
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 2078 **Hearing Date:** June 21, 2016
Author: Kim
Version: February 17, 2016
Urgency: No **Fiscal:** Yes
Consultant: AA

Subject: *Protective Orders*

HISTORY

Source: Author

Prior Legislation: SB 352 (Block) – Chapter 279, Statutes of 2015
SB 723 (Pavley) – Chapter 155, Statutes of 2011
AB 289 (Spitzer) – Chapter 582, Statutes of 2007

Support: California District Attorneys Association; California State Sheriffs' Association

Opposition: Legal Services for Prisoners with Children

Assembly Floor Vote: 72 - 0

PURPOSE

The purpose of this bill is to conform the misdemeanor punishment for a violation of a protection order issued after a conviction for felony domestic violence to the punishment for other similar protective orders.

Current law authorizes the trial court in a criminal case to issue protective orders when there is a good cause belief that harm to, or intimidation or dissuasion of a victim or witness has occurred or is reasonably likely to occur. (Pen. Code, § 136.2, subd. (a).)

Current law requires a court, in all cases where the defendant is charged with a crime of domestic violence, to consider issuing a protective order on its own motion. All interested parties are required to receive a copy of those orders, as specified. (Pen. Code, § 136.2, subd. (e)(1).)

Current law allows a court, in any case in which a complaint, information, or indictment charging a crime of domestic violence has been filed, to consider, in determining whether good cause exists to issue a protective order, the underlying nature of the offense charged, and information provided to the court through a background check, including information about the defendant's prior convictions for domestic violence, other forms of violence or weapons offenses, and any current protective or restraining order issued by a criminal or civil court. (Pen. Code, §§ 136.2, subd. (h) and 273.75.)

Current law provides in all cases in which a criminal defendant has been convicted of a crime of domestic violence, as defined in relevant sections of the Family Code, or any crime that requires the defendant to register as a sex offender, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. (Pen. Code, § 136.2, subd. (i)(1).)

Current law provides that a person violating a protective order may be punished for any substantive offense described in provisions of law related to intimidation of witnesses or victims, or for contempt of court. (Pen. Code, § 136.2, subd. (b).)

Current law sets forth the following circumstances constituting misdemeanor contempt of court:

- 1) Disorderly, contemptuous, or insolent behavior committed during the sitting of a court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority.
- 2) Behavior specified in paragraph (1) that is committed in the presence of a referee, while actually engaged in a trial or hearing, pursuant to the order of a court, or in the presence of any jury while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law.
- 3) A breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of the court.
- 4) Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by a court, including orders pending trial.
- 5) Resistance willfully offered by any person to the lawful order or process of a court.
- 6) The contumacious and unlawful refusal of a person to be sworn as a witness or, when so sworn, the like refusal to answer a material question.
- 7) The publication of a false or grossly inaccurate report of the proceedings of a court.
- 8) Presenting to a court having power to pass sentence upon a prisoner under conviction, or to a member of the court, an affidavit, testimony, or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon the prisoner, except as provided in this code.
- 9) Willful disobedience of the terms of an injunction that restrains the activities of a criminal street gang or any of its members, lawfully issued by a court, including an order pending trial. (Penal Code § 166(a).)

Current law provides generally that the penalty for these contempt misdemeanors is up to six months in jail and a fine, except that in specified cases the penalty is up to a year in jail, and a fine of not more than \$1000 or both.

Current law provides that the willful and knowing violation of specified protective or stay-away orders are subject to the greater penalty of up to one year in jail and a fine of not more than \$1000 or both. (Penal Code § 166 (b) and (c).) Where a violation results in physical injury, specified mandatory jail time applies. (Penal Code § 166(c)(2).) A second or subsequent conviction for a violation of these orders occurring within seven years of a prior conviction for a violation of any of those orders and involving an act of violence or “a credible threat” of violence, as defined, is punishable as a “wobbler,” (jail up to one year, or state prison for 16 months or two or three years).(Penal Code § 166(c)(4).)

This bill would add a restraining order issued by the sentencing court in a felony domestic violence case (Penal Code § 273.5(j)) to the list of protective or stay-away orders subject to these greater penalties.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Stated Need for This Bill

The author states in part:

Every nine seconds a woman is assaulted in the United States, and nearly 20 people per minute are physically abused by their intimate partner. The consequences of domestic violence are devastating and can cross generations and last a life-time. By making appropriate cross-references in the Penal Code, AB 2078 closes a loophole ensuring that all those who violate domestic violence restraining orders are held accountable. Restraining orders are one of the best ways to protect victims of domestic violence from further abuse and AB 2078 would provide more fitting sentencing guidelines than the general contempt of court guidelines it currently falls under.

Courts may issue a protective order to potential victims of domestic violence if the judge finds that there is good cause to believe that harm, intimidation, or dissuasion of a victim or witness has occurred or is likely to occur. But due to a drafting error in current law, if violators of restraining orders pursuant to PC 273.5(j) are not also listed in PC 166 the defense could argue that the perpetrator cannot be rightly charged under PC 166, which provides for stronger penalties for violations of court restraining and protective orders relating to sexual assault, elder abuse, and domestic violence-related crimes. . . .

Because criminal protective orders issued pursuant to Penal Code section 273.5(j) are always going to be domestic violence orders by definition of the charge, violation of such orders should be punishable as contempt under Penal Code section 166(c)(1). If orders issued pursuant to Penal Code section 273.5(j) are not listed in 166(c)(1), then the defense could argue that such violations cannot be charged under this subsection.

2. What This Bill Would Do

There are certain violations of protective orders that are punished with an enhanced misdemeanor sentence when a violation of that order is proven. These include: (1) protective orders based on the court's finding of good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur; (2) a protective order issued as a condition of probation in a domestic violence case; (3) an order issued after conviction in an elder or dependent adult abuse case; (4) a restraining order after conviction of a sex offense involving a minor; and (5) other family court protective orders.

In 2007, legislation was enacted authorizing a court to issue a protective order for 10 years upon a defendant's felony conviction of willful infliction of corporal injury. Subsequently, in 2011, the Legislature expanded this authority to cover all cases involving domestic violence, regardless of the sentence imposed. (SB 723 (Pavley), Chapter 155, Statutes of 2011.) However, a conforming cross reference was inadvertently omitted from the contempt of court statute, which among other things describes the punishment for violating restraining orders. (See Pen. Code, § 166.)

In contrast, last year when the legislature amended the elder abuse statute, Penal Code section 368, to allow for post-conviction restraining orders in all elder abuse cases regardless of whether probation was granted, the bill was amended to include a conforming cross reference to the statute that provides how a violation of the restraining order is punished, Penal Code section 166. (See SB 352 (Block), Chapter 279, Statutes of 2015, [June 17, 2015 amendments].)

This bill makes the punishment for a violation of a post-conviction domestic violence restraining order consistent with that for other post-conviction restraining orders against defendants convicted of abuse.

3. Background

As a general matter, courts can issue a protective order in any criminal proceeding pursuant to Penal Code Section 136.2 where it finds good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. Protective orders issued under this statute are valid only during the pendency of the criminal proceedings. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382.)

When criminal proceedings have concluded, courts have authority to issue protective orders as a condition of probation. For example, when domestic violence criminal proceedings have concluded, the court can issue a "no-contact order" as a condition of probation. (Pen. Code, § 1203.097.)

In addition, in some cases in which probation has not been granted, courts also have the authority to issue *post-conviction* protective orders. Courts are authorized to issue no-contact orders for up to 10 years when a defendant has been convicted of willful infliction of corporal injury to a spouse, former spouse, cohabitant, former cohabitant, or the mother or father of the defendant's child. The court can also issue no-contact orders lasting up to 10 years in cases involving a domestic-violence-related offense, rape, spousal rape, statutory rape, or any crime requiring sex offender registration. (Pen. Code, § 136.2, subd. (i)(1).) The same is true of stalking cases (Pen. Code, §646.9, subd. (k)). Similarly, in cases involving a criminal conviction or juvenile adjudication for a sex offense in which the victim was a minor, the court may issue an order "that would prohibit ... harassing, intimidating, or threatening the victim or the victim's family members or spouse." (Pen. Code, § 1201.3, subd. (a).)

Disobedience of a court order may be punished as criminal contempt. The crime of contempt is a general intent crime. It is proven by showing that the defendant intended to commit the prohibited act, without any additional showing that he or she intended "to do some further act or achieve some additional consequence." (*People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.) Nevertheless, a violation must also be willful, which in the case of a court order encompasses both intent to disobey the order, and disregard of the duty to obey the order." (*In re Karpf* (1970) 10 Cal.App.3d 355, 372.)

Criminal contempt under Penal Code Section 166 is a misdemeanor, and so proceedings under the statute are conducted like any other misdemeanor offense. (*In re McKinney* (1968) 70 Cal.2d 8, 10; *In re Kreitman* (1995) 40 Cal.App.4th 750, 755.)

4. Opposition

Legal Services for Prisoners with Children opposes this bill, stating in part:

We do not believe that increasing punishments will increase public safety. . .
Solutions to violence against others should be addressed at the root, instead of
reactionary responses which punish people.

5. Related Legislation

This bill is identical to SB 883 (Roth) which currently is in the Assembly. That bill passed this Committee (7-0) on April 4th of this year.

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