

**Attorney General  
Opinions**

STATE OF TENNESSEE  
OFFICE OF THE  
ATTORNEY GENERAL  
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NASHVILLE, TENNESSEE 37202

January 19, 2010

Opinion No. 10-06

Ex Parte Order of Protection

QUESTIONS

1. Does a judge or magistrate, who issues an ex parte order of protection upon determining that there is a substantial risk of immediate harm to the petitioner, have the discretion to order the respondent to vacate a residence shared with the petitioner pending a hearing?
2. Does a judge or magistrate have the authority to hold a respondent in contempt of court for returning to the shared residence in violation of the judge or magistrate's specific order?

OPINIONS

1. Yes. A judge or magistrate's authority to issue an ex parte order of protection includes discretionary authority to issue reasonable directives crafted to ensure the order's principle goal of protecting the petitioner from the abusive acts of the respondent.
2. Yes. A judge has legal authority to issue an order of contempt and could cite the respondent for contempt who returns to this residence in direct violation of a judge or magistrate's order. Magistrates, however, are only granted authority to issue an order of protection, and, therefore, lack the authority to conduct contempt proceedings.

ANALYSIS

1. Tennessee Code Annotated § 36-3-601, *et seq.*, commonly referred to as the domestic abuse statute, gives "courts" the power to issue ex parte orders of protection when petitioned by an aggrieved party. The statute's definition of "court" includes "judicial commissioners, magistrates, and other officials with the authority to issue an arrest warrant in the absence of a judge for purposes of issuing ex parte orders of protection when a judge . . . is not available." Tenn. Code Ann. § 36-3-601(3)(D). The General Assembly enacted § 36-3-601, *et seq.*, to provide domestic abuse victims with enhanced protections from domestic abuse, and to ensure the enforcement of the domestic abuse laws to protect victims from further abuse. Tenn. Code Ann. § 36-3-618. The statute gives the courts power to issue ex parte orders of protection

for good cause, including circumstances presenting an "immediate and present danger of abuse to the petitioner." Tenn. Code Ann. § 36-3-605(a).

You have asked whether a judge or magistrate's authority to issue an ex parte order of protection after determining that there is a substantial risk of immediate harm to the petitioner includes discretion to order the respondent to immediately vacate the residence shared with the petitioner pending a hearing on the merits. Generally, all courts have the power to "control, in furtherance of justice, the conduct of its officers, and all other persons connected with a proceeding before it, in every matter pertaining to the proceeding." Tenn. Code Ann. § 16-1-102. A condition requiring the respondent to temporarily vacate the shared residence furthers the interest of justice by protecting the petitioner from abuse until the court has had the opportunity to hold a hearing on the merits of the petition which, pursuant to state law, must occur within fifteen days. See Tenn. Code Ann. § 36-3-605(b). Accordingly, this Office is of the opinion that a judge or magistrate issuing an ex parte order of protection has the authority to order a respondent to immediately vacate the residence pending a hearing. That authority, however, cannot be exercised to permanently bar the respondent from the shared residence by "evicting" the respondent until both parties have been given the opportunity to be heard by the court. See Tenn. Code Ann. § 36-3-606(a).

2. You have asked whether a judge or magistrate has the authority to hold a respondent in contempt for violating a requirement in an ex parte order of protection requiring the respondent to vacate a residence shared with the petitioner. Under Tennessee law, the contempt power of the courts is purely statutory. *Konvalinka v. Chattanooga-Hamilton County Hosp. Authority*, 249 S.W.3d 346, 354 (Tenn. 2008); see also, Tenn. Code Ann. § 16-1-103 ("For the effectual exercise of its powers, every court is vested with the power to punish for contempt as provided for in this code"). The General Assembly has codified the circumstances under which a court may exercise its contempt powers:

The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

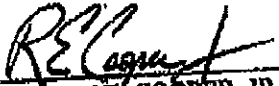
- (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice;
- (2) The willful misbehavior of any of the officers of such courts, in their official transactions;
- (3) The willful disobedience or resistance of any officer of such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts;
- (4) Abuse of, or unlawful interference with, the process or proceedings of the court;


(5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them; or

(6) Any other act or omission declared a contempt by law.

Tenn. Code Ann. § 29-9-102. The Court of Appeals has recently held that any person who violates an ex parte order of protection can be held in criminal contempt. *See Dockery v. Dockery*, 2009 WL 3486662 (Tenn. Ct. App., Oct. 29, 2009). This Office is therefore of the opinion that a judge has authority to hold a respondent in contempt for violating an express directive in an order of protection to temporarily vacate a shared residence pending a hearing.

Authority to hold the respondent in contempt under these circumstances, however, would not extend to a magistrate. "Judicial commissioners, magistrates, or other officials with the authority to issue an arrest warrant may not conduct a hearing or issue an extended order of protection." Op. Tenn. Att'y Gen. No. 01-027 (Feb. 27, 2001). Tennessee law requires that any person charged with criminal contempt be provided adequate notice of the charge and afforded a hearing. *See* Tenn. R. Crim. P. 42(b). Because a magistrate authorized to issue an ex parte order of protection lacks the authority to conduct a hearing pertaining to the order, a magistrate cannot hold a respondent in contempt for violating an ex parte order of protection.

  
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March 31, 2008

Opinion No. 08-71

Probable cause to arrest for the offense of violating an order of protection or restraining order

QUESTIONS

1. May a law enforcement officer arrest a suspect for the criminal offense of violating an order of protection or restraining order, under Tenn. Code Ann. § 39-13-113, without first independently verifying that the requirements of Tenn. Code Ann. § 39-13-113(f) are satisfied?
2. May a statement by the alleged victim that the suspect has violated an order of protection or restraining order support an arrest under Tenn. Code Ann. § 39-13-113 without the officer otherwise confirming that the requirements of Tenn. Code Ann. § 39-13-113(f) are satisfied?

OPINIONS

1. The arresting officer must have probable cause to believe that the suspect violated Tenn. Code Ann. § 39-13-113, including probable cause that the requirements of subsection (f) are satisfied. As in the case of an arrest for any other offense, the officer may develop probable cause of a violation of Tenn. Code Ann. § 39-13-113 through independent investigation or other reliable means.
2. If the alleged victim's statement provides the officer with probable cause to believe the suspect has violated Tenn. Code Ann. § 39-13-113 and the victim qualifies as a "citizen informant," the officer may make an arrest. The officer must have probable cause from the victim's statement or from some other means to believe that the requirements of subsection (f) are met.

ANALYSIS

1. Under Tenn. Code Ann. § 39-13-113 (2006), it is a Class A misdemeanor for a person to knowingly violate an order of protection issued under Tenn. Code Ann. §§ 36-3-601, *et seq.* (2005 & Supp. 2007), or a restraining order issued to a victim as defined in Tenn. Code Ann. § 36-3-619. However, under Tenn. Code Ann. § 39-13-113(f), the following circumstances must apply before the violation of an order of protection or a restraining order constitutes this criminal offense:

- (1) The person must have received notice of the request for an order of protection or restraining order;

- (2) The person must have had an opportunity to appear and be heard in connection with the order of protection or restraining order; and
- (3) The court made specific findings of fact in the order of protection or restraining order that the person had committed abuse as defined in Tenn. Code Ann. § 36-3-601.

An arrest for this criminal offense may be with or without a warrant, as authorized by Tenn. Code Ann. § 36-3-611, and it must be conducted under the requirements of Tenn. Code Ann. § 36-3-619. Tenn. Code Ann. § 39-13-113(b).

This opinion request asks whether an officer may effectuate an arrest for this criminal offense without first independently verifying that the three conditions of subsection (f) are satisfied. The request notes that "[i]n many rural counties law enforcement, especially on weekends, has no way of knowing or determining any [of] the provisions of subsection (f)."

An arresting officer with probable cause to believe that a suspect has committed this criminal offense may arrest the suspect. This means that the officer must also have probable cause to believe that the three requirements in subsection (f) have been met, for if one of them is not satisfied, the suspect has not committed the criminal offense. The officer may develop probable cause of these three requirements through an independent investigation or any other reliable means.

Regardless whether someone may be immediately arrested for committing this criminal offense under Tenn. Code Ann. § 39-13-113, an officer may still arrest any respondent to an order of protection issued under Tenn. Code Ann. §§ 36-3-601, *et seq.*, for violating the order of protection, so long as the respondent was previously served with the order of protection or otherwise acquired actual knowledge of it. Tenn. Code Ann. § 36-3-611. In fact, under Tenn. Code Ann. § 36-3-611(a), if the following conditions are met, the officer "shall" arrest the suspect without a warrant:

- (a) The officer has proper jurisdiction over the area in which the violation occurred;
- (b) The officer has reasonable cause to believe the respondent has violated or is in violation of an order of protection; and
- (c) The officer has verified whether an order of protection is in effect against the respondent. If necessary, the police officer may verify the existence of an order for protection by telephone or radio communication with the appropriate law enforcement department.

Anyone arrested for such a violation is subject to being held in civil or criminal contempt. Tenn. Code Ann. §§ 36-3-310 and 36-3-612 (Supp. 2007).

If an officer receives verification that an order of protection is in effect and if the officer has jurisdiction and reasonable cause to believe the order has been violated, the officer "shall" arrest the respondent. The officer has no discretion to do otherwise, as this Office previously noted in Op. Tenn. Att'y Gen. 01-119 (July 27, 2001). But this verification requirement merely triggers the statutory duty to arrest; it does not follow that any arrest executed under Tenn. Code Ann. § 36-3-611 must necessarily include this type of independent verification. Rather, an officer with reasonable cause to believe the respondent has violated an order of protection may arrest the respondent on that basis. This is true even if the requirements of Tenn. Code Ann. § 39-13-113(f) are not met to support an arrest for the criminal offense of violating an order of protection or restraining order under Tenn. Code Ann. § 39-13-113.

2. This opinion request also asks whether an alleged victim's statement that a suspect has violated an order of protection or restraining order "standing alone [is] sufficient to justify an arrest without confirming the requirements under subsection (f).]" A statement by the alleged victim may be sufficient to give an officer probable cause to arrest a suspect for violating Tenn. Code Ann. § 39-13-113. But the officer must have from the victim's statement or some other source probable cause to believe that the conditions of Tenn. Code Ann. § 39-13-113(f) have been satisfied.

If the alleged victim reporting a violation of an order of protection or a restraining order can also provide information to satisfy the three factors in subsection (f), then that person's statement could supply the probable cause necessary to support an arrest, provided the alleged victim is a "citizen informant." When an informant is a member of the "criminal milieu," the reliability of his or her information must be tested under *Spinelli v. United States*, 393 U.S. 410 (1969), and *Agullar v. Texas*, 378 U.S. 108 (1964), to ensure (1) the basis of the informant's knowledge and (2) the credibility of the informant or the reliability of the information. *State v. Jacumin*, 778 S.W.2d 430, 432 (Tenn. 1989). But when the information supporting probable cause is gathered from a "citizen informant" with no ties to the criminal community, the information is presumed reliable. *State v. Melson*, 638 S.W.2d 342, 355 (Tenn. 1982).

In this context, the alleged victim already will have succeeded in securing an order of protection or restraining order against the suspect under Tenn. Code Ann. §§ 36-3-601, *et seq.* This fact weighs against considering the alleged victim a part of the "criminal milieu" and in favor of treating this person as a "citizen informant." Furthermore, "[t]he fact that information given by the informant is based upon his personal observation is a reliable basis for [the] conclusion that his statements are true." *Melson*, 638 S.W.2d at 355 (citing *United States v. Rollins*, 522 F.2d 160 (2d Cir. 1975)). Thus, the alleged victim reporting direct knowledge of a violation of an order of protection or restraining order generally will qualify as a "citizen informant." If the alleged victim is a "citizen informant," the officer may presume that the alleged victim's statements supporting probable cause to arrest the suspect for violating Tenn. Code Ann. § 39-13-113 are reliable.

In any event, as discussed above, under Tenn. Code Ann. § 36-3-611, an officer can still arrest the respondent to an order of protection for violating the order of protection if the respondent was previously served with or informed of the order. A statement by the alleged victim, as a "citizen informant," of a violation is sufficient to give the officer probable cause to arrest the respondent

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under Tenn. Code Ann. § 36-3-611, even if the requirements of Tenn. Code Ann. § 39-13-113(f) were not established from the victim's statement or some other means to support an arrest for the criminal offense in Tenn. Code Ann. § 39-13-113.

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May 22, 2006

Opinion No. 06-094

Warrantless Arrest on *Ex Parte* Orders of Protection

QUESTIONS

1. What punishment can a defendant receive for violating an *ex parte* order of protection when he or she has knowledge of or has been served with the order and when the violation would not itself be a crime?
2. Can a law enforcement officer arrest such a defendant without a warrant for violating an *ex parte* order of protection?

OPINIONS

1. When the defendant has knowledge of or has been served with the order at the time of the violation, and when the violation would not itself be a crime, punishment for violating an *ex parte* order of protection can include civil or criminal contempt and a civil penalty of fifty dollars (\$50.00).
2. Yes, a law enforcement officer can arrest a defendant without a warrant if the defendant violates an *ex parte* order of protection and if the requirements of Tenn. Code Ann. § 36-3-611 have been met.

ANALYSIS

1. The legislature has provided for the punishment of individuals who violate orders of protection in Tenn. Code Ann. § 36-3-610:
  - (a) Upon violation of the order of protection or a court-approved consent agreement, the court may hold the defendant in civil or criminal contempt and punish the defendant in accordance with the law. A judge of the general sessions court shall have the same power as a court of record to punish the defendant for contempt when exercising jurisdiction pursuant to this part or when exercising

concurrent jurisdiction with a court of record. A judge of the general sessions court who is not a licensed attorney shall appoint an attorney referee to hear charges of criminal contempt.

(b) In addition to the authorized punishments for contempt of court, the judge may assess any person who violates an order of protection or a court-approved consent agreement a civil penalty of fifty dollars (\$50.00). The judge may further order that any support payment made pursuant to an order of protection or a court-approved consent agreement be made under an income assignment to the clerk of court.

(c) Upon collecting the civil penalty imposed by subsection (b), the clerk shall, on a monthly basis, send the money to the state treasurer who shall deposit it in the domestic violence community education fund created by § 36-3-616.

The plain language of the statute answers the first question. Punishment for violation of an order of protection includes whatever punishments are allowed by law for civil or criminal contempt. Further, a civil penalty of fifty dollars (\$50.00) may be assessed.

However, if the order of protection is *ex parte*, the defendant may *not* be found guilty of violation of a protective order under Tenn. Code Ann. § 36-3-612. Tenn. Code Ann. § 36-1-612 provides, as pertinent to this analysis:

(a) A person who knowingly violates an order of protection issued pursuant to this part, or a restraining order issued to a party who is a victim, as defined in § 36-3-601 (11), commits the offense of violation of a protective order.

(b) In order to be found guilty under this section:

- (1) The person must have received notice of the request for an order of protection or restraining order;
- (2) The person must have had an opportunity to appear and be heard in connection with the order of protection or restraining order; and
- (3) The court made specific findings of fact, in the order of protection or restraining order, that the person had committed domestic abuse, as defined in this part.

Tenn. Code Ann. § 36-3-612 (a) and (b). This statute does not apply in the situation of an *ex parte* order since the defendant has not had an opportunity to appear and be heard in connection with the underlying order of protection, and the trial court has not made specific findings of fact in the protective order that the respondent committed domestic abuse as alleged in the petition. Therefore,

punishment for violating an *ex parte* order of protection is limited to those available for contempt and a civil penalty as contemplated by Tenn. Code Ann. § 36-3-610.

2. The requirements for arresting a person who is believed to have violated an order of protection are set forth in Tenn. Code Ann. § 36-3-611:

(a) An arrest for violation of an order of protection issued pursuant to this part may be with or without warrant. Any law enforcement officer shall arrest the respondent without a warrant if:

- (1) The officer has proper jurisdiction over the area in which the violation occurred;
- (2) The officer has reasonable cause to believe the respondent has violated or is in violation of an order for protection; and
- (3) The officer has verified whether an order of protection is in effect against the respondent. If necessary, the police officer may verify the existence of an order for protection by telephone or radio communication with the appropriate law enforcement department.

(b) No *ex parte* order of protection can be enforced by arrest under this section until the respondent has been served with the order of protection or otherwise has acquired actual knowledge of such order.

Put briefly, law enforcement officers are *required* to arrest individuals *without a warrant* for violation of an order of protection if: (1) the officer has proper jurisdiction; (2) the officer has verified that an order of protection is in effect; and (3) the officer has reasonable cause to believe an order of protection is being violated. If the order of protection is *ex parte*, then it cannot be enforced by arrest until the individual has been served or has actual knowledge of the order.

Tenn. Code Ann. § 36-3-611 clearly authorizes, and in fact requires, arrest without a warrant if the statutory requirements have been met. Op. Tenn. Att'y Gen. 01-119 (July 27, 2001). If the individual has violated an *ex parte* order of protection, a warrantless arrest is still required so long as the defendant has been served with the order of protection or has actual knowledge of it. Therefore, the only remaining issue to be addressed is whether this authority is affected when the violation is due to behavior that would not in and of itself be a crime.

Tenn. Code Ann. § 36-3-611 does not distinguish between violations based on whether or not the behavior would itself be a crime. In fact, if it only pertained to inherently criminal behavior, then the statute would be mere surplusage.

Courts should give the language of a statute its natural and ordinary meaning in light of the substance of the entire statute. *Oliver v. King*, 612 S.W.2d 152, 153 (Tenn. 1981). Statutes forming a single statutory scheme should be construed together to make the system consistent in all its parts and uniform in its operation. *Westinghouse Electric Corp. v. King*, 678 S.W.2d 19, 23 (Tenn. 1984),

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*app. dismissed*, 470 U.S. 1075, 105 S. Ct. 1830, 85 L. Ed. 2d 131 (1985); *Pritchard v. Carter County Motor Co.*, 270 S.W.2d 642, 643 (1954); *Bodin Apparel, Inc. v. Lowe*, 614 S.W.2d 571, 573 (Tenn. Ct. App. 1980).

The legislature's intent in enacting the domestic abuse statutes was to "recognize the seriousness of domestic abuse as a crime and to assure that the law provides a victim of domestic abuse with enhanced protection from domestic abuse . . . the official response to domestic abuse shall stress enforcing laws to protect the victim and prevent further harm to the victim." Tenn. Code Ann. § 36-3-618.

When presented with the issue of the right to a jury trial prior to the issuance of orders of protection, the Tennessee Court of Appeals opined that the statute was silent on the issue and that, "the language of this act clearly conveys the legislature's intent to provide a swift and efficient summary proceeding which requires only a hearing in front of a judge, not a jury trial." *Clark v. Crow*, 37 S.W.3d 919, 921 (Tenn. Ct. App. 2000). The language that conveys the legislature's intent to provide a swift and efficient summary proceeding (*ex parte*) also conveys the intent to prevent domestic abuse by arresting violators prior to the victim's being harmed. Behavior enjoined by the order of protection can include both criminal and noncriminal acts. Tenn. Code Ann. § 36-3-619. It would be contrary to the legislature's intent for the courts to construe the statute as only applying to violations of the enjoined criminal behavior. Such an interpretation would leave law enforcement officers without the power to prevent domestic abuse, one of the expressly stated purposes of the statute.

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May 9, 2006

Opinion No. 06-085

Dual Prosecutions for (1) Contempt for Violating an Order of Protection and (2) Violation of Tenn. Code Ann. § 36-3-612 for Knowingly Violating a Protective Order.

**QUESTIONS**

1. When a person under an order of protection violates that order in a manner sufficient to constitute a violation of Tenn. Code Ann. § 36-3-612, would it constitute double jeopardy in violation of the United States and Tennessee Constitutions if the defendant were convicted of the Class A misdemeanor offense of violating an order of protection and the judge held such defendant in contempt of court for violating such order and if the offense and the contempt were based upon the same conduct?

2. Would it violate the doctrine of separation of powers if the General Assembly enacted legislation to prohibit a judge from enforcing an order of such judge's court by use of the power of contempt if the conduct giving rise to the contempt also constituted the criminal offense of violation of a protective order?

**OPINIONS**

1. No. It is the opinion of this Office that dual convictions for (1) criminal contempt of court for violating an order of protection under Tenn. Code Ann. § 36-3-610 and (2) the Class A misdemeanor offense for knowingly violating a protective order under Tenn. Code Ann. § 36-3-612 could be constitutionally supported.

2. No. It would not violate separation of powers if the General Assembly elected to remove a court's statutory authority to punish, as contempt of court, conduct which would constitute a violation of Tenn. Code Ann. § 36-3-612.

**ANALYSIS**

1. In Op. Tenn. Att'y Gen. 05-183, this Office opined that Public Chapter No. 394, Public Acts of 2005, which amended Tenn. Code Ann. § 36-3-612 by creating the Class A misdemeanor offense of knowingly violating an order of protection under certain circumstances, did not repeal by implication Tenn. Code Ann. § 36-3-610 or any other statutory authority allowing a court to punish a violation of an order of protection as contempt of court. This opinion request now

asks whether dual prosecutions for contempt of court and for the new criminal offense codified at Tenn. Code Ann. § 36-3-612 would offend constitutional double jeopardy protections.

It is the opinion of this Office that dual convictions could be constitutionally sustained. In *State v. Winningham*, 958 S.W.2d 740 (Tenn. 1997), the Supreme Court determined that the double jeopardy clauses of the United States Constitution and the Tennessee Constitution did not prohibit dual prosecutions for criminal contempt of court for violating an order of protection and for arson, after the defendant burned down his wife's house. In so doing, the court looked at the following four factors from *State v. Denton*, 938 S.W. 373 (Tenn. 1996):

- a. An analysis under *Blockburger v. United States*, 284 U.S. 299 (1932), of the statutory elements of each offense.
- b. An analysis of the evidence used to prove each offense.
- c. A consideration of whether there were multiple victims or discrete acts.
- d. A comparison of the purposes of the respective statutes.

No one factor is determinative, but the results of each is weighed and considered in relation to the each other to determine the double jeopardy issue.

As for the first factor, the court noted that the relevant inquiry is "whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *Winningham*, 958 S.W.2d at 743 (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)). The court concluded that criminal contempt and arson have markedly distinct statutory elements and in fact have no common elements. "Thus, application of the *Blockburger* test strongly suggests that the legislature intended to impose separate punishment for each of these offenses." *Id.* at 746.

Regarding the second factor, "[i]f the same evidence is not required to prove each offense, then the fact that both charges relate to, and grow out of, one transaction, does not make a single offense where two are defined by the statutes." *Id.* The court noted that the defendant's conduct underlying the contempt were threats on the victim's life, trespass onto her property, firing shots at her and setting her house on fire. While only the last of these facts was evidence necessary to establish arson, the court concluded that this factor weighed in favor of finding a double jeopardy violation because, "in order to prove arson, the State must rely on evidence which necessarily includes some of the same evidence used to establish the appellee's conduct as contemptuous." *Id.*

On the third factor, although both offenses involved the same conduct of burning the victim's house, the contempt proceeding also involved other violations of the order of protection. There were also different victims of the two offenses. For arson or any other criminal offense, the criminal conduct offends the State as the sovereign, but the victim of a contempt is the court itself, as an

organ of public justice. "The fact that different victims are involved suggests that separate prosecutions would not violate double jeopardy principles under the Tennessee Constitution." *Id.*

Finally, as for the fourth factor, the contempt and arson statutes serve vastly different purposes, and this suggests that separate prosecutions would not violate double jeopardy principles under our state constitution. The court concluded, upon weighing the four factors, that dual prosecutions did not offend double jeopardy.

Applying these principles to the issue presented here, it is the opinion of this Office that dual convictions for contempt of court for violating an order of protection under Tenn. Code Ann. § 36-3-610 and for knowingly violating a protective order under Tenn. Code Ann. § 36-3-612 could be imposed. Applying the first *Danton* factor, the statutes contain different elements. Under Tenn. Code Ann. § 36-3-610(a), a court may punish any violation of an order of protection or a court-approved consent agreement as civil or criminal contempt. But under Tenn. Code Ann. § 36-3-612(a), it is only an offense if one violates an order of protection, or a restraining order issued to a "victim," and if:

- a. The person received notice of the request for an order of protection or restraining order;
- b. The person had an opportunity to appear and be heard in connection with the order; and
- c. The issuing court made specific findings of fact in the order that the person previously committed domestic abuse.

This latter statute thus has several elements not encompassed in the offense of criminal contempt, and the latter only applies if each of these three circumstances are present.

As for the remaining *Danton* factors, the application of the second factor necessarily turns on the evidence presented in a particular prosecution. In any situation with dual prosecutions for these two offenses, there presumably would be proof that the defendant violated the order of protection; however, a prosecution under Tenn. Code Ann. § 36-3-612(a) would require further evidence to prove this offense. The third factor weighs in favor of allowing dual prosecutions because, just as in *Winningham*, each offense has different victims. Likewise, under the fourth factor, the statutes have different purposes, in that contempt seeks to maintain the integrity of the court and vindicate its authority, but the criminal statute seeks to deter and prohibit knowing violations of protective orders in certain specific situations. For example, the criminal statute only applies if the person subject to the protective order has previously been found to have committed domestic abuse. Weighing all of these factors together, dual prosecutions would not appear to offend double jeopardy. See also *State v. Wyche*, 914 S.W.2d 558 (Tenn. Crim. App. 1995) (dual prosecutions for contempt in failing to pay child support and for the misdemeanor offense of flagrant nonsupport did not offend constitutional double jeopardy protections).

2. "In Tennessee, the court's authority to punish certain acts as contempt derives from statute," and "any conduct punished as contempt in Tennessee must fall under these statutory provisions." *State v. Turner*, 914 S.W.2d 951, 955 (Tenn. Crim. App. 1995). It is true that "[t]he inherent power of courts to punish contemptuous conduct has long been regarded as essential to the protection and existence of the courts." *Black v. Blount*, 938 S.W.2d 394, 397 (Tenn. 1996). "Indeed, at common law, the power of courts to punish contempts was vast and undefined." *Id.* However, "[b]ecause unlimited, undefined discretionary power carried with it the potential for abuse, specific statutory provisions were adopted to limit and define the conduct punishable by contempt." *Id.* A court may now only punish someone for contempt of court for an act designated by statute as contemptuous. *See also Doe v. Bd. of Professional Responsibility*, 104 S.W.3d 465, 473 (Tenn. 2003).

As this Office noted in Op. Tenn. Att'y Gen. 05-183, a court presently may punish a violation of an order of protection as contempt under Tenn. Code Ann. § 36-3-610, as well as under Tenn. Code Ann. §§ 16-1-103 and 29-9-102. In light of the above, it would appear that the General Assembly has the authority to remove a court's statutory authority to punish as contempt of court conduct which would constitute violation of a protective order under Tenn. Code Ann. § 36-3-612.

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December 22, 2005

Opinion No. 05-183

Effect of Public Chapter No. 394, Public Acts of 2005, on *ex parte* Orders of Protection and Domestic Abuse Bail Conditions

QUESTIONS

1. Is an *ex parte* order of protection issued under Tenn. Code Ann. § 36-3-605 a type of protective order whose violation is a Class A misdemeanor under Public Chapter No. 394?
2. Has Public Chapter No. 394 repealed by implication any portion of Title 36, Chapter 3 of the Tennessee Code, including specifically Tenn. Code Ann. § 36-3-610?
3. In light of Public Chapter No. 394, does a trial court still retain authority under Tenn. Code Ann. § 40-11-150(i) to hold a defendant in contempt of court and to revoke bail for violating a bail condition in a domestic abuse case?

OPINIONS

1. No. A respondent's violation of an *ex parte* order of protection issued under Tenn. Code Ann. § 36-3-605 cannot constitute a violation of the Class A misdemeanor criminal offense established in Public Chapter No. 394 for violating an order of protection. The new act does not apply if the respondent has not had an opportunity to appear and be heard in connection to the underlying order of protection, nor does it apply if the trial court has not made specific findings of fact in the protective order that the respondent committed domestic abuse as alleged in the petition. Neither condition exists in an *ex parte* order of protection.
2. No. The only portion of Title 36, Chapter 3 modified by Public Chapter 394 is Tenn. Code Ann. § 36-3-612, which the new act replaces. By enacting Public Chapter No. 394, the General Assembly did not repeal by implication Tenn. Code Ann. § 36-3-610, authorizing a trial court to hold a respondent to an order of protection in civil or criminal contempt, or any other statute in Title 36, Chapter 3.
3. Yes. Under Tenn. Code Ann. § 40-11-150(i), if a defendant violates a bail condition imposed under Tenn. Code Ann. § 40-11-150(b), the trial court must punish such violation as contempt of court and may revoke bond. This is above and beyond any further action authorized by Public Chapter No. 394.

**ANALYSIS**

1. Prior to the enactment of Public Chapter No. 394, Public Acts of 2005, Tenn. Code Ann. 36-3-612 stated that any respondent arrested for violating an order of protection must be taken before a magistrate or court with jurisdiction to answer a charge of contempt, and the magistrate or court must (1) set a hearing on the violation within ten days of the arrest, (2) set a reasonable bond on the violation and (3) notify the petitioner to show cause why the respondent should be held in contempt for the violation. Public Chapter No. 394 rewrote Tenn. Code Ann. § 36-3-612 by creating a Class A misdemeanor offense for knowingly violating an order of protection, provided the following conditions exist:

- a. The person must have received notice of the request for an order of protection or restraining order.
- b. The person must have had an opportunity to appear and be heard in connection with the order of protection or restraining order; and
- c. The court must have made specific findings of fact in the order of protection or restraining order that the person had committed domestic abuse as defined in this part.<sup>1</sup>

Under Tenn. Code Ann. § 36-3-605, a trial court presented with a petition for an order of protection may issue an *ex parte* order of protection for good cause shown, including an immediate and present danger of domestic abuse. The *ex parte* order remains binding on the respondent only until the hearing on the petition, which must occur within 15 days of service of the *ex parte* order on the respondent.

A violation of an *ex parte* order of protection cannot constitute a violation of Public Chapter No. 394. A respondent under an *ex parte* order of protection has received notice of the request for an order of protection. However, the respondent has not yet had an opportunity to appear and be heard on the petition, nor has the court made findings of fact that the respondent committed the alleged domestic abuse. Consequently, Public Chapter No. 394 is inapplicable to a respondent's violation of an *ex parte* order of protection.

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<sup>1</sup>The new act also clarified that the conduct constituting the offense of violating a protective order is subject to arrest under Tenn. Code Ann. § 36-3-619; that a person arrested for violating a protective order shall be considered within the provisions of Tenn. Code Ann. § 40-11-150(a) and subject to a 12-hour hold under Tenn. Code Ann. § 40-11-150(b); that, when considering bond for the violation offense, the court must notify the petitioner of the violation; that an arrest or the issuance of a warrant or capias for violating the order of protection does not affect the validity or enforceability of the underlying order; and that the sentence for the violation offense must be consecutive to any sentence on the violating conduct, unless the sentencing court makes the sentences concurrent.

2. By enacting Public Chapter No. 394, the General Assembly rewrote Tenn. Code Ann. § 36-3-612. In so doing, it did not expressly modify Tenn. Code Ann. § 36-3-610, which authorizes a trial court to hold a respondent in contempt of court for violating an order of protection, nor any other portion of Title 36, Chapter 3. Nor did the General Assembly repeal any portion of Title 36, Chapter 3 by implication. The Tennessee Supreme Court recently reiterated that a repeal of a prior statute by implication, in light of a subsequent statute's enactment, "will only be found when the statutes cannot be construed together harmoniously." *State v. Davis*, \_\_\_ S.W.3d \_\_\_, No. E2003-00765-SC-R11-CD, 2005 WL 2396294, slip op. at \*3 (Tenn. Sept. 29, 2005) (copy attached). When resolving statutory conflicts, courts must strive to give effect to the legislative intent and adopt a reasonable construction of the prior and subsequent statutes that avoids conflict and allows for a harmonious operation of the laws. *Id.*

Public Chapter No. 394, by its express terms, purports only to modify Tenn. Code Ann. § 36-6-612. When enacting this new act, the General Assembly elected to leave unchanged a trial court's authority, under Tenn. Code Ann. § 36-6-610, to hold the respondent to an order of protection in civil or criminal contempt for violating the order. "[T]he legislature is presumed to know its prior acts, so repeals by implication will only be found when the statutes cannot be construed together harmoniously." *Id.* In light of the new act, a respondent commits a Class A misdemeanor when he or she violates an order of protection, provided the three above-stated conditions apply, but the court issuing the order still retains authority to punish the violation as contempt of court under Tenn. Code Ann. § 36-3-610. Likewise, the court retains its inherent contempt powers under Tenn. Code Ann. §§ 16-1-103 and 29-9-102 to punish a violation of a valid court order.

3. Under Tenn. Code Ann. § 40-11-150(a), certain criminal defendants, including those in violation of an order of protection issued under Tenn. Code Ann. §§ 36-3-601, *et seq.*, may only be released on bail after the trial court has considered the following circumstances:

- a. A threat to the alleged victim;
- b. A threat to public safety; and
- c. Reasonably likely to appear in court.

Under Tenn. Code Ann. § 40-11-150(b), the court must impose on the defendant one of the following bail conditions:

- a. An order enjoining the defendant from threatening to commit or committing specified offenses against the alleged victim;
- b. An order prohibiting the defendant from harassing, annoying, telephoning, contacting or otherwise communicating with the alleged victim, either directly or indirectly;

- c. An order directing the defendant to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be;
- d. An order prohibiting the defendant from using or possessing a firearm or other weapon specified by the magistrate;
- e. An order prohibiting the defendant from possession or consumption of alcohol or controlled substances; and
- f. Any other order required to protect the safety of the alleged victim and to ensure the appearance of the defendant in court.

This Office has previously opined, in light of *Wallace v. State*, 245 S.W.2d 192, 193 (Tenn. 1952), that these conditions do not violate the right to bail guaranteed by Article I, Section 15, of the Tennessee Constitution. See Op. Tenn. Att'y Gen. 95-057. If a defendant subsequently violates a bail condition imposed under Tenn. Code Ann. § 40-11-150(b), then under Tenn. Code Ann. § 40-11-150(i), the defendant is subject to immediate arrest, and the defendant's violation shall be punished as contempt of the court. In addition, the court may revoke the defendant's bail.

Public Chapter No. 394 in no way modifies the authority of a trial court to punish the violation of a bail condition under the clear and unambiguous language of Tenn. Code Ann. § 40-11-150(i). Just as the new act does not repeal by implication a court's authority under Tenn. Code Ann. § 36-3-610 to hold a respondent in contempt of court for violating an order of protection, the act does not repeal by implication a court's authority to hold a defendant in contempt of court and to revoke bail under Tenn. Code Ann. § 40-11-150(i).

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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE

Opinion No. 98-169

1998 Tenn. AG LEXIS 169

August 28, 1998, Decided

**SYLLABUS:**

[\*1]

Duration of Probable Cause to Make Warrantless Arrest for Domestic Abuse Crimes

**REQUESTBY:**

The Honorable H. Gresley Wells, Jr.  
District Attorney General  
Second Judicial District  
P.O. Box 526  
Blountville, Tennessee 37617

**QUESTION:**

If a law enforcement officer forms probable cause to believe that a person has committed a crime involving domestic abuse such that a warrantless arrest is justified under *Tenn. Code Ann. § 36-3-619(a)*, how long will the probable cause continue to support a warrantless arrest of the suspect?

**OPINION**

Once a law enforcement officer forms probable cause to arrest a person for a crime involving domestic abuse, the probable cause will continue to support a warrantless arrest under § 36-3-619(a) for the indefinite future, unless the officer discovers facts that dispel it.

**OPINIONBY:**

JOHN KNOX WALKUP, Attorney General and Reporter; MICHAEL E. MOORE, Solicitor General; GORDON W. SMITH, Associate Solicitor General

**OPINION:**

**ANALYSIS**

Section 36-3-619(a) provides:

If a law enforcement officer has probable cause to believe that a person has committed a crime involving

domestic abuse, whether the crime is a misdemeanor or felony, or was committed within or without the presence of the officer, the [\*2] preferred response of the officer is arrest.

An arrest under § 36-3-619 may be made by an officer without a warrant. *Tenn. Code Ann. § 40-7-103(7)*. No statute addresses how long the probable cause formed by the officer will support a warrantless arrest of the suspect. However, several judicial decisions have resolved this issue uniformly.

Probable cause to arrest, "once formed will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light." *United States v. Blaler*, 111 F.3d 214, 219 (1st Cir. 1997), quoting *United States v. Watson*, 423 U.S. 411, 449-450, 96 S.Ct. 820, 840, 46 L.Ed.2d 598 (1976) (Marshall, J., dissenting); *State v. Bell*, 334 So.2d 385, 387 (La. 1976) ("an arrest warrant does not become 'stale' with the passage of time," as grounds for arrest, once established, will continue to exist indefinitely, assuming that no new facts have come to light"); *Commonwealth v. Walker*, 370 Mass. 548, 560, 350 N.E.2d 678, 688 (1976); W. LaFare, *Search and Seizure*, § 3.7(a)(3d) [\*3] ed. 1996 ("assuming no contrary facts later come to light, . . . probable cause will continue to exist for an indefinite period").

It is, therefore, the opinion of this office that once a law enforcement officer forms probable cause to arrest a person for a crime involving domestic abuse, the probable cause will continue to support a warrantless arrest under § 36-3-619(a) for the indefinite future, unless the officer discovers facts that dispel it.

It should not be assumed, however, that merely because probable cause to arrest has not dissipated, an arrest may be postponed indefinitely without legal consequences. First, a statute of limitation will bar prosecution of the offense if the prosecution is not commenced within the statutory period. Furthermore, courts have recognized that an unreasonable delay between the commission of the offense and the arrest may violate the defendant's constitutional rights and would require dismissal if it were shown that the delay caused substantial prejudice to the defendant's right to a fair trial, and that the delay was an intentional device to gain tactical advantage over the accused. *United States v. Marlon*, 404 U.S. 307, 324-325, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971); [\*4] *State v. Utley*, 936 S.W.2d 489, 495 (Tenn. 1997).

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
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