

Court of Appeals Upholds Validity of Ex Parte DVPOs

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Background. In *State v. Byrd*, 363 N.C. 214 (2009), the state supreme court concluded that an ex parte domestic violence protective order, or DVPO, was not a “valid protective order” for purposes of the sentencing enhancement under G.S. 50B-4.1(d). (As explained in [this prior post](#) about *Byrd*, the enhancement provides that a felony that also constitutes a DVPO violation shall be punished one class higher than it otherwise would be.) The ruling cast broad doubt on the validity of ex parte DVPOs, and the General Assembly subsequently enacted legislation that appeared to be intended to reverse *Byrd* and to bolster the efficacy of ex parte DVPOs. Today, the court of appeals considered whether the legislation achieved its desired outcome.

The case is [State v. Poole](#). As a side note, the State was represented in the case by new School of Government faculty member LaToya Powell, back when she was still at the Attorney General’s office. *Poole* involved the following series of events.

- October 14, 2011: The defendant’s wife sought and obtained an ex parte DVPO based on the defendant’s threatening and harassing behavior. The order required the defendant to surrender his firearms to the officer who served the order.
- October 17, 2011: A deputy sheriff served the DVPO on the defendant.
- October 18, 2011: Officers returned to the defendant’s home and found a shotgun. The defendant was “arrested for violating the DVPO and indicted for ‘owning, possessing, purchasing, or receiving a firearm’ in violation of [G.S.] 14-269.8.”

Defendant’s motion to dismiss. The defendant moved to dismiss the charge, apparently on two grounds. First, he noted that G.S. 50B-1 defines a “protective order” as an order issued after a “hearing by the court or consent of the parties.” He argued that *Byrd* held that an ex parte proceeding is not a “hearing,” and therefore, that an ex parte DVPO is not a “protective order.” And if an ex parte DVPO is not a “protective order,” he reasoned, it cannot support a prosecution under G.S. 50B-3.1(j) (making it a Class H felony to possess a firearm in violation of a “protective order”), and its counterpart, G.S. 14-269.8. Second, he argued that prosecuting him criminally for violating an ex parte order violated due process principles.

Court rulings. The trial judge agreed, but the State appealed and the court of appeals reversed.

Ex parte DVPOs can support charges under G.S. 50B-3.1. It dealt with the statutory argument first. It noted that the General Assembly enacted [S.L. 2009-342](#) immediately after *Byrd*, and observed that the amendment added G.S. 50B-4(f) and G.S. 50B-4.1(h), both of which expressly define the term “valid protective order” to include ex parte DVPOs. Although the defendant was charged under G.S. 50B-3.1, which was not amended, rather than G.S. 50B-4 or G.S. 50B-4.1, the court of appeals ruled that the amendments manifested a legislative intent to confer full legitimacy on ex parte DVPOs. Furthermore, it noted, G.S. 50B-3.1(a) expressly refers to “an emergency or ex parte order,” so a violation of that statute in particular may be predicated on an ex parte DVPO.

No due process violation. The court then ruled on the constitutional issue, concluding that the defendant was not deprived of due process when he was prosecuted for violating an ex parte DVPO. The court noted that due process

usually requires that a person be given notice and an opportunity to be heard before he or she may be deprived of liberty or property, but stated that prior notice and an opportunity to be heard may be dispensed with in exceptional circumstances. It ruled that the need to protect victims of domestic violence is a purpose sufficiently important to justify the use of ex parte orders, especially given that such orders are subject to review at an adversarial hearing within 10 days.

Conclusion. Perhaps the legislative response to *Byrd* could have been drafted to avoid any ambiguity about the status of ex parte DVPOs. But whatever ambiguity existed before *Poole*, little remains afterwards. Violations of ex parte DVPOs are no different from violations of other types of orders that may be issued under Chapter 50B, and may result in charges under G.S. 50B-3.1 as well as 50B-4.1.