Is Kenton Retroactive?

Author : Jessica Smith

Categories : Uncategorized

Tagged as : DVPOs, kenton, retroactivity

Date : April 23, 2012

In a post here, Jeff wrote about the N.C. Court of Appeals decision in *Kenton v. Kenton*, holding that a consent domestic violence protective order (DVPO) lacking any finding that the defendant committed an act of domestic violence was void *ab initio*. As it turns out, a number of district court judges have been entering orders similar to those held void under *Kenton.* Of course, *Kenton* applies prospectively. However, questions have been raised about whether it applies retroactively to convictions that became final before it was decided. Consider the defendant who was convicted in 2010 of violating a *Kenton*-like DVPO. An element of that crime is the existence of a valid DVPO. Can the defendant now file a motion for appropriate relief (MAR) asserting that the protective order was invalid under *Kenton* and thus that he or she is entitled to relief? The answer depends on whether *Kenton* applies retroactively to the defendant's case.

As I discuss in more detail here, the retroactivity analysis for new federal rules is known as the *Teague* test. *Kenton*, however, was grounded in North Carolina law, not federal law. When a new rule is grounded in North Carolina law, the relevant retroactivity rule is that articulated in *State v. Rivens*, 299 N.C. 385 (1980). *See* State v. Zuniga, 336 N.C. 508, 513 (1994). Under *Rivens*, new rules are presumed to operate retroactively unless there is a compelling reason to make them prospective only.

Thus, the first question in the retroactivity analysis is this: Is *Kenton* a new rule? If a rule isn't new there is no retroactivity issue because the rule doesn't change existing law. There isn't a lot of guidance in the North Carolina case law about how to resolve this issue. Under the federal *Teague* test, a rule is "new" if reasonable jurists could differ as to whether precedent compelled the new rule. Federal law says that answering this question requires an examination of appellate precedent as well as institutionalized practice over a period of years. Under this approach *Kenton* arguably is not a new rule. The *Kenton* opinion expressly concluded that the precedent set by *Bryant v. Williams,* 161 N.C. App. 444 (2003), controlled. Slip Op. at 6 ("[W]e must conclude the precedent set by *Bryant* is controlling in this case."). That's pretty compelling evidence that the rule is not new (whether *Bryant* was a new rule is a separate question). On the other hand, there seems to be evidence of an institutionalized practice of judges entering *Kenton*-like orders, thereby suggesting that reasonable jurists disagreed on whether *Kenton* was mandated by *Bryant*. In Jeff's post, for example, 89 blog readers answered his survey, indicating that judges have been entering *Kenton*-like DVPOs in their districts. Thus, this aspect of the analysis may not be so clear cut.

If *Kenton* is a new rule, under *Rivens* it operates retroactively unless there are compelling reasons to make it prospective only. Note that this standard is very different than the federal *Teague* test which starts from a presumption of non-retroactivity. Cases have clarified that for purposes of determining whether compelling reasons exist for prospective application only, the court must look to the "purpose and effect of the new rule and whether retroactive application will further or retard its operation" as well as "the reliance placed upon the old rule and the effect on the administration of justice of a retrospective application." Faucette v. Zimmerman, 79 N.C. App. 265, 271 (1986) (civil case applying *Rivens*). *State v. Honeycutt*, 46 N.C. App. 588 (1980), decided only months after *Rivens*—but not citing that case—found reasons for prospective-only application of a new evidence rule. In *Honeycutt*, the defendant filed a MAR asserting that after his case was decided, the N.C. Supreme Court decided *State v. Haywood*, 295 N.C. 709 (1978), changing the law regarding the admissibility of declarations against penal interest. For more than a century, the North Carolina courts had ruled that declarations against penal interest were inadmissible for any purpose. Then, in

Haywood, the Court held that such declarations may be admitted under certain conditions. The defendant asserted that although he had litigated this evidentiary issue in his case and lost, he was entitled to retroactive application of the new rule. The superior court judge agreed and ordered a new trial. The State appealed, contending that the new rule should have prospective application only. The *Honeycutt* court agreed, reasoning that retroactive application "could easily disrupt the orderly administration of [the] criminal law." *See Honeycutt*, 46 N.C. App. at 591 (quotation omitted). The court found this conclusion bolstered by its belief that the change in evidentiary law did not "rise to the magnitude of a constitutional reform," which "most likely would mandate retroactivity." *Id.* at 591-92. But as noted above *Honeycutt* did not cite *Rivens*, a fact that's significant because it's not clear that *Honeycutt* honored the *Rivens* presumption of retroactivity. By contrast, however, is *State v. Funderbunk*, 56 N.C. App. 119 (1982), a case that did cite *Rivens.* In *Funderbunk* the court found no compelling reason why a decision modifying the common law rule of general disqualification in criminal proceedings of the testimony of a defendant's spouse involving communications between the spouse and the defendant should not apply retroactively.

It can be argued that like the rule in *Honeycutt*, retroactive application of *Kenton* DVPO rule "could easily disrupt the orderly administration of [the] criminal law" and does not "rise to the magnitude of a constitutional reform." On the other hand, *Honeycutt* didn't cite *Rivens* and it's not clear that *Honeycutt* is entirely consistent with the *Rivens* rule. Additionally, any retroactive application of a new rule will cause some disruption to the "orderly administration of [the] criminal law;" a blind application of this exception would swallow the *Rivens* rule. Considering the dearth of cases applying *Rivens*, the issue seems open. If you have thoughts as to how it should be resolved with respect to *Kenton*, please share them.