Consent DVPOs without Findings of Fact Are Void ab Initio

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The court of appeals recently decided *Kenton v. Kenton*, a civil case of major significance for criminal lawyers. In a nutshell, a wife sought a domestic violence protective order (DVPO) against her husband. A district court judge entered a consent DVPO, finding that "[t]he parties agree to entry of this order without express findings of fact regarding the behavior of either party," and noting that the parties also waived conclusions of law. A year later, the wife sought to renew the DVPO. The husband "moved to dismiss the motion on the ground that the [c]onsent DVPO was facially invalid because the order contained no finding of fact or conclusion of law that defendant committed an act of domestic violence, as required by [G.S.] 50B-3(a)." The trial court denied the defendant's motion and renewed the DVPO, but the court of appeals reversed. Citing *Bryant v. Williams*, 161 N.C. App. 444 (2003), it ruled that the DVPO was "void *ab initio*" because it "lacked any finding that defendant committed an act of domestic violence."

No further appeal seems likely. The opinion was unanimous, so the wife doesn't have a right to further review. And although the docket sheet states that she was represented by an attorney, no brief was filed on her behalf in the court of appeals.

So, now we know that consent DVPOs without findings of fact are not proper. I've heard that such orders were common practice in some districts and not common in others. To try to get a rough handle on the prevalence of such orders, I've put up a poll – please take a moment to note how things worked in your district.

Did judges in your district regularly enter consent DVPOs without findings of fact?

- Yes
- No

View Results

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Clearly, *Kenton* will affect any pending cases in which a defendant is charged with violating a consent DVPO without findings of fact. Under G.S. 50B-4.1, it is a crime to violate a "valid protective order." An order that is void *ab initio* isn't valid, so violating it can't be a crime.

The more interesting question is whether *Kenton* affects past cases in which defendants have been convicted of violating consent DVPOs without findings of fact. Under G.S. 15A-1415(b)(1), a defendant is entitled to relief if "[t]he acts charged . . . did not at the time they were committed constitute a violation of criminal law." I can imagine an argument that (1) *Kenton*-style DVPOs are void *ab initio*, meaning (2) that no such order was ever valid, no matter how common they were, and so (3) a defendant convicted of violating such an order was convicted of something that was not a crime. Or an argument that under the retroactivity principles of *Teague*, *Kenton* is an "old rule" and so retroactive at least to *Bryant*. On the other hand, the state may argue that *Kenton* is a "new rule" that should not be applied retroactively to afford relief in closed cases. I haven't thought much about this, and I'd be interested in readers' analyses of this issue. [Update: my colleague Jessie Smith believes that, because *Kenton* is grounded in state law, retroactivity should be determined under *State v. Rivens*, 299 N.C. 385 (1980), not *Teague*. Her paper here discusses the difference and states that *Rivens* provides for a presumption of retroactivity.] Note that if defendants are entitled to reopen old cases under *Kenton*, convictions beyond those for violating a DVPO may be implicated. For example, a defendant convicted of the federal crime of possessing a firearm while subject to a DVPO, 18 U.S.C. § 922(g)(8), might seek relief based on the asserted invalidity of the DVPO.

Kenton raises other issues, too, like how detailed the findings of fact must be to support a DVPO, and whether a defendant who is willing to consent to a DVPO can do so in a way that doesn't amount to an admission in a related criminal case. Stay tuned.

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