

8017 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

August 31, 2005

The Honorable Robert H. Benson
Sheriff, Chester County
P. O. Drawer 727
Chester, South Carolina 29706

Dear Sheriff Benson:

In a letter to this office you referenced that a defendant has been charged with criminal domestic violence, second offense, in magistrate's court. In addition, the attorney of the victim associated with the CDV2nd case has filed a rule to show cause for the violation of an order of protection in family court with reference to the same incident. You have questioned whether both of these cases can go forward or is proceeding on both a violation of the defendant's fifth amendment double jeopardy rights.¹

S.C. Code Ann. § 16-25-20 provides for the criminal offense of criminal domestic violence. Pursuant to such provision,

It is unlawful to: (1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Also included in such statute is the provision that

(E) A person who violates the terms and conditions of an order of protection issued in this State under Chapter 4, Title 20, the "Protection from Domestic Abuse Act", or a valid protection order related to domestic or family violence issued by a court of another state...is guilty of a misdemeanor.

¹The Double Jeopardy Clause, the Fifth Amendment to the United States Constitution, provides that no person shall be "...subject for the same offence to be twice put in jeopardy of life or limb."

Robert H. Benson

Therefore, the violation of an order of protection may be a separate criminal offense.² However, it is my understanding that in the situation you addressed in your letter, the victim's attorney is seeking a finding of contempt for violation of an order of protection which consistent with S.C. Code Ann. § 20-4-60 (b) may be punishable by up to one year in prison and/or a fine not to exceed fifteen hundred dollars. I assume that the contempt arises from a situation where there has been some type of improper contact with the victim by the defendant after the order of protection was issued.

In State v. Warren, 330 S.C. 584, 500 S.E.2d 128 (Ct. App. 1998), the State Court of Appeals dealt with a situation where a family court restraining order had been issued which prohibited unsupervised contact between a child and her mother and stepfather. Because of subsequent allegations of contact, a rule to show cause was issued against the mother and stepfather for failure to comply with the family court order. Following a hearing, the father was found in contempt and sentenced. Subsequently, the father was tried and convicted of second degree criminal sexual conduct arising from the same incidence of contact with the victim. The father argued that his trial and conviction for the criminal offense constituted double jeopardy alleging that he had already been punished for the same offense in family court when he was found in contempt.

In Blockburger v. United States, 284 U.S. 299, 304 (1932), the United States Supreme Court stated that

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

In Warren, the Court of Appeals stated:

Applying the traditional *Blockburger* test,...it is clear the elements of the contempt offense are different from the elements of the charge of second degree criminal sexual conduct with a minor. Contempt results from the wilful disobedience of a court order...Clearly, the offenses are separate and distinct, and prosecution for both does not violate the Double Jeopardy charge.³

²Pursuant to S.C. Code Ann. § 16-25-20 (E) an individual convicted of criminal domestic violence and convicted of a violation of the terms and conditions of an order of protection, a misdemeanor offense, "...must not be sentenced under both sections for the same offense."

³Pursuant to S.C. Code Ann. § 16-3-655, for purposes of the case before the court ...the elements of second-degree criminal sexual conduct with a minor are as follows: (1) the actor engages in sexual battery, (2) with a victim who is at least fourteen years of age, but who is less

The Honorable Robert H. Benson
Page 3
August 31, 2005

330 S.C. at 599. Accordingly, the Court of Appeals determined that the prosecution for second degree criminal sexual conduct with a minor, which followed a finding of contempt, did not violate the Double Jeopardy Clause.

While finding no double jeopardy violation, the Court of Appeals nevertheless reversed the defendant's conviction determining that the trial judge had erred with regard to the instructions provided the jury. That decision was appealed to the State Supreme Court where that Court reversed the decision of the Court of Appeals with regard to the jury instructions. The Supreme Court, however, did not review the double jeopardy question. Therefore, it appears that the Supreme Court's reversal of the decision by the Court of Appeals did not impact the finding by the Court of Appeals that there was no double jeopardy violation. As a result, that determination still stands. I would note that the decision in Warren is consistent with findings by other courts with regard to allegations of a double jeopardy violation in similar circumstances. See State v. Grayhurst, 852 A.2d 491 (R.I. 2004); Ex parte Arenivas, 6 S.W.3d 631 (Ct.App. Texas 1999).

Consistent with the above, a defendant may be prosecuted for criminal domestic violence, second offense, in magistrate's court and simultaneously charged with a violation of an order of protection in family court with reference to the same incident. In my opinion, there is no double jeopardy violation in such circumstances.

If there are any questions, please advise.

Sincerely,


Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:


Robert D. Cook
Assistant Deputy Attorney General

³(...continued)

than sixteen years of age, and (3) the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or who is older than the victim.

330 S.C. at 599.