OFFICE OF THE STATE ATTORNEY
TENTH JUDICIAL CIRCUIT

Legal Advisor

Volume 17, Issue 2 **February 2003**

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STATE ATTORNEY

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Misdemeanor	534-4926
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INJUNCTIONS FOR PROTECTION AFTER JANUARY 1, 2003

BY VICTORIA AVALON

The new year has brought some changes in the laws surrounding injunctions for protection. This article will cover the various types of protective orders and let you know the three choices you generally have when a person claims a violation of the order has occurred. Most of these persons will be female, so I will use the female gender when referring to the Petitioner, the person who has asked for the order. The Respondent is the person to whom the order is directed, and he or she will be your defendant. When reviewing injunction cases, you should keep in mind that the judge's order is directed to the Respondent and not to the Petitioner. Therefore, we cannot prosecute the Petitioner for a violation of the injunction, even where she is the party precipitating the violation; she cannot be held criminally responsible for violating an order not directed to her. There, the proper remedy would be for the issuing judge to dismiss the injunction. The Respondent, however, is responsible for obeying the order regardless of the Petitioner's actions and cannot willingly have contact with the Petitioner even if she invites it, in the absence of a judicial modification of the order.

A. THE TYPES OF PROTECTIVE INJUNCTIONS

After January 1, 2003, three types of protective injunctions may be encountered in the field. Two are old acquaintances, and one is new. First, and most common, is the Injunction for Protection Against Domestic Violence, authorized by Florida Statutes § 741.30 (1). A circuit judge may order this when a Petitioner shows that she is, or has reasonable cause to believe that she will be, the victim of domestic violence. Domestic violence, as you are aware, is defined as having been perpetrated by a family or household member, including persons who have a child in common.

Tori Avalon is an Assistant State Attorney in Felony, Division 5.

The second type of protective order is the Injunction for Protection Against Repeat Violence, authorized by Florida Statutes § 784.046 (2)(a). It applies when a petitioner can show two incidents of violence or stalking, directed either at the Petitioner herself or her immediate family. One of these must have occurred within the six months preceding the petitioner's request for protection. The parent or guardian of a minor child can move for protection on

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Injunctions for Protection

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behalf of the child. Unlike the injunction for protection against domestic violence, the Petitioner does not have to show any relationship to the Respondent.

The new type of injunction is a variant of the action for protection against repeat violence, and is authorized by the same statute. This is the Injunction for Protection Against Dating Violence. To obtain one, the petitioner must show three things:

- A dating relationship must have existed within the six months preceding the request for protective injunction.
- The relationship must be characterized by an expectation of affection or sexual involvement between the parties.
- The parties must have been both involved over time, and continuously so during the course of the relationship.

Fla. Stat. § 784.046 (1)(c)(1-3). If the petitioner shows these three things and can also show she has reasonable cause to believe she will be the victim of an act of violence from the other party, then a circuit judge can issue the injunction. As with the repeat violence injunction, a parent or guardian of a minor child can move for protection on the child's behalf.

B. What Crimes Can Be Charged

By the time you get involved, the Petitioner will already have received her order, and hopefully will have a copy of it on hand. You should look at it carefully. Generally, you have three options when confronted with an injunction violation:

- The defendant may be chargeable with Aggravated Stalking, a third-degree felony.
- The defendant may be charged with Violation of an Injunction for Protection, a misdemeanor of the first degree..
- The petitioner herself, or the State Attorney's Office on her behalf, may petition the issuing court for an Order to Show Cause why the Respondent should not be held in contempt of court for violating the order. Indirect Criminal Contempt is a misdemeanor punishable by up to 179 days in the county jail or up to twelve months probation.

1. Aggravated Stalking

You should consider first whether the circumstances rise to the level of a felony. Where a Respondent to an injunction for protection of whatever type knowingly, willfully, maliciously, and repeatedly follows or harasses the petitioner, that respondent may be charged with Aggravated Stalking under Florida Statutes § 784.048 (4). Should you elect this option, you must follow your departmental procedures for filing a felony charge, including taped statements of all witnesses. You should always verify that the injunction in question is still active and has been served upon the Respondent. We cannot hold the Respondent responsible for obeying the judge's order unless he is on notice of its existence.

One can speedily verify whether the injunction is active by checking with the Clerk of Circuit Court's Domestic Violence Unit in Bartow. At night, the Clerk's website can assist you if you have Internet access. Simply go to the Civil Records section of the site, enter the Petitioner's name, last name first, go to the file matching the case number on her copy of the injunction, and check the court's docket for a dismissal. You should then contact the Sheriff's Office and ensure that the Respondent was served. Try to advise in your report the serving deputy's name and the date of service. If you are looking at a Final Injunction for Protection, as opposed to a temporary injunction, odds are that the Respondent was served in court the day it was granted. Look at the last page for the Clerk's certification or the Respondent's signature. Most final injunctions you deal with will have this.

2. Violation of an Injunction for Protection

Your next option is to charge the Respondent with the first-degree misdemeanor of Violation of Injunction for Protection. This charge is not "contempt of court," and you should not confuse the two. It is a stand-alone misdemeanor charge. As with the felony, one should verify service on the Respondent and the injunction's status. Many of the protective orders issued within the last two years expired within twelve months of issuance. On the first page of the form order will be a notation of the expiration date, if any. Orders expiring "on further order of the court" are valid until rescinded by the court, in essence, permanent. Ensure in your report that all witnesses to the violation are noted, giving full names, addresses and telephone numbers, if any. I will discuss what we must prove for a criminal violation of an injunction for protection after we discuss your third option, the indirect criminal contempt process, because the elements of proof for a successful prosecution are identical.

As with any criminal

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charge, we have to prove an injunction violation allegation beyond and to the exclusion of any reasonable doubt. In a misdemeanor case, this will go before a County Court jury composed of strangers who have no knowledge of the Petitioner, the Respondent, or their prior history. Often, that prior history will be inadmissible at trial. Many times, our office will review reports alleging a violation that contain no evidence whatsoever that the Respondent actually committed the violation. This happens when an officer responds to a call and is confronted by an angry Petitioner who claims that the Respondent was there at the house, or nearby, or that he called, but the Petitioner has no witness and no physical evidence exists. Do not be surprised if you are advised of a "No-Bill" on such a charge. Does this mean that the case is dead and will not be followed up? Not necessarily. We have a third option, the Indirect Criminal Contempt process, and as you will see, often it is the best option.

3. THE INDIRECT CRIMINAL CONTEMPT PROCESS

The Indirect Criminal Contempt process is triggered when the state asks the court to hold the Respondent in contempt for violating the injunction. This is generally initiated by the Petitioner herself going to the Clerk's Office in Bartow and filing an affidavit which is routed to the State Attorney's Office for action. In cases where your department believes it does not have probable cause to proceed with a complaint, this is the best advice to give an angry Petitioner. She can proceed with the case herself. This process is in many ways much simpler and faster than a County Court misdemeanor case, particularly because that the Respondent is generally not entitled to trial by jury in a contempt case. This being so, often we will review complaint affidavits or arrest reports from law enforcement charging a misdemeanor in County Court, and determine that the better course of action is to proceed on it directly as a contempt case. These we file directly, and the Petitioner does not have to go to the Clerk's Office to file, as she would if no police action had been taken.

C. WHAT OUR OFFICE MUST PROVE AT TRIAL

What constitutes a violation of an injunction (here I speak of the misdemeanor case, not Aggravated Stalking) that can be pursued criminally? This is the most common question we hear. Frequently, we are confronted by a Petitioner who is angry over child custody, child support, or visitation issues, and wants the Respondent prosecuted for this. Though it is a violation of the court order, it is not a criminal violation. To determine what violations may be criminally enforced, either as a misdemeanor injunction violation or as an indirect criminal contempt, one must turn to the authorizing statutes for the type of injunction.

In cases of an Injunction for Protection Against Domestic Violence we can criminally prosecute the following eight types of violation:

1) The Respondent's refusal to vacate a dwelling shared by the parties;
2) The Respondent's going to, or being within 500 feet of, the Petitioner's residence, school, place of employment, or a place, specified in the injunction, that is frequented by the Petitioner and any named family or household member (WARNING: Contrast this with the violation of injunction for protection against repeat violence/dating violence noted below, "Five-hundred-foot violations" are not criminally actionable in cases of repeat violence or dating violence under the current statutory scheme.);
3) The Respondent commits a new act of domestic violence against the Petitioner (remember that we'll also have to prove the new violent act);
4) The Respondent commits any other violation through an intentional, unlawful threat, word, or act to do violence to the Petitioner;
5) The Respondent telephones, contacts, or otherwise communicates with the Petitioner, either directly or indirectly, unless the injunction specifically allows indirect contact through a third party (for this, you must read the injunction carefully. Some judges will authorize limited contact directly between the parties when children are involved, even though the statute does not provide for that. Such provisions normally do not allow the Respondent to become harassing or abusive to the Petitioner during a permitted contact, however. Many violations occur this way.);
6) The Respondent comes within 100 feet of the Petitioner's motor vehicle, regardless of whether the vehicle is occupied;
7) The Respondent destroys or defaces the Petitioner's personal property, including her motor vehicle (remember that we'll have to prove ownership to successfully prosecute this charge);
8) The Respondent refuses to surrender firearms or ammunition, if the court has ordered him to do so.

Remember, however, that before we

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...CONTINUED FROM PAGE 3...

get to one of the above categories, we must prove that (1) an injunction for protection naming the Respondent exists, (2) that it was in force on the date of the violation, and (3) that it was served upon the Respondent.

In the cases of violation of injunction for either repeat violence or dating violence, our options are considerably narrower as there are only five categories of criminal violation. These are:

- The Respondent's refusal to vacate a shared dwelling;
- The Respondent's going to the Petitioner's residence, school, place of employment, or a place specified in the injunction regularly frequented by the Petitioner and any named family or household member (WARNING: Contrast this with the violation of a domestic violence injunction above. Again, "Five-hundred-foot violations" are not criminally actionable in cases of repeat violence or dating violence under the current statutory scheme.)
- The Respondent's committing a new act of repeat violence or dating violence against the Petitioner;
- The Respondent's committing any other violation of the injunction through an intentional, unlawful word, threat, or act to do violence to the Petitioner;
- The Respondent's telephoning, contacting, or otherwise communicating with the Petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party (unlike the domestic violence injunction, judicial modifications to this provision within the injunction are rare).

As with the domestic violence injunction above, we must also prove that the Respondent was served with the injunction, and that it both names him or her and was properly in force on the date of the claimed violation.

If the violation claimed does not fall within one of the statutory categories, then the violation is not susceptible to felony or misdemeanor prosecution. Common sense tells us that Aggravated Stalking requires a Respondent's repeated personal contact with the Petitioner while a served injunction naming that Respondent is in effect. Likewise, a misdemeanor Violation of Injunction for Protection requires the Respondent to violate one of the statutory categories before we may proceed. Even where Indirect Criminal Contempt is concerned, we will generally not go forward unless the Respondent has violated one of the statutory categories. The exception to this rule lies with the five-hundred-foot violation for repeat and dating violence cases;. Here, depending on the facts presented, we will often go forward with a criminal contempt action, but not with a misdemeanor injunction violation case. A good rule of thumb to follow is that, generally, violation cases will not be criminal violation cases without some form of prohibited contact or attempted prohibited contact, initiated by the Respondent.

You should keep in mind that even if a criminal violation is not apparent to you, the Petitioner is not without redress. Where a violation of child custody, visitation, or support arrangements is the triggering event, she can still petition the issuing court to hold the Respondent in civil contempt. This also applies where the Respondent has failed to comply with treatment requirements set out in the injunction, failed to get an HIV or sexually transmitted diseases test, or any other complained-of event not involving some form of contact with the Petitioner or damage to her personal property. Where this is the case, you should direct the Petitioner to contact the Domestic Violence Coordinator for the Clerk of Circuit Court, who is to be found at the same place she originally went to get her injunction.

D. A FINAL WORD

In conclusion, should you be confronted with a Petitioner claiming violation of a Protective Injunction, after securing the crime scene, you should always first ascertain what type of injunction it is. Whether it is to protect her against domestic violence, repeat violence, or dating violence, your police action will necessarily be dictated by the injunction's current status, whether or not it was served on the named Respondent, and whether or not the violation falls within one of the guidelines set forth by the statutes. Whether you and your supervisors choose to go with a felony charge, a misdemeanor charge, or to advise the Petitioner to file an Affidavit with the Clerk on her own, you should always strictly follow the policies and procedures set forth by your department, and thoroughly document your actions. If you have questions or concerns on the injunction process, injunctions for protection, or facts surrounding prosecution of an injunction case, please contact our office at (863) 534-4985. The State Attorney's Domestic Violence Unit is your resource in these matters. Call on us for your questions, and we will assist in whatever way we can.

...From the Courts...

Officer's Information Was Too Stale to Support Stop

In this Polk County case, the defendant was charged with first-degree murder and filed a motion to suppress evidence. The facts on which the motion was based were that an officer, while on undercover surveillance, saw the defendant driving. The officer had known the defendant to have a suspended license, but it had been three years since he had actually checked the defendant's record. However, for at least a part of that time, the defendant had been in prison. The officer radioed a marked unit to stop the defendant which it did, although it was unable to confirm the status of the defendant's license before the stop. The stop led to the seizure of evidence relating to the murder. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Florida Supreme Court reversed, holding that the officer's information was too stale to create a reasonable suspicion of criminal activity which would justify the stop. *Moody v. State*, 28 FLW S77 (Fla. Jan. 23, 2003).

Passenger May not Be Detained Absent Reasonable Suspicion

In this Polk County case, the defendant was charged with possession of cocaine and drug paraphernalia and filed a motion to suppress. The facts on which the motion was based were that the defendant was a passenger in a vehicle, which was stopped for running a stop sign. When he started to get out of the car, the officer ordered him to stay seated. The officer testified that he did this for general safety reasons and did not suspect the defendant committed any crime or believe he was a threat. Subsequently, the officer asked the defendant to come to the back of the car where he ultimately asked for and received permission to pat the defendant down. As a result of the pat down, drugs and paraphernalia were discovered. The trial court denied the motion, and the defendant pled to the charges. On appeal, the Second District Court of Appeal reversed, holding that an officer may not detain a passenger by ordering him to remain in the vehicle absent a reasonable suspicion that the passenger has committed a crime or is a threat. *Faulkner v. State*, 28 FLW D241 (Fla. 2d DCA Jan. 17, 2003).

Evidence Insufficient to show Aggravated Battery by Motor Vehicle

The defendant was charged with, among other things, two counts of aggravated battery on a law enforcement officer. At his trial, the evidence established that during a chase of the defendant, he backed his vehicle into a police cruiser. The officer who was driving the cruiser testified that he saw the defendant's vehicle reversing toward him as he was taking off his seatbelt. He said that the impact damaged his bumper, cracked a turn signal light, and caused a strobe light to fall off the dashboard. Another officer who had been riding in the car testified that the crash caused the car's door to strike him, injuring his arm and shin area. The defendant was convicted of both counts. On appeal the Third District Court of Appeals reversed the conviction relating to the officer who was the driver, and held that the evidence was insufficient because there was no testimony that the driver was injured, jostled, or moved about or that he had to brace himself because of the impact. *Rosa v. State*, 28 FLW D219 (Fla. 3d DCA Jan. 15, 2003).

- Major Floyd Buckhalter will be retiring from the Game and Fish Commission. His last working day will be Friday, February 28th. Thank you Major Buckhalter for all of your years of service!

- Lieutenant Fran Clark of the Polk County Sheriff's Office retired January 30th after having served more than 25 years. Thank you Lt. Clark for all your years of service!

Congratulations and we hope you enjoy your retirement; you deserve it!

- Congratulations to Lakeland Police Department's new police chief, Roger Boatner. Chief Boatner was officially sworn in on Monday, February 24th.

- Officer Wayne Osbourne of the Bartow Police Department was injured during an apprehension of a suspected car thief on Saturday, February 22nd. Good job and best wishes for a speedy recovery!

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...FROM THE COURTS...

STATEMENTS AND ACTIONS OF DEFENDANT SUPPORTED TAMPERING CHARGE

The defendant was charged with, among other things, witness tampering. At his trial, the evidence showed that he was stopped by a store security officer for shoplifting. When he was being led from the store by a police officer, he said to the security officer that he was coming back to see him. He in fact returned several days later but left when the security officer told him to do so. The security officer testified that he felt threatened by the defendant's words and actions and considered not testifying. The defendant was convicted of the witness tampering charge, and on appeal, the Third District Court of Appeal affirmed, holding that the evidence was sufficient to show that the defendant engaged in intimidation in order to keep a witness from testifying. *Pollen v. State*, 28 FLW D221 (Fla. 3d DCA Jan 15, 2003).

SEXUAL PREDATOR ACT DECLARED UNCONSTITUTIONAL

The defendant was charged with and pled guilty to sexual battery on a physically incapacitated person by multiple perpetrators. The court, in sentencing him, declared him to be a sexual predator. On appeal, the Third District Court of Appeal reversed the sexual predator designation, holding that the Sexual Predator Act is unconstitutional because it fails to provide minimal procedural due process. *Espindola v. State*, 28 FLW D222 (Fla.3d DCA Jan. 15, 2003).

Pictured above is the Support Staff of the State Attorney's Office, Juvenile Division. From left to right are Luci Douglas, Connie Strickland, Arlene Waltz, and Brandy Watson (front).

- Assistant State Attorney E. Allen Nelson will be retiring from the State Attorney's Office after approximately 20 years of service with the state. Allen's last day will be Friday, February 28th. Congratulations on your retirement; you've earned it!

STATE ATTORNEY'S OFFICE EMPLOYEE BIRTHDAYS

MARCH

Highlands County:
David Ward, 29th

Felony Intake:
Joe McCarthy, 8th
Michelle Connors, 13th

Felony:
Mitch Ladner, 19th
Tammy Furlong, 23rd
Brad Copley, 30th

Special Prosecution:
Paul Wallace, 21st

Investigations:
Dan Butler, 18th

Computer Services:
Brenda Edenfield, 9th

Misdemeanor:
Mary Cloudman, 2nd
Leslie Lasseigne, 14th
Louann Lango, 20th
Debbie Willis, 22nd

Juvenile:
Alan Burns, 3rd
Luci Douglas, 31st

Lakeland Office
Linda Taylor, 20th

Winter Haven:
Melissa Shaw, 11th