6377 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 4, 1997

Jeffrey B. Moore, Executive Director
South Carolina Sheriffs' Association
P.O. Box 21428
Columbia, South Carolina 29221-1428

Dear Mr. Moore:

You have asked several questions regarding criminal domestic violence in South Carolina. These are as follows:

1. If a defendant is convicted of criminal domestic violence against one victim and is later arrested and brought to court for criminal domestic violence against a different victim, should the new case be treated as a charge of criminal domestic violence first offense simply because it was perpetrated against a different victim?

2. Is there any reason why a court cannot try a defendant for criminal domestic violence without the victim being present at trial as long as the officer has sufficient evidence to proceed without the victim's testimony?

3. Parties who meet the definition of "household member" under the Protection from Domestic Abuse Act are eligible to petition for an Order of Protection from Domestic Abuse. For parties who don't meet that definition, such as boyfriend and girlfriend who never lived together, they must apply for a restraining order under the Harassment and Stalking Laws (See S.16-3-1750). Just because the victim initially complained of

> physical abuse, must he/she show a pattern of physical abuse in order to qualify for a restraining order, or is it enough to show a pattern of any acts described in S.16-3-1800 as constituting harassment or stalking?

Law / Analysis

The crime of criminal domestic violence is codified at S.C. Code Ann. Sec. 16-25-10 et seq. Section 16-25-10 defines the term "household member" to mean "spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly have cohabited." Section 16-25-20 makes it unlawful to "(1) cause physical harm or injury to a person's own household member, (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." Pursuant to § 16-25-30, a violation of § 16-25-20 is a misdemeanor carrying with it a fine of not more than five hundred dollars or imprisonment for not more than thirty days.

Section 16-25-40 enhances the penalties for criminal domestic violence for third convictions. Pursuant thereto,

> [a]ny person who violates Section 16-25-20 after having previously been convicted of two violations of Section 16-25-20 or two violations of Section 16-25-65 [criminal domestic violence of a high and aggravated nature] or a violation of Section 16-25-20 and a violation of Section 16-25-65 is guilty of a misdemeanor and, upon conviction, must be fined not more than three thousand dollars or imprisoned not more than three years, or both.

In addition, § 16-25-50 imposes penalties for violation of an order of protection and § 16-25-65 creates a statutory offense for criminal domestic violence of a high and aggravated nature.

With regard to your first question, Section 16-25-40 speaks only of "having previously been convicted of two violations ...." of the Domestic Violence statute as specified. The law makes no mention of nor distinguishes as a result of there being different victims. Nothing therein leads me to believe that, because there was a different victim in the subsequent offense, the law would, therefore, treat the offense as a "first offense." A statute should be given a reasonable and practical construction which is consistent with the purpose and policy expressed therein. Hertz Corp. v. S.C. Tax

Comm., 246 S.C. 92, 142 S.E.2d 445 (1965). The obvious purpose of § 16-25-70 of the Domestic Violence statute is to enhance punishment for subsequent convictions. It is to impose a stern punishment upon repeat offenders. Thus, it would make little or no sense only to do so when the victim was the same person as previously. See, DeWitt v. S.C. Dept. of Highways and Public Transportation, 274 S.C. 184, 262 S.E.2d 28 (1980) [when state is prosecuting a person for an offense that carries an enhanced penalty upon conviction for second or subsequent offense, it is only necessary to prove that the previous conviction exists, that the conviction was for an offense that occurred prior to the commission of the offense for which defendant is being tried, and that the defendant was the subject of such prior conviction]. If the General Assembly had meant such a distinction to exist, it could have clearly said so; in view of the fact that it did not, I am of the opinion that no requirement exists for the victim to have been the same victim in order to constitute subsequent offenses under the Act.

Secondly, you ask if there is any reason why a court cannot try a defendant for criminal domestic violence without the victim being present at trial as long as the officer has sufficient evidence to proceed without the victim's testimony. Certainly, there is no legal reason why a case cannot be prosecuted without the testimony of the victim.

In an Informal Opinion, dated August 5, 1996, I concluded that there is no prohibition upon an officer being an affiant upon a warrant for Criminal Domestic Violence, and such warrant is executed at a later date, at another place. The Opinion was rendered in response to the all too frequent situation where police officers respond to a domestic call and possess probable cause to believe an assault has taken place, but "the victim does not wish to prosecute." It was stated as a premise in that Opinion that "[i]n recent years many suspects have come to realize, if they leave before the police arrive they will not be arrested by the police and the victim is not likely to pursue charges at a later date." Referenced in that Opinion was Section 16-25-70, which provides in pertinent part as follows:

> (A) A law enforcement officer may arrest, with or without a warrant, a person at the person's place of residence or elsewhere if the officer has probable cause to believe that the person is committing or has freshly committed a misdemeanor or felony under the provisions of Section 16-25-20, 16-25-50, or 16-25-65 even if the act did not take place in the presence of the officer. The officer may, if necessary, verify the existence of an order of protection by telephone or radio communication with the appropriate police department.

(B) A law enforcement officer must arrest, with or without a warrant, a person at the person's place of residence or elsewhere if physical manifestations of injury to the alleged victim are present and the officer has probable cause to believe that the person is committing or has freshly committed a misdemeanor or felony under the provisions of Section 16-25-20, 16-25-50, or 16-25-65 even if the act did not take place in the presence of the officer. The officer may, if necessary, verify the existence of an order of protection by telephone or radio communication with the appropriate police department.

(C) In effecting a warrantless arrest under this section, a law enforcement officer may enter the residence of the person to be arrested in order to effect the arrest where the officer has probable cause to believe that the action is reasonably necessary to prevent physical harm or danger to a family or household member.

(D) If a law enforcement receives complaints of domestic or family violence from two or more household members involving an incident of domestic or family violence, the officer shall evaluate each complaint separately to determine who was the primary aggressor. If the officer determines that one person was the primary physical aggressor, the officer need not arrest the other person believed to have committed domestic or family violence. In determining whether a person is the primary aggressor, the officer shall consider:

(1) prior complaints of domestic or family violence;
(2) the relative severity of the injuries inflicted on each person;
(3) the likelihood of future injury to each person; and
(4) whether one of the persons acted in self-defense.

The existing literature points to the fact that, more and more, due to preservation of physical evidence by police, and the availability of expert witnesses in this field, prosecutions for domestic violence are proceeding even where the victim is not willing to testify. See, Truss, "The Subjection of Women ... Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence," 26 St. Mary's L. J. 1149, 1192

(1995); Hanna, "No Right to Choose: Mandated Victim Participation In Domestic Violence Prosecutions," 109 Harvard L. Rev. 1849 (June, 1996). Therefore, assuming the evidence is sufficient, there is no legal reason why a criminal domestic violence charge cannot proceed without the victim's testimony.

An example of this is the case of State v. Lee, 73 Ohio Misc.2d 9, 657 N.E.2d 604 (1995). There, the Prosecutor implemented a policy to proceed to trial should the evidence warrant even where the victim did not testify. The evidence in Lee consisted simply of the victim's 911 call and the testimony of one of the two officers called to the scene. Defendant's counsel moved for acquittal, arguing that without the presence of the victim at trial, the state could not present admissible evidence sufficient to convict the defendant as there was no proof of the family relationship or of any physical harm.

The Court rejected the defendant's argument, concluding as follows:

> [i]n many jurisdictions across the country, the state is going forward with domestic violence cases even if the alleged victim fails to appear to testify at trial. No rule of law requires that a battered partner testify against a loved one for the state to proceed on a charge of domestic violence. Murder cases obviously go forward without the testimony of the victim because s/he's dead. Thus, if domestic violence cases are properly investigated and prepared for trial, the victim's presence may not be required. Sometimes, all that is necessary is the testimony of a responding officer ... and a transcript of the 911 tape.

Id. at 607-608. The Court went on to hold that given that the officer testifies at trial, "the defendant's fundamental right to confront the witnesses against him is preserved" even though the victim does not appear and testify. Id. at 608, n. 5.

Your third question referenced § 16-3-1750 [the Harassment and Stalking law]. You wish to know what is the applicable standard for the issuance of a restraining order pursuant thereto. You inquire as to whether "[j]ust because the victim initially complained of physical abuse, must he/she show a pattern of physical abuse in order to qualify for a restraining order, or is it enough to show a pattern of any acts described in S.16-3-1800 as constituting harassment or stalking?"

Section 16-3-1750 authorizes a magistrate to issue a restraining order "against a person engaged in harassment or stalking." "Harassment" is defined by Section 16-3-1700(A) to mean

> ... a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that causes the person and would cause a reasonable person in his position to suffer mental distress. Harassment may include, but is not limited to:
>
> (1) following the targeted person as he moves from location to location;
>
> (2) visual, physical or verbal contact that is initiated, maintained, or repeated after a person has been provided notice that the contact is unwanted;
>
> (3) surveillance of or the maintenance of a presence near the targeted person's
>
> (a) residence;
> (b) place of work;
> (c) school; or
> (d) another place regularly occupied by the targeted person; and
>
> (4) vandalism and property damage.
>
> Harassment does not include words or conduct that is protected by the Constitution of this State or the United States and does not apply to law enforcement officers or process servers performing their official duties.

Subsection (B) of Section 16-3-1700 defines "stalking" to mean

> ... a pattern of words or conduct that is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear:
>
> (1) death of the person or a member of his family;
> (2) assault upon the person or a member of his family;
> (3) bodily injury to the person or a member of his family;

(4) criminal sexual contact on the person or a member of his family;
(5) kidnapping of the person or a member of his family.

Stalking does not include words or conduct that is protected by the Constitution of this State or the United States and does not apply to law enforcement officers process servers performing their duties.

(C) "Aggravated stalking" means stalking accompanied or followed by an act of violence.

(D) "Pattern" means two or more acts within a ninety-day period.

(E) "Family" means a spouse, child, parent, sibling, or a person who regularly resides in the same household as the targeted person.

Section 16-3-1760 provides upon good cause shown for the issuance of a temporary restraining order "without giving the defendant notice of the motion for the order." The statute deems it "good cause" if there is a "prima facie showing of immediate and present danger of bodily injury, verified by support affidavits ...."

In response to your specific question, nothing in § 16-3-1700 et seq. indicates that the applicant for a restraining order must show a pattern of physical abuse in order for a restraining order to be granted. Nothing in the statute requires that there exist a previous Incident Report filed. The restraining order authorized pursuant to § 16-3-1700 et seq. is a civil proceeding, not a criminal action; thus, the issuance of a restraining order is not limited by the stricter standards of criminal prosecutions. Compare §§ 16-3-1710 and 1720 (criminal penalties for harassment and stalking); see § 16-3-1750 [an "action" for a restraining order]; Cf. Op. Atty. Gen., August 8, 1995 [order for protection is issued in a civil proceeding]. While physical abuse or physical contact is indeed one example of "harassment," and a reasonable person's fear of death, assault, bodily injury, criminal sexual contact, kidnapping or damage to property is necessary to constitute stalking, certainly, a pattern of physical abuse is not the sole criterion which would enable the court to issue a restraining order. The issuing judge would weigh the particular facts and circumstances involved, and determine whether the defendant is engaged in stalking or harassment in a civil proceeding context. Thus, for a restraining order to issue for harassment, there must simply be shown a "pattern" of conduct defined in the definition

of "harassment." Likewise, for a restraining order to be granted for "stalking," the elements of that conduct must be met. "Harassment" requires a "pattern" of "intentional, substantial and unreasonable intrusion into the private life of a targeted person" causing a reasonable person in his position to suffer mental distress. "Stalking" is a "pattern of words or conduct" intended to cause a reasonable person in such position to fear death, assault, bodily injury, criminal sexual contact, kidnapping or property damage. In neither instance, must there be a pattern of physical abuse actually demonstrated.

Of course, our courts have emphasized on many occasions that the issuance or nonissuance of a temporary injunction or restraining order rests in the sound discretion of the judge to whom the application is made. Powell v. Immanuel Church, 261 S.C. 219, 199 L.E.2d 60 (1973). Each application for such relief depends on its own facts. Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 878 (1928). But summary judges must remember that the issuance of a restraining order as authorized by the Stalking or Harassment statute is a civil, not a criminal, proceeding. And, in that context, the showing required by the statute is simply that "a person [is] engaged in harassment or stalking" as defined. Thus, depending upon the facts and circumstances involved, a pattern of the acts described or the elements enumerated in the harassment/stalking statute would be sufficient for the issuance of the type of restraining order authorized by that statute.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an

REVIEWED AND APPROVED BY:

Zeb C. Williams, III
Deputy Attorney General