

## ***State v. Byrd* and *Ex Parte* Domestic Violence Protective Orders**

John Rubin\*

UNC School of Government

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Several questions have arisen about the impact in domestic violence cases of the North Carolina Supreme Court's decision in *State v. Byrd*, 363 N.C. 214 (2009). This memorandum briefly reviews the decision as well as proposed legislative changes in response.

**Ruling.** In *Byrd*, the North Carolina Supreme Court addressed the meaning of the term "valid protective order" as used in the domestic violence protective order statutes in Chapter 50B of the North Carolina General Statutes. The specific question addressed by the Court was whether a person who violates an *ex parte* order is subject to the sentencing enhancement in G.S. 50B-4.1(d), which elevates a felony by one class if the defendant violates a "valid protective order" in the course of committing the felony. The Court ruled first that the sentencing enhancement did not apply to the defendant's conduct because the order that the defendant violated was a temporary restraining order (TRO) entered under North Carolina Rule of Civil Procedure 65(b), not a domestic violence protective order entered under Chapter 50B. The order therefore did not fall within the term "valid protective order" as required in Chapter 50B. This part of the Court's decision has a limited impact because, in most instances, protective orders will be issued under Chapter 50B. The second part of the Court's ruling has a much wider impact. The Court ruled that even if the order had been entered under Chapter 50B, it did not fall within the term "valid protective order" because it was entered *ex parte*. G.S. 50B-1(c) defines a "protective order" as an order entered "upon hearing by the court or consent of the parties." The Court found that this statute requires a hearing at which the defendant has received notice and has the opportunity to be heard. An order entered by a court *ex parte* is, by definition, without notice or opportunity to be heard and does not satisfy this requirement. Although the Court's decision arose in the context of the felony sentencing enhancement in G.S. 50B-4.1, its reasoning applies to the other criminal consequences in G.S. 50B-4.1, discussed below, because all require that a "valid protective order" be in effect.

**Misdemeanor violation of DVPO.** G.S. 50B-4.1(a) makes it a Class A1 misdemeanor for a defendant to knowingly violate a "valid protective order." In light of *Byrd*, a violation of an *ex parte* domestic violence protective order (DVPO) is NOT chargeable as a misdemeanor violation of G.S. 50B-4.1(a). The Court in *Byrd* recognized, however, that a violation of an *ex parte* DVPO remains punishable as criminal contempt. G.S. 50B-4(a) contains a simplified procedure for a person protected by a DVPO to institute contempt proceedings through the clerk's office. Also, a misdemeanor violation of G.S. 50B-4.1(a) may still be charged if the defendant violates a protective order entered after a hearing or by consent of the parties—that is, an order that is not *ex parte*.

**Arrest for violation of DVPO.** G.S. 50B-4.1(b) requires a law enforcement officer to arrest a person without a warrant or other process for certain violations of a "valid protective order." In light of *Byrd*, this statute does NOT authorize arrest for violations of an *ex parte* DVPO. A person is still subject to

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\* John Rubin can be reached at [rubin@sog.unc.edu](mailto:rubin@sog.unc.edu) or 919-962-2498.

arrest, however, if the court issues an order to show cause for contempt AND an order for arrest. See G.S. 5A-16(b) (a judicial official who initiates contempt proceedings may issue an order for arrest under G.S. 15A-305 if the judicial official finds probable cause to believe the person ordered to appear will not appear). A person is also subject to arrest if he or she has committed other offenses that do not depend on whether a DVPO is in effect. Thus, under G.S. 15A-401(b)(2), an officer may arrest a person without a warrant for certain misdemeanors committed outside the officer's presence, such as a misdemeanor assault, if the officer has probable cause of the offense and the defendant and victim have a personal relationship as defined in G.S. 50B-1.

**Other criminal consequences.** G.S. 50B-4.1(f) makes a violation of a "valid protective order" a Class H felony if the person has two prior convictions under Chapter 50B, and G.S. 50B-4.1(g) makes certain violations of a "valid protective order" a Class H felony if the perpetrator violates the order while possessing a deadly weapon. In light of *Byrd*, a violation of an *ex parte* DVPO is NOT chargeable as an offense under either subsection.

**Continuance of hearing and maintenance of conditions of *ex parte* DVPO.** Following the issuance and service of an *ex parte* DVPO, the court must hold a hearing within the time limits specified in G.S. 50B-2(c). Defendants sometimes will request a continuance to prepare for the hearing. What if the court grants a continuance and maintains the terms of the *ex parte* DVPO in effect? Do the above criminal consequences apply if the defendant violates the DVPO after the continuance is granted but before the full hearing is held? *Byrd* does not definitively resolve the issue. The facts of the case suggest that such a continuance would not satisfy the hearing or consent required for a "valid protective order" and the imposition of the criminal consequences in G.S. 50B-4.1 for violation of the order. In *Byrd*, exactly that happened: The trial court granted the defendant's request for a continuance and ordered the terms of the TRO to remain in effect, and the defendant violated the TRO after the continuance but before the full hearing occurred. Even if the defendant explicitly agrees to maintenance of the protective order as a condition of the continuance, such an arrangement might not meet the statutory requirement of hearing or consent. In that instance it could be argued that the defendant still will not have had an opportunity to be heard on the allegations in support of the protective order. An argument can be made, however, that if a defendant requests a continuance and expressly consents to maintenance of the terms of the order during the period of the continuance, he or she has sufficiently consented within the meaning of G.S. 50B-1(c) and is subject to the criminal consequences in G.S. 50B-4.1 for any subsequent violations of the order.

**Proposed legislation.** House Bill 115, introduced earlier in the 2009 legislative session, was revised July 1, 2009, in response to the *Byrd* decision. The legislation would amend pertinent sections of Chapter 50B to provide that the term "valid protective order" includes an emergency or *ex parte* protective order. THE GENERAL ASSEMBLY HAS NOT ENACTED THE LEGISLATION AS OF THIS WRITING. (The status of the bill can be viewed [here](#). If the bill becomes law, I will send out a notice to that effect.) If the legislation passes, Chapter 50B would authorize imposition of the criminal consequences discussed above. For example, if the legislation passes, magistrates could issue criminal process and officers could arrest for the misdemeanor offense of violating an *ex parte* DVPO. The legislation may not finally resolve the issue, however. In *Byrd*, the Court expressed Due Process concerns about the imposition of criminal

consequences based on a violation of an order entered without notice and an opportunity to be heard. If the proposed legislation passes, it would still be subject to review by the courts in light of those constitutional considerations.