No Contact Orders for Sex Offenders

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Under G.S. 15A-1340.50, a judge may issue a permanent no contact order prohibiting a sex offender from coming into contact with the victim of his or her offense. According to the procedure set out in the statute, the prosecutor can, at the defendant's sentencing for a reportable sex crime, request that the judge issue a no contact order. The defendant then gets the opportunity to show cause why the order should not issue. The victim also has a right to be heard. If the judge determines at the hearing that reasonable grounds exist for the victim to fear any future contact with the defendant, then the judge must issue the no contact order. The court has to enter written findings of fact and the grounds on which the order is issued. The AOC form for the order, AOC-CR-620, gives the court plenty of space to do that.

The law gives the judge some flexibility in determining the exact form of relief set out in the order. It can, among other things, order the defendant not to threaten or visit the victim; not to abuse or injure the victim; not to telephone or electronically contact the victim; not to be present at the victim's residence, school, or work; or some or all of the above. There is also a catch-all provision that allows the court to impose any other relief deemed necessary and appropriate. Again, the AOC form accommodates this sort of cafeteria plan approach to shaping the order. At any time after issuance of the order the court may rescind it on motion of the State (at the request of the victim) or the defendant if it determines that the victim no longer has a reasonable grounds to fear future contact from the defendant. G.S. 15A-1340.50(h).

Any no contact order issued should be enforced by all North Carolina law enforcement agencies without further order by the court. Under G.S. 15A-1340.50(g), an officer *shall* arrest and take a person into custody, with or without a warrant, if he or she has probable cause to believe that the person knowingly violated the order. A knowing violation of the order is a Class A1 misdemeanor.

The no contact order statute has been in effect for a few years (it was enacted in 2009, S.L. 2009-380, and made effective for offenses committed on or after December 1, 2009), but I haven't heard much about how or how often it is being used. Last week the court of appeals decided State v. Hunt, __ N.C. App. __ (June 5, 2012), the first appellate case to consider the law.

In *Hunt*, the judge issued a no contact order for a defendant convicted of multiple counts of statutory rape and sexual offense against his 13-year-old half-sister. The victim asked the State to seek the order because she feared that the defendant would, as her half-brother, be aware of her contact information and because the offenses against her were violent and unprovoked. The trial judge found that those concerns were reasonable grounds for her to fear future contact and issued the no contact order.

The defendant made several arguments about the order on appeal.

First, he argued that the no contact order was an impermissible punishment under Article XI, section I of the North Carolina Constitution. That section lists the permissible punishments in our state, including (among other things) imprisonment, fines, probation, community service, and death. The court of appeals determined that the no contact order was civil in nature and thus did not implicate Article XI, section I at all. To reach that conclusion the court applied the same "intent-effects" test our courts have used to determine that sex offender registration and satellite-based

monitoring (SBM) of sex offenders are civil regimes. *See* State v. White, 162 N.C. App. 183 (2004) (registration); State v. Bowditch, 364 N.C. 335 (2010) (SBM, discussed here). As with registration and SBM, the court decided that the General Assembly did not *intend* for no contact orders to be criminal punishment (notwithstanding the statute's placement in Chapter 15A, enforcement by the police, and literal statement that the no contact order "shall be incorporated into the judgment imposing the sentence"). The court then concluded that the law was not so punitive in *effect* as to negate the legislature's intent to deem it civil. To the contrary, the court noted that the effect of the no contact order was "quite minor" in comparison to SBM; that the law had a clear, rational connection to a nonpunitive purpose (protecting victims from further contact by their assailants); and that the law was not excessive with respect to that purpose. Other jurisdictions have come to different conclusions about similar issues. *See* State v. Orduna, 129 Wash. App. 1026 (2005) (unpublished) ("The State concedes that the no-contact order erroneously extended beyond the statutory maximum for the crime.").

Second, the defendant argued that his due process rights were violated because the State did not provide him with notice of its intent to seek the no contact order. Assuming for the sake of argument that a protected liberty interest was at stake, the court concluded that no special notice was required. The defendant should, the court said, be generally aware of the prospect that a show cause hearing might be held by virtue of the no contact order statute itself. Additionally, because the no contact order hearing necessarily is done at sentencing, it is more akin to SBM determinations done at sentencing under G.S. 14-208.40A, for which no special notice is required, State v. Jarvis, __ N.C. App. __ (Aug. 2, 2011), than to SBM determinations done at "bring-back" hearings under G.S. 14-208.40B, for which the Division of Adult Correction must give the offender notice of the eligibility category into which it believes he or she falls and a brief statement of the factual basis for that determination, State v. Stines, 200 N.C. App. 193 (2009).

Next, the defendant argued that imposition of the no contact order, in addition to his term of imprisonment, violated double jeopardy. Having determined that the no contact order was not punishment at all, the court of appeals rejected the argument.

Finally, the court disagreed with the defendant's argument that the trial court failed to follow the statutory procedure of G.S. 15A-1340.50 by combining the sentencing hearing with the show cause hearing on the no contact order. The court of appeals said the trial court is not required to delineate one hearing from the other to comply with the law.

Because the court found the no contact order to be civil and not criminal, it noted that notice of the defendant's appeal of the trial court order should—like the appeal of an SBM determination—have been in writing pursuant to Rule 3(a) of the North Carolina Rules of Appellate Procedure. *See* State v. Brooks, 204 N.C. App. 193 (2010). The court of appeals nonetheless chose to hear the case as a petition for writ of certiorari. Slip op. at 6 (noting that a defendant "would have needed a considerable degree of foresight" to know that the appellate courts would deem the no contact order civil and that written notice of appeal would therefore be required). On a related note, the court of appeals continues to do that in SBM cases (it happened again last week in State v. Lineberger), but as time goes by and the rule becomes more well established, the court's willingness to do so may diminish.