

Court issues opinion on admissibility of testimony given at domestic violence hearings

08/03/12

In New Jersey, domestic violence incidents can result in two separate and different types of court cases. A recent opinion from the Superior Court, Appellate Division, has helped to explain how these two separate but parallel court proceedings can sometimes interact with each other.

UNDER NEW JERSEY LAW WHAT IS AN ACT OF DOMESTIC VIOLENCE?

Under New Jersey law, an act of domestic violence occurs only when someone commits one or more specifically defined offenses, against someone with whom they share a certain type of relationship. There are 14 offenses that qualify as acts of domestic violence. They are as follows:

Homicide, Assault, Terroristic Threats, Kidnapping, Criminal Restraint, False Imprisonment, Sexual Assault, Criminal Sexual Contact, Lewdness, Criminal Mischief, Burglary, Criminal Trespass, Harassment, Stalking

In order to constitute an act of domestic violence, the offenses must be committed against a victim with whom the offender shares one of the following relationships:

- A spouse or former spouse
- A present or former household member
- The parties share a child in common or anticipate having a child in common if one of the parties is pregnant
- The parties have had a dating relationship

TWO PARALLEL COURT CASES:

Very often, when an act of domestic violence occurs, the parties become involved in two separate court matters. These two matters are before separate courts and are governed by different standards, and have different consequences. For example, a victim of an act of domestic violence frequently is granted a Temporary Restraining Order (TRO) barring the offender from returning to the residence and from having any contact with the alleged victim. The TRO, as the name implies, is temporary in nature, and any victim seeking a permanent or Final Restraining Order (FRO) must proceed before a family court judge in a civil domestic violence hearing. At a civil domestic violence FRO hearing, a family court judge is authorized to convert the TRO into an FRO. Additionally, the family court judge has the statutory authority to award a victim of domestic violence certain other types of relief, including child support and other financial support and attorneys' fees. This is a civil case, and an individual found to have committed an act of domestic at an FRO Hearing has not been convicted of any crime. There is no right to a trial by jury, and the plaintiff in a civil domestic violence FRO hearing need only persuade the family court judge by a preponderance of the evidence.

Often at the same time, a criminal charge has been filed against the offender. The criminal charge proceeds in due course, and will result in either an appearance before a municipal court judge if the offense charged is a disorderly persons offenses, or will be referred to the county prosecutor's office if an indictable offense. Should the county prosecutor elect to prosecute the charges as indictable offenses, a grand jury indictment will be

sought, and the accused will be afforded all of the procedural rights due to an accused in a criminal case, including the right to a trial by jury.

WHEN A CIVIL RESTRAINING ORDER CASE AND A PARALLEL CRIMINAL CASE INTERSECT

When lawmakers crafted New Jersey's domestic violence laws, they were well aware that domestic violence matters were likely to result in two separate court cases. Since FRO hearings proceed through the family courts much more quickly than related criminal charges proceed through the criminal courts, the legislature drafted a statute that attempted to address how testimony given in an FRO hearing would impact a related criminal case. N.J.S.A. 2C:25-29a provides that:

If a criminal complaint arising out of the same incident which is the subject matter of a [Civil Domestic Violence Final Restraining Order Hearing] has been filed, testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in the simultaneous or subsequent criminal proceeding against the defendant.

In *State v. Duprey*, an opinion released on August 1, 2012, the Superior Court, Appellate Division, analyzed this statute to determine whether testimony given in a Civil Domestic Violence FRO hearing can be used to cross examine someone who testifies at the related criminal case. Analyzing the purposes underlying this statute, and after considering a criminal defendant's constitutional right to cross examine witnesses, the Appellate Division concluded that

the trial testimony of a DV complaining must be available for use by the defendant during cross examination to impeach contradictory or inconsistent testimony that is material to the charges against the defendant, or to show bias, prejudice, or ulterior motives on the part of the witness.

Additionally, the Court held, "if a defendant [in a criminal case] chooses to testify, he or she would be subject to cross examination to the same extent as the DV complainant."

These holdings are founded upon the notion that when someone testifies in a court proceeding, but has previously given testimony that seemingly conflicts with testimony now being offered, such contradictions are relevant to an assessment of whether the witness is telling the truth. As a hypothetical example, if someone seeking a Final Restraining Order testified at the FRO hearing that the act of domestic violence took place on a Tuesday at 4:00 p.m., but at the related criminal case testified that the incident occurred on a Saturday at 2:00 a.m., the attorney representing the accused in the criminal case would be able to cross examine the witness about the discrepancy. If the accused in the criminal case testified at the FRO hearing that he was driving a red Chevrolet at the time of the incident, but later took the witness stand in his own behalf at the related criminal case and testified that he was driving a black Mercedes, the prosecutor could then attempt to impeach the defendant's credibility by confronting him with the prior inconsistent statement given at the FRO hearing. However, the prosecutor may only use a criminal defendant's prior testimony from an FRO hearing to cross examine the defendant if he elects to testify. If the defendant elects to remain silent at the criminal case, as is his constitutional right, the prosecutor may not use the criminal defendant's testimony from the prior FRO hearing as part of the State's evidence against the defendant due to the provisions of N.J.S.A. 2C:2-29a, quoted above.

The Appellate Division Opinion in *Dupree* strikes the right balance directing the traffic of testimony that occurs at the intersection between FRO civil restraining order Hearings and the trial of related criminal cases.

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