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DOMESTIC VIOLENCE SPECIAL PRETRIAL RELEASE AND OTHER ISSUES

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This memorandum will discuss the special pretrial release rules that apply to domestic violence crimes. To fully understand those provisions, it is important to understand the varying definitions of "domestic violence" or "domestic crime" used by North Carolina statutes. The term is used in determining eligibility for a civil domestic violence protective order, pretrial release for domestic violence crimes, authority to arrest without a warrant for domestic violence crimes, and eligibility for victim's assistance. In each instance the term has a different meaning and applies to different people. Therefore, this memorandum will address those different provisions, including the special pretrial release rules that apply to domestic violence crimes.

Civil Domestic Violence Protective Orders

Definition of Domestic Violence

"Domestic violence" for purposes of acquiring a civil domestic violence protective order in North Carolina is defined as "the commission of … [certain] acts upon an aggrieved party [the plaintiff] or the party's minor child by a person with whom the aggrieved party has or has had a personal relationship."[1]

The covered acts are: Attempting to cause bodily injury or intentionally causing bodily injury upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party; placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury; or committing any act defined as rape or sexual offense under G.S. 14-27.2 through -27.7 against the aggrieved party or minor.

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[1] G.S. 50B-1.

Effective March 1, 2002, S 346[2] adds another act that constitutes domestic violence: "Placing the aggrieved party or a member of the aggrieved party's family or household in fear of … continued harassment that rises to such a level as to inflict substantial emotional distress." Harassment is defined as knowing conduct, including written or printed communication or transmission, telephone or cellular or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

In order to qualify for a protective order, the person seeking the order (the plaintiff) and the perpetrator of the acts (the defendant) must have a "personal relationship," which means one of the following relationships exists:

- They are current or former spouses.
- They are persons of the opposite sex who are living together or who have lived together in the past.
- They have a child in common.
- They are persons of the opposite sex who are in a dating relationship (defined as one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship).
- They are related as parent (including person acting *in loco parentis*[3]) and child or grandparent and grandchild.
- They are current or former household members. This provision includes family members who have ever lived together; same sex couples who live or have lived together; and roommates.

[2] S 346 passed the last day of the 2001 session of the General Assembly and had not been signed by the Governor when this bulletin was printed. The bill provides that "it becomes effective March 1, 2002, and applies to offenses committed on or after that date." It is not clear how this effective date provision applies to the civil protective order change, but since the conduct is "fear of continued harassment," if the plaintiff seeks a protective order on or after March 1, 2002 and is in "fear of continued harassment" at that time, the new law would apply.

[3] *In loco parentis* means "in the place of a parent" and applies to a person who has assumed the status and obligations, including support and maintenance, of a parent without a formal adoption. Liner v. Brown, 117 N.C. App. 44, 449 S.E.2d 905 (1994).

Crime of Violating Protective Order

G.S. 50B-4.1 makes it a Class A1 misdemeanor for a defendant to "knowingly violate a valid protective order entered pursuant to G.S. Chapter 50B or by the courts of another state or the courts of an Indian tribe." A person acts knowingly when the person is aware or conscious of what he or she is doing.[4] A person does not act "knowingly" if he or she merely should have known; the person must actually know.[5] The violation can be for any provision of the order. For example, if the order includes a requirement to give possession of a car to the plaintiff and the defendant violates that order, the crime applies. A valid order is one that is in effect at the time of the violation. G.S. 50B-4(d) provides that in determining the validity of an out-of-state order, a law enforcement officer may rely upon a copy of the protective order issued that is provided to the officer and on the statement of the person protected by the order that to the best of that person's knowledge the order is presently in effect as written. Similarly, a judicial official who is determining whether to issue criminal process can rely on the same information or on any other evidence that gives the judicial official probable cause to believe that there is a protection order, that it prohibits the conduct alleged to have occurred, and that the order is still valid. What is clear from G.S. 50B-4 is that the magistrate or law enforcement officer is not required to check with the court in the state where the order was entered to determine if the order is still valid.

Consent As a Defense to Charging the Crime of Violating a Protective Order

One issue that arises in domestic violence cases is whether the plaintiff's consent to the defendant's violation of a protective order constitutes a defense to the defendant being charged with the crime of violating the protective order. No North Carolina cases have dealt with this issue, but the supreme court in Washington answered the question for that state. In *State v. DeJarlais*[6] the defendant challenged a conviction for violating a protective order that restrained him from going within 100 feet of his

[4] Underwood v. Board of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971). See ROBERT L. FARB, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIMES 3-4 (4th ed. 2001).

[5] State v. Miller, 212 N.C. 361, 193 S.E. 388 (1937).

[6] 969 P.2d 90 (Wash. 1998), *aff'g* 944 P.2d 1110 (1997).

girlfriend's residence. The defendant contended that his girlfriend invited him to her residence and argued that her consent was a defense to the charge of violating a domestic violence order for protection. The court disagreed with that argument indicating that the statute providing for domestic violence protection orders does not merely protect a private right but rather recognizes that domestic violence is a problem of immense proportions that affects the public and societal interest as well as a private right. Allowing consent to be a defense would undermine the intent of the statute. It seems likely that North Carolina's court would follow this reasoning if faced with the issue because it has pointed to the state's interest in dealing with domestic violence as a "serious and invisible problem."[7]

Special Pretrial Release Rules

What is the "48 Hour Rule?"

In 1995 the General Assembly amended G.S. 15A-534.1 to provide that only a judge may set conditions of pretrial release for a defendant arrested for a domestic violence crime for the first 48 hours after arrest. If no judge has acted to set conditions of pretrial release within 48 hours, a magistrate must set conditions of pretrial release.

The provision is not and has never been a provision authorizing a domestic violence defendant to be held without bond for 48 hours. Rather it is a policy decision by the General Assembly that because of the serious nature of domestic violence, a judge rather than a magistrate is the preferred judicial official to set conditions of pretrial release. Recognizing that judges are not always available, the General Assembly decided that a defendant should not be held longer than 48 hours awaiting a judge and provided that after 48 hours a magistrate must set bond.

Appellate Decisions Interpreting the Law

The appellate courts of North Carolina have fleshed out the statute in a series of cases. In *State v. Thompson*[8] a defendant charged with a domestic violence crime challenged the statute arguing that it violated the due process provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution. The North Carolina Supreme Court held the statute constitutional as written, indicating that it was not a punitive automatic 48-hour hold statute.[9] It was appropriate for the General Assembly to have decided that a judge was the best person to set conditions of pretrial release for domestic crimes, but the court stated that a defendant is still entitled to have conditions of pretrial release set "as soon as possible following his or her arrest and no later than forty-eight hours after arrest."[10]

Because a statute can be constitutional as written but unconstitutional as applied in a particular situation, the second step for the court was to determine whether under the particular facts of the case the statute as applied violated due process. In Thompson the defendant was arrested at 3:45 p.m. on a Saturday for assault inflicting serious injury on his former domestic partner. The magistrate completed a Release Order, designated the defendant as a "domestic violence" arrestee, ordered him sent to jail, and ordered the jailer to take the defendant before a judge or magistrate on Monday at 3:45 p.m., which was 48 hours after arrest. The defendant was taken before a district court judge at that time and the judge set conditions of pretrial release. However, in that county two sessions of district court opened at 9:00 a.m. and two sessions of criminal superior court opened at 10:00 a.m. on Monday morning. The court found that the magistrate's order automatically detaining the defendant without a hearing until well into the afternoon, while available judges spent several hours conducting other business violated the defendant's procedural due process rights to a timely pretrial-release hearing. As a remedy, the court dismissed the assault charge against the defendant. Essentially, the court said that the defendant is entitled to have conditions of pretrial release set at a meaningful time and in a meaningful manner and that although North Carolina can require a judge to set those conditions within the first 48 hours, the state cannot delay the hearing well beyond the time when a judge is available to hear the matter. Similarly, if a judge does not set conditions of pretrial release with 48 hours after arrest, the magistrate cannot delay the setting of conditions beyond 48 hours.

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[7] State v. Thompson, 349 N.C. 483,486 508 S.E.2d 277, 279 (1998)

[8] 349 N.C. 483, 508 S.E.2d 277 (1998).

[9] A later case, *State v. Gilbert*, 139 N.C. App. 657, 535 S.E.2d 94 (2000), upheld the constitutionality of the statute under the due process and double jeopardy protections of the North Carolina Constitution ("law of the land" clause N.C. Const. art. I § 19).

[10] State v. Thompson, 349 N.C. 483, 495, 508 S.E.2d 277, 284 (1998).

In *State v. Malette*[11] the court determined that there was no evidence that the State failed to move expeditiously when the defendant was taken before a judge the day after his arrest. And in *State v. Jenkins*,[12] the court recognized that in some situations when necessary for the efficient administration of the court system, it is permissible to hold the defendant a short time after a judge becomes available. In Jenkins the defendant was arrested early in the morning. The magistrate ordered the defendant to be taken before a district court judge at 1:30 p.m. that day even though district court opened at 9:30 a.m. However, the trial court found that the practice in that county was to schedule bond hearings at 1:30 p.m. for the purpose of scheduling district court cases in a rational and sufficient manner given the volume of the work and to give time for the papers to be filed with the clerk so the matter can be set for a hearing. The court of appeals held that the bond hearing occurred in "a reasonably feasible time and promoted the efficient administration of the court system."

If No Court Will Be In Session Is the Defendant Always Held for 48-Hours?

Even if a defendant is arrested at a time that no court is scheduled for forty-eight hours the defendant will not always be held 48 hours before conditions of pretrial release are determined. Because the judge is performing the magistrate's usual role in the initial setting of conditions of pretrial release, no formal hearing with notice to the prosecutor is required. Therefore, it is not uncommon for a judge who is contacted by an attorney for a defendant to set conditions of pretrial release even though no court is in session. Therefore, a person advising the victim of domestic violence should never inform the victim that the defendant will be held in jail for forty-eight hours after arrest, thereby giving the victim the false impression that she (or he) is safe for forty-eight hours.

Summary of Procedure in Applying 48 Hour Rule

Several important points can be gleaned from the court's interpretation of the statute.

- A magistrate cannot order a defendant to be held for 48 hours.
- A magistrate before whom a defendant is taken when arrested must complete a Release Order and order the defendant to be committed to the jail but to be taken to the first session of court (third check block in the "Order of Commitment).
- A detention facility officer must take defendant to the first session of court, either district or superior, after the defendant is admitted to the detention facility.
- If no judge has set a bond within 48 hours after arrest, a detention facility officer must take the defendant before a magistrate at that time.
- If the magistrate is on call at the time a defendant has been held for 48 hours, the magistrate must come to the courthouse to set conditions of pretrial release immediately and may not delay the hearing until regular office hours or for the convenience of the magistrate.
- A hearing may be delayed briefly beyond the opening of the first session of court only if there is a valid reason to promote the efficiency of the administration of the justice system. Two examples of brief delays that can be argued as promoting efficiency are: If the judge or magistrate is in the middle of other business when a defendant is brought for a hearing, the judicial official can delay the hearing for a brief time while completing the work underway. If a defendant is admitted to the detention facility shortly before a session of court opens, the detention facility can finish its normal admission procedure before taking the defendant before a judge.
- Failure to give a defendant a timely hearing may result in dismissal of the criminal charges against him or her.
- Do not tell the victim that the defendant will be held for 48 hours after arrest.

Crimes Covered by Special 48-Hour Pre-Trial Release Rule

Crimes Covered

The special pretrial rule requiring a judge rather than a magistrate to set bond within the first forty-eight hours of arrest applies only to certain "domestic crimes."

[11] 350 N.C. 52, 509 S.E.2d 776 (1999).

[12] 137 N.C. App. 367, 527 S.E.2d 672 (2000).

Assault on a current or former spouse or a person with whom the defendant is living or has lived as if married, communicating a threat [G.S. 14-277.1] against a current or former spouse or a person with whom the defendant is living or has lived as if married, domestic criminal trespass [G.S. 14-134.3], and violating a protective order [G.S. 50B-4.1].

The most common assault charges are: simple assault, assault on a female, assault with a deadly weapon, and assault inflicting serious injury [G.S. 14-33]; assault by pointing a gun [G.S. 14-34]; assault with a deadly weapon with intent to kill, assault with a deadly weapon inflicting serious injury; assault with a deadly weapon with intent to kill inflicting serious injury [G.S. 14-32]; and assault inflicting serious bodily injury [G.S. 32.4].[13]

A person with whom the defendant is now living or has lived "as if married" means a person of the opposite sex with whom the defendant has lived, in other words, girlfriend and boyfriend who are living or have lived together. An element of the crime of domestic criminal trespass is that the occupant of the premises entered be the present or former spouse of the defendant or a person with whom the defendant has lived as if married. For the special pretrial release rule to apply to the crimes of assault or communicating a threat the relationship between the defendant and victim must be current or former spouses or persons of the opposite sex who live or have lived together as if married.

The fourth offense to which the special "48 hour rule" applies is the crime of violating a protective order. Because those with a "personal relationship" to the perpetrator—current or former spouse; person of the opposite sex who are or who have lived together; persons who have a child in common; persons of the opposite sex who are or have been in a dating relationship; parent and child or grandparent and grandchild; or current or former household members—are eligible to receive protective orders, any of those relationships might exist when violating a domestic violence protective order is charged. However, a law enforcement officer or magistrate need not determine the relationship between the defendant and victim. If the defendant is arrested for the crime of violating a domestic violence order [G.S. 50B-4.1], only a judge can set conditions of pretrial release for the first 48 hours.

For offenses occurring on or after March 1, 2002, S 346 adds a number of new crimes for which a judge must set bond within the first 48-hours after arrest if the crime is committed on a current or former spouse or a person with whom the defendant is living or has lived as if married. The following crimes are covered:

- Any felony under Article 7A of General Statutes Chapter 14 —first-degree rape; first-degree sexual offense; second-degree rape, second-degree sexual offense; and statutory rape or sexual offense of 13, 14, or 15 year old.
- Any felony under Article 8 of General Statutes Chapter 14. Article 8 includes felony assaults, which were already covered by the special pretrial release rules, but also castration; malicious maiming; and throwing of corrosive acid or alkali.
- Any felony under Article 10 of Chapter 14 of the General Statutes—kidnapping; involuntary servitude; and felonious restraint.
- Any felony under Article 15 of Chapter 14 of the General Statutes—arson; burning of an uninhabited building; burning of a building in the process of construction; burning of a boat; burning of personal property; burning of any other kind of building or structure; making a false report concerning destructive device; and perpetuating hoax by use of false bomb or other device.

Does the special pretrial release rule apply if the defendant is arrested for violating a protective order issued by an out-of-state court or an Indian tribal court? G.S. 15A-534.1 provides that the special pretrial release rule applies to "orders entered pursuant to Chapter 50B," while G.S. 50B-4(d) provides that orders entered by another state or by and Indian tribe shall be accorded full faith and credit … and shall be enforced by the courts and law enforcement agencies as if it were an order issued by a North Carolina court." Reading these two statutes together, it seems that an out-of-state order is enforced as if it were entered under Chapter 50B; therefore, the special pretrial release rule would apply to defendants arrested for a violation of G.S. 50B-4.1, based on an out-of-state order.

[13] There are numerous other assault crimes that would fall within the special pretrial rule if the defendant and victim are current or former spouses or persons who have lived together as if married. Some examples are: assault in a secret manner [G.S. 14-31]; habitual misdemeanor assault [G.S. 14-33.2]; assault on handicapped persons [G.S. 14-32.1].

Crimes Not Covered By the Special Rule

For any crime not mentioned in the previous section, the magistrate must set conditions of pretrial release when the defendant is arrested and initially brought before the magistrate. Some of the common crimes and situations for which the magistrate must set conditions of pretrial release without waiting for a judge are:

- Assault when it does not involve an assault on a spouse or former spouse or person with whom the defendant lives or has lived as if married. For example, if defendant is arrested for assaulting a woman with whom he has never lived but they have a child in common the magistrate must set conditions of pretrial release immediately and may not hold the defendant for a judge. Similarly, if a man is charged with assaulting his live-in boyfriend, the magistrate sets conditions of pretrial release immediately.
- Communicating a threat when it does not involve threat on a spouse or former spouse or person with whom the defendant lives or has lived as if married. For example, if a female defendant is charged with communicating a threat against her grandmother, the magistrate must set conditions of pretrial release immediately.
- Stalking no matter what the relationship between the defendant and victim.
- First or second degree trespass no matter what the relationship between the defendant and victim.
- Harassing telephone calls no matter what the relationship between the defendant and victim.
- Before March 1, 2002, rape or sexual offense no matter what the relationship between the defendant and victim. For offenses occurring on or after March 1, 2002, it will cover rape or sexual offense if the victim is the current or former spouse of the defendant or a person with whom the defendant lives or has lived as if married.
- Before March 1, 2002, kidnapping no matter what the relationship between the defendant and victim.[14] .For offenses occurring on or after March 1, 2002, it will cover kidnapping if the victim is the current or former spouse of the defendant or a person with whom the defendant lives or has lived as if married.

Holding Defendant Who Poses Danger of Injury to Victim

G.S. 15A-534.1 does provide for a "cooling off" period by providing that a judge or magistrate who is setting conditions of pretrial release for a domestic crime may retain the defendant in custody for a reasonable period of time upon determining that the immediate release of the defendant will pose a danger of injury to the alleged victim or is likely to result in intimidation of the alleged victim and that an appearance bond will not reasonably assure that such injury or intimidation will not occur.

Since this "cooling off" provision was enacted several years before the law requiring a judge to set conditions of pretrial release for the first 48 hours, one might question whether a judge or magistrate may impose this preventive, pretrial detention for a defendant who has already been held for some time awaiting an available judge to set pretrial conditions. In *Thompson* the court recognized that a judge conducting the hearing on conditions of pretrial release might retain the defendant in custody for a reasonable period of time beyond the initial forty-eight hours if the judge determines that release will pose a danger to injury to the alleged victim.[15] Thus, if the defendant is acting in a manner as to make the judge or magistrate believe there is danger of injury to the alleged victim if the defendant is released immediately, the judge or magistrate may enter an order of commitment to hold the defendant for a reasonable period of time and then bring him or her back before the judicial official to set conditions of pretrial release. Because the defendant has already been held for up to forty-eight hours before imposing this "cooling off" period, "a reasonable period of time" should probably be a relatively short time.

[14] State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94 (2000).

[15] 349 N.C. 483, 501, 508 S.E.2d 277, 288 (1998).

Law Enforcement Officer's Duty or Authority to Arrest Without a Warrant for Domestic Violence Crimes

Mandatory Arrest

Generally, when a law enforcement officer is granted authority to make an arrest of a defendant without a warrant having been issued that authority is discretionary. However, one statute—G.S. 50B-4.1(b)—provides that a law enforcement officer "shall arrest and take a person into custody without a warrant or other process." This statute sets out a mandatory requirement for a law enforcement officer to arrest a person without seeking a warrant if the officer has probable cause to believe that the person has violated a valid domestic violence protective order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from threatening, abusing, following, harassing, or otherwise interfering with the other party to the protective order. This mandatory duty to arrest without a warrant does not permit an officer to enter the defendant's residence or the residence of a third person unless certain Fourth Amendment requirements are satisfied.[16]

Discretionary Arrest

A law enforcement officer has the discretion whether to arrest without a warrant or seek issuance of a warrant before arresting a person for certain "domestic crimes" that were committed outside the officer's presence. Those crimes are: [17]

- The person has committed domestic criminal trespass.
- The person has committed simple assault, assault with a deadly weapon, assault inflicting serious injury, assault on a female, or assault by pointing a gun and the defendant and victim have a "personal relationship" as defined in the domestic violence protective order statute.
- The person has committed a misdemeanor under G.S. 50B-4.1 (violating a domestic violence protective order) under circumstances that do not require a mandatory duty to arrest, discussed above.

A law enforcement officer has the authority to arrest without a warrant in other situations mentioned in G.S. 15A-401, but arrest under those provisions apply to any defendants rather than being related to domestic violence exclusively.

Domestic Crime Under the Crime Victims' Rights Act

The Crime Victims' Rights Act sets out the responsibilities various officials in the justice system with regard to notifying victims of crimes of their rights under the law and provides for monetary compensation to those victims. When enacted, the law applied only to victims of felonies. In 1998, the General Assembly extended coverage to certain misdemeanors if the defendant and the victim have a "personal relationship" as defined in the civil domestic violence protective order law,[18] in other words if they are current or former spouses; persons of the opposite sex who have lived or are living together; persons in a dating relationship; person who have a child in common; parent and child or grandparent and grandchild; or former or current household members. The misdemeanors covered under the Victims' Rights Act are:

- Simple assault.
- Assault inflicting serious injury.
- Assault with a deadly weapon.
- Assault on a female.
- Assault by pointing a gun.
- Domestic criminal trespass (which only applies to current or former spouses or persons who have lived together as if married).
- Stalking.

A new law, S.L. 2001-433 (H 1154), effective December 1, 2001, requires magistrates who issue a warrant for arrest for any of these misdemeanors when the defendant and victim have a "personal relationship" to flag the warrant as covered by the Crime Victims' Rights Act. If the warrant is based on evidence from a complaining witness rather than a law enforcement officer to record the defendant's name and the victim's name, address and telephone number

[16] See ROBERT L. FARB, ARREST, SEARCH AND INVESTIGATION IN NORTH CAROLINA 48-53 (2nd ed. 1992).

[17] G.S. 15A-401(b)(2)(c.-e.)

[18] G.S. 15A-830(7)(g).

electronically or on a form separate from the warrant, unless the victim refuses to disclose any or all of the information, in which case the magistrate must indicate the refusal. For magistrates using the automated magistrate system, when one of the misdemeanors listed above is charged, the automated system will ask that the magistrate determine whether the relationship is one that qualifies, and, if so, will then ask for the victim identifying information. The warrant will then be flagged as a Victim's Rights Act case. Magistrates who are not using the automated system must note on the warrant if the case qualifies as a Victim's Rights Act Case and must write the victim's name, address and telephone number on a sheet of paper separate from the warrant. At some point the Administrative Office of the Courts may develop a separate form for that purpose.

Conclusion

In order to assist those enforcing domestic violence crimes, the provisions regarding the crimes covered by the special pretrial release rules, the rules regarding arrest without a warrant, and the Crime Victims' Rights Act are set out in the form of a chart as an appendix to this memorandum.

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