapter is in addition to other civil or criminal remedies.

G. Willful violation of a court order entered under RCW 26.44.063 is a misdemeanor. In addition, any person having actual notice of the existence of a restraining order issued by a court of competent jurisdiction under RCW 26.44.063 who refuses to comply with the provisions of such order is guilty of a misdemeanor. The notice requirement of the preceding sentence may be satisfied by a peace officer giving oral or written evidence to the person subject to the order by reading from or handing to that person a copy certified by a notary public or the clerk of the court to be an accurate copy of the original court order which is on file. The copy may be supplied by the court or any party.

(Ord. 120202 Section 1, 2000; Ord. 120059 Section 4, 2000; Ord. 117673 Section 8, 1995; Ord. 112465 Section 9, 1985; Ord. 111857 Section 7, 1984.)

Link to Recent ordinances passed since 1/8/07 which may amend this section. (Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances. For more information, contact the Seattle City Clerk's Office at 206-684-5474, or by e-mail at clerk@seattle.gov)



