

State v. Byrd¹

June 19, 2009

Volume 8, Number 14

When A Domestic Violence Protective Order Doesn't Provide Much Protection

By Brian Beasley, Domestic Pacifist
and Legal Adviser, High Point PD

ROLL CALL TRAINING

From North Carolina's 24/7 Police
Attorney Law Firm

PO Box 4803

Greensboro, NC 27404-4803

Telephone (336) 691-7058

fax (336) 969-1879

www.policehelp.net

**IMPORTANT: STATE V. BYRD WAS
EFFECTIVELY OVERRULED BY THE N.C.
LEGISLATURE ON JULY 24, 2009. THIS UPDATE IS HERE FOR
HISTORICAL PURPOSES, BUT THE LAW CURRENTLY ALLOWS YOU
TO ARREST FOR BOTH EX PARTE AND PERMANENT 50B ORDERS.**

Billy Ray Byrd and his wife Carrie lived in Transylvania County, North Carolina.² In 2003, their marriage hit the rocks and Carrie, acting pro se,³ obtained first an ex parte domestic violence protective order and then a domestic violence protective order valid for one year. Within four months, the couple had reconciled and Carrie's motion to set aside the protective order was allowed in July of 2003.

Unfortunately, the mended relationship did not last too long and in March of 2004, Carrie filed a complaint for, inter alia,⁴ "divorce from bed and board."⁵ Along with that complaint, she also sought a TRO (temporary restraining order) alleging domestic violence. The TRO was similar to a 50B order, but was obtained through Rule 65(b) of the Rules of Civil Procedure instead of being filed under Chapter 50B of the General Statutes. The district court issued an ex parte⁶ order granting the request for a TRO on March 11, 2004 and set a hearing date of March 15, 2004. The defendant was served with the TRO on March 12, 2004, his attorney moved for a continuance of the hearing on March 15, and the hearing and temporary TRO were both continued until March 24th.

¹ 363 N.C. 214 (2009).

² According to the Transylvania County webpage, Transylvania is known as "The Land of Waterfalls" due to the 250 waterfalls found throughout the county. Transylvania is derived from Latin meaning "on the other side of the woods." Pretty creepy if you ask me.

³ Latin for "for himself," this refers to one who appears for himself in court without a lawyer. You have probably heard the adage that a man who represents himself has a fool for a client. I have a folder in my office full of humorous documents filed by "pro se" defendants, most of them trying to get out of traffic tickets.

⁴ Latin for "among other things."

⁵ In Latin, this is "Divorce a mensa et thoro." In laymen's terms, this is a way of telling your spouse, through order of the court, that they are no longer welcome in your bed and furthermore why don't they just get out of the house altogether. It's a court-ordered separation that starts the clock ticking for when an absolute divorce can occur.

⁶ Latin again. "Ex parte" means "on one side only" and refers in the law to those situations where something is done at the request of one party only, without notice to the other party, as in "the reason the judge knows so much about your case prior to trial is because of the ex parte communication he had at lunch with the defense attorney." Obviously, some "ex partes" are okay under the law while others are not.

On March 23rd, the day before they were scheduled to be in court, Billy Ray Byrd went to Carrie's office with a .22-caliber semiautomatic rifle. A coworker, Gerald Cotton, was there and testified later that Byrd pointed the rifle at Cotton's chest and pulled the trigger, but the gun didn't fire.⁷ Cotton ran toward the back door and heard two more shots while he was running.

Beth Vockley, the branch supervisor, came out of her office when she saw Cotton fleeing down the hall. She saw Byrd pointing the gun at Carrie, then saw Carrie push the gun away and try to run away. Vockley heard two gunshots and Carrie fell to the floor. Byrd dropped the rifle on the floor and walked out of the office. Carrie Byrd survived despite being shot in the left frontal area of her head. According to testimony at the trial, she was still having difficulty forming words and multitasking.

The jury at Byrd's trial hung up on the charge of attempted murder of Carrie but found the defendant guilty of Assault With A Deadly Weapon With Intent To Kill Inflicting Serious Injury. They found the defendant Not Guilty of attempted murder of Cotton.⁸ The fact that the defendant violated a valid domestic violence protective order at the time of the crime (i.e. the TRO) was used as an aggravating factor to enhance the defendant's sentence under N.C.G.S. 50B-4.1(d) which states that "a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order" under this section "shall be guilty of a felony one class higher than" the one he committed (emphasis added). Byrd received 196 to 245 months active imprisonment, plus 75 days for a misdemeanor assault on Cotton.

The case eventually made its way up to the North Carolina Supreme Court on the question of whether the sentence was improperly enhanced as a result of the protective order. The defendant argued that since this was not a domestic violence protective order entered under Chapter 50B but a TRO entered under the Rules of Civil Procedure, it should not have been used for increasing his sentence. The court agreed and sent the case back for resentencing.

However, the Court, somewhat *sua sponte*,⁹ decided to go one big step further and say that EVEN IF this had been an *ex parte* domestic violence protective order under Chapter 50B, it would NOT have met the definition of a "valid domestic violence protective order" under the statute. The court pointed out that N.C.G.S. 50B-1(c) defines a "protective order" as one entered "upon hearing by the court or consent of the parties." According to the N.C. Supremes, an *ex parte* proceeding without an opportunity for the other party to be heard is not a "hearing." At first glance, it seems like a small distinction, but it actually has a big impact on your ability to enforce domestic violence protective orders.

THE BOTTOM LINE

For you to charge a "perp"¹⁰ for violating a domestic violence protective order, it MUST be the year-long DVPO entered after a court hearing between the parties instead of the *ex parte* temporary DVPO. Be sure and check the paperwork.

Now that we have that ugliness out of the way, let's take some questions...

⁷ In his famous speech at Yankee Stadium on July 4, 1939, Lou Gehrig said that he considered himself "the luckiest man on the face of the earth." That may have been true on July 4, 1939. On March 23, 2004, that honor went unanimously to Gerald Cotton.

⁸ I don't know why. Don't ask me.

⁹ Although this sounds like a delicious pasta dish at your favorite Italian restaurant, it is actually Latin for "on its own motion." This phrase is used when the Court decides to do something that no one asked for, which as you know happens quite regularly.

¹⁰ An abbreviation for "perpetrator," from the Latin "perpetratus" meaning "to carry out."

Q: How do we know whether it is an “ex parte” order or the year-long order?

A: You ask to see the paperwork. Surprisingly enough, an ex parte domestic violence protective order is titled¹¹ “Ex Parte Domestic Violence Order of Protection.” The more permanent order is entitled “Domestic Violence Order of Protection.” If you have questions, call me and I’ll ask you to read me the title over the phone.

Even with a “Domestic Violence Order of Protection,” you should read the actual document carefully to determine what specific conditions apply in your case. Each one is a little different depending on what boxes the judge checked before signing the order. You should definitely check the “expiration date” as well.

Q: What if we respond to a domestic and really want to hook the guy up but there is only an ex parte order in place – can we do anything?

A: Quite possibly. You may certainly charge any other violations of the law other than violation of a domestic violence protective order. For example, if you have probable cause that a trespass is taking place or a domestic assault has occurred, you may make an arrest for that.

In addition, if you determine that the suspect is out on pre-trial release for a previous domestic crime, you might want to evaluate whether you can make an arrest for violating the terms of that pre-trial release. N.C.G.S. 15A-401(b)(2)(b)(f)(whew!) allows you to make a warrantless arrest for a violation of a pretrial release order entered in a domestic case.¹² It’s not a new charge, per se,¹³ but you take him before the magistrate and the magistrate can revoke his previous bond and set new conditions for pretrial release.

Q: My television suddenly stopped working last Friday night no matter how I position my “rabbit ears.” What gives?

A: If your analog television set has stopped working and you don’t know why, I regret to report that you are no longer qualified to either own a television or watch a television. Quick – go turn on a radio and see if you are still allowed to receive those transmissions!

Q: What about this “mandatory arrest” policy with regards to domestic violence crimes?

A: Because N.C.G.S. 50B-4.1(b) says that “a law enforcement officer shall arrest,” (emphasis added) most agencies have a policy which calls for mandatory arrest in situations where there exists probable cause that a domestic violence protective order has been violated.¹⁴ Obviously,

¹¹ Top right of the page. All capital letters.

¹² In other words, a pretrial release order entered in a case for which the “domestic hold” applied. This statute does not authorize a warrantless arrest for violating most pre-trial release conditions. Those are generally handled by the prosecutor’s office making a motion to revoke bond.

¹³ A Latin phrase meaning “by itself.”

¹⁴ For High Point officers, this is found in General Order 3.8.

this would now not apply to ex parte orders of protection but still applies to the more permanent DVPO.

Q: Was that you I heard in the reenactment video of the High Point Bank Operations Center “robbery”¹⁵ that’s been floating around the HPPD this week?

A: I can neither confirm nor deny this. The fact that my office is the location for the video is merely circumstantial evidence. And I won’t give up the detective who played the role of the robber either.¹⁶

Q: Wow. This change really hurts our ability to protect domestic violence victims. Is anything being done to fix it?

A: I would imagine that the General Assembly will amend Chapter 50B to make the violation of an ex parte protective order a crime again. Unfortunately, it is very late in the current legislative session and they already have a full plate, so it may be next year before the fix is passed into law. I’ll keep you posted.

Q: You act like you know all this Latin stuff, but that’s not Latin at all! Latin is when you take the end of a word and put it at the beginning, right?

A: At-thay is-way ig-pay atin-lay, ou-yay idiot-way! And-way efore-bay ou-yay ask-way, Atin-lay is-way ot-nay at-whay ey-thay eak-spay in-way Atin-lay America-way, either-way.



Smith, Rodgers & Strickland PLLC

provides 24-hour real-time legal support for client law enforcement agencies.

“The materials on this website are instructional only, and do not constitute legal advice or create an attorney-client relationship. Readers should consult in-house counsel or city/county attorneys for advice and guidance on specific legal issues and applications. Clients of SR&S may of course contact the firm’s 24-hour switchboard for immediate legal consultation in real-time.”

¹⁵ For those that read this outside our jurisdiction, we had a couple of thugs go into a large building with a High Point Bank and Trust sign outside, throw a bag at a worker there and demand money. Upon learning that they were in the operations center, and no money was handled there, one of the robbers said, “Well, give me my bag back then,” retrieved the bag, and fled the scene. Let this be a lesson to all of us: If you fail to plan, you plan to fail. A reenactment video was put together at the HPPD for “intelligence purposes,” or so I’ve been told.

¹⁶ By the way, and on a completely unrelated note, someone tell Detective Kevin Ray that he left his mask in my office. Thanks.