# Avoiding Criminal Charges by Not Coming to Court

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Not showing up for court is, generally speaking, bad trial strategy. In criminal court, such behavior can result in such unpleasantness as entry of an order for arrest and the revocation of one's driver's license. In civil court, a defendant's failure to respond can result in a default judgment for the entire sum claimed by the plaintiff. Yet in criminal cases involving charges of violating a domestic violence protective order, some defendants are benefiting from their failure to appear in the civil action leading to entry of the protective order. The defendants argue that because they never appeared for the hearing in the earlier action, they did not know a domestic violence protective order was entered, and thus, could not have *knowingly* violated its provisions pursuant to G.S. 50B-4.1(a). They contend that they are entitled to dismissal of the charges on this basis, and some trial courts have agreed.

Though our appellate courts haven't considered this issue, I'm highly skeptical that such arguments have merit when the alleged violations occur after the defendant was served with the 50B complaint and any ex parte order, regardless of whether the defendant actually received a copy of the final protective order.

**How DVPOs Come About.** A person entitled to relief under Chapter 50B may file a civil action in district court alleging acts of domestic violence and seeking entry of protective order. When such an action is filed, a summons must be issued and served upon the defendant pursuant to Rule 4 of the Rules of Civil Procedure. The summons must require the defendant to answer within 10 days of the date of service. The complaint, notice of hearing, and any temporary or ex parte order that has been issued must be attached. At the hearing, if the court finds that an act of domestic violence has occurred, the court must enter a protective order restraining the defendant from further acts of domestic violence. G.S. 50B-3. Such an order may, among other types of relief, grant the plaintiff possession of the residence or household and order the defendant to stay away from the residence. G.S. 50B-3(c) provides that "a copy of any order entered and filed under this Article shall be issued to each party." The statute does not specify how issuance occurs. It seems clear, however, that personal service under Rule 4 is not required. As a practical matter, if the defendant appears at the hearing, the defendant is handed a copy of the order. If the defendant does not appear at the hearing, the clerk carries out this directive by mailing a copy to the defendant and noting that service on the order. Sometimes, defendants contend that they moved or for some other reason did not received the mailed order.

**Proving a Knowing Violation.** The pattern jury instructions for violation of a domestic violence protective order provide that "[w]here a domestic violence protective order has been served on a defendant, you may presume that the defendant knew the specific terms of the domestic violence protective order." N.C.P.I.—Crim. 240.50. The court of appeals in State v. Branch, 2011 WL 6402713, ___ N.C. App. ___, 720 S.E.2d 461 (2011) (unpublished op.), implicitly sanctioned that instruction when it found no error in a colloquy between the judge and defense counsel after the close of the evidence regarding whether the State had proved service. In *Branch*, however, the defendant stipulated to service after the State forecast testimony from the victim that the defendant had appeared at the underlying civil proceeding and was present when the order was issued. This aspect of the factual circumstances in *Branch* may lead some defendants to argue that the presumption does not apply when the defendant was not personally served with the order. As I said before, I'm doubtful that this is the case.

**Like DWLR.** The presumption stated in the jury instruction for violating a domestic violence protective order accords with the manner in which the State must prove knowledge of a license revocation for purposes of G.S. 20-28. In that

context, the courts have held that proof that DMV mailed notice pursuant to G.S. 20-48 raises a rebuttable presumption that the defendant received the notice and thus knew of the revocation. State v. Coltrane, 184 N.C. App. 140, 143 (2007), *aff'd*, 362 N.C. 284 (2008) (holding that State raised prima facie presumption of receipt and presumption "was clearly not rebutted" when defendant "chose not to present any evidence at trial").

**Purpose of Chapter 50B.** More significantly, the very purpose of Chapter 50B—protecting victims of domestic violence—would be undermined by permitting a defendant to avoid prosecution for violating a protective order when the State cannot prove that the order personally was served upon him. A defendant who is served with a summons for a Chapter 50B action has been notified that the plaintiff is seeking a protective order, since such an order ***must*** issue if the court finds that an act of domestic violence occurred. A defendant ought not be able to thwart the enforcement of a protective order issued in such a proceeding by willfully failing to appear. In considering similar provisions under Texas Law, the Texas Court of Criminal Appeals has characterized the "evident purpose" of the "requirement [] that the respondent be served with the application and notice of the hearing, without which the protective order is not binding" as ensuring "that the person to whom the protective order applies has knowledge of the order, or at the very least such knowledge of the application for a protective order that he would be reckless to proceed without knowing the terms of the order." *See* Harvey v. State, 78 S.W.3d 368, 371 (Tex. Crim. App. 2002) (stating that "[t]he requirements are only that the respondent be given the resources to learn the provisions; that is, that he be given a copy of the order, or notice that an order has been applied for and that a hearing will be held to decide whether it will be issued" and that "[t]he order is nonetheless binding on the respondent who chooses not to read the order, or who chooses not to read the notice and the application and not to attend the hearing."); *but see* Small v. State, 809 S.W.2d 253, 256-57 (Tex. App. 1991) (finding evidence insufficient to sustain conviction for violation of domestic violence protective order where "[a]side from indicating that the appellant was served with notice of the hearing on the protective order, there is no evidence in this record that the appellant agreed to a protective order, attended any hearing or in any way participated, that he was ever served with a copy of the protective order, or that he in any way received notice, formal or informal, of the issuance or existence of the court order in question prior to his coming into the home").

**Have your say.** That's my view. As always, if you see things differently or have something to add, please send in a comment below.