

Chapter 8: Criminal Matters Related to Domestic Violence

Section 8A: Criminal Laws and Related Statutes of Special Significance in Domestic Violence

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Generally, in criminal actions Kentucky does not distinguish cases which involve domestic violence from any other criminal case. Therefore, any potential criminal charges which would be available in a non-domestic case are also available in cases involving domestic violence. The Kentucky criminal statutes and related laws which are specific to domestic violence cases or which have special significance in domestic violence cases are addressed below.

CRIMINAL LAWS

A number of changes to the Kentucky Revised Statutes since 1992 directly impact domestic violence cases. First, the 2000 General Assembly passed legislation amending KRS 508.140 to permit a prior misdemeanor conviction for stalking to be among those prior offenses which would cause a subsequent stalking offense to qualify as a felony rather than a misdemeanor. KRS 508.130 was also amended to broaden the definition of protective order to include emergency protective orders and domestic violence orders issued under KRS 403.175 to 403.785, foreign protective orders as defined in KRS 403.7521(1), an order issued under KRS 431.064 and any condition of a bond, conditional release, probation, parole, or pretrial diversion order designed to protect the victim from the offender.

Second, KRS 508.032 was enacted in 1996 making it a Class D felony to commit a third or subsequent fourth degree assault in a domestic situation. In order to meet the elements of this crime, the defendant and the victim must meet the definition of a family member or member of an unmarried couple as defined in KRS Chapter 403 and the offenses must have occurred within a five year period measured by the date of the offense, not the date of conviction. The statute specifically provides that the victim of each offense need not be the same person. In 2000 the General Assembly amended 508.032 to provide that the person “**may** be convicted of a Class D felony.” The statute also sets out the following procedure to be utilized. “If the Commonwealth desires to utilize the provisions of this section the Commonwealth shall indict the defendant and the case shall be tried in the Circuit Court as a felony case. The jury, or judge if the trial is without a jury, may decline to assess a felony penalty in a cases under this section and may convict the defendant of a misdemeanor.”

Third, an amendment to KRS 525.070 in 1996 changed the penalty for Harassment from a violation to a Class B misdemeanor if there is actual striking, shoving, kicking or physical contact.

Fourth, in order to bring Kentucky in compliance with the Violence Against Women Act, in 1996 KRS 403.7539 and KRS 403.7527 were enacted. KRS 403.7539 made the violation of a

foreign protective filed with the court and authenticated or filed with the court and awaiting authentication a Class A misdemeanor. KRS 403.7527 required that the provisions of any filed and authenticated foreign protective order be enforced in Kentucky. In 1998, the General Assembly amended these statutes to remove the requirement that the foreign order be filed before an authenticated order can be enforced or the crime of violation of a foreign protective order is committed.

Fifth, KRS 431.064 requires the court or agency having authority to make a decision concerning pretrial release of a person arrested for a violation of KRS Chapters 508 (Assault and Related Offenses) or 510 (Sexual Offenses) or charged with a crime involving a violation of a protective order issued pursuant to KRS 403.740 or 403.750 to review the facts of the arrest and detention of the person and determine whether the person is a threat to the alleged victim or other family or household members and whether he is reasonably likely to appear in court. The statute also provides a list of conditions that may be imposed, provides that the victim is entitled to a free certified copy of the conditions of release and makes a violation of an order issued pursuant to this statute a Class A misdemeanor. Legislation passed by the 2000 General Assembly amended KRS 431.064 to require that the conditions be entered into the computer system maintained by the Administrative Office of the Courts within twenty four (24) hours of the filing of the order of release, excluding weekends and holidays, and that the information entered be accessible to any agency designated as a terminal agency for the Law Information Network of Kentucky. Finally, in 1998 KRS 520.095 was amended to create the crime of fleeing or evading police in the first degree, a Class D felony. This crime may be committed in a number of ways, however as it relates to domestic violence the statute requires a finding that "while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer" and that the person is fleeing immediately after committing an act of domestic violence as defined in KRS 403.720.

The sentencing statutes also contain three provisions directly affecting victims of domestic violence. In 1998, KRS 532.025 relating to aggravating circumstances in death penalty cases was amended to add as an aggravating circumstance that the victim had obtained an emergency protective order, domestic violence order or similar order. KRS 439.3401(4) exempts from the parole provisions of this statute which would otherwise be applicable¹ those defendants determined by the court to be victims of domestic violence and who kill or cause serious physical injury to their abusers. KRS 533.060 exempts victims of domestic violence from the provisions of this statute that prohibit probation, shock probation and conditional discharge for those who are found guilty of or plead guilty to a Class A, B, or C felony involving the use of a weapon. Before the exemption is applicable the court must conduct a hearing to determine the validity of the claim and the applicability of the exemption.

¹See also KRS 439.3402 which sets forth the provisions to be followed by those who seek an exemption from the parole provisions of KRS 439.3401.

LAWS OF ARREST

Special warrantless arrest powers have been provided for in four situations exclusively or primarily involving domestic violence. First, in 1992, KRS 403.760 was amended to expand an officer's arrest power in a domestic violence situation by authorizing officers, who have probable cause to believe that a violation of a protective order has occurred, to arrest without a warrant, for violation of a protective order, a misdemeanor.² With the Law Enforcement Network of Kentucky (LINK) protective order file, law enforcement officers can access the conditions of Kentucky protective orders 24 hours a day. This same warrantless arrest power was subsequently extended to violations of foreign protective orders.³ The fact that a foreign protective order has not been entered into LINK shall not be grounds for a peace officer not to enforce the provisions of that order unless it is readily apparent to the peace officer to whom the order is presented that the order has either expired according to a date shown on the order, or that the order's provisions clearly do not prohibit the conduct which is the basis of the complaint.⁴

KRS 431.005(2) permits any peace officer⁵ to arrest a person without a warrant when the peace officer has probable cause to believe the person has intentionally or wantonly caused physical injury to a family member or member of an unmarried couple.

Finally, in 1996 the General Assembly enacted KRS 431.005(4) which provides that a law enforcement officer, shall, without a warrant, arrest a person who he has probable cause to believe has violated a condition of release imposed in accordance with KRS 431.064. The officer must also verify that the alleged violator has notice of the conditions. As a result of legislation passed by the 2000 General Assembly orders setting forth conditions of release should now be accessible to law enforcement agencies through the LINK system. Clients should still be advised, however, of the availability of free certified copies of these orders and to keep such orders with them at all times. This will increase the likelihood that the order can be enforced by the peace officer 24 hours a day, seven days a week.

²Before an arrest may be made the respondent must have been served with or given notice of the order. KRS 403.760.

³KRS 403.7529

⁴KRS 403.7529

⁵For purposes of this statute peace officer is defined at KRS 431.005(3) as: (a) A full-time sworn officer of the Kentucky State Police, a full-time sworn officer of the Kentucky Horse Park, a commissioned full-time state park ranger, a full-time state water patrol officer, a full-time city policeman, a full-time county policeman, a full-time university safety and security officer appointed pursuant to KRS 164.950 to 164.970, a full-time city-county policeman, a duly elected sheriff, or a full-time paid deputy sheriff; or (b) A part-time paid law enforcement officer, or a special paid deputy, who has completed a Kentucky law enforcement council approved education and training program referred to in KRS 403.784.

VICTIMS RIGHTS

The "Kentucky Crime Victim Bill of Rights," KRS 421.500 through KRS 421.575, provides that in all felony and misdemeanor cases crime victims⁶ have the right to be:

- informed of protective, social and emergency services, assistance from a victim advocate, community treatment programs, the criminal justice process and where applicable crime victim compensation and restitution
- notified when the accused is arrested
- informed about protection from harassment, intimidation and retaliation including the crime victim and witness protection program provided for by KRS 15.247
- notified of judicial proceedings relating to their case including but not limited to the defendant's release on bond, any special conditions of release, the charges against the defendant, the date set for the trial, date of sentencing, any scheduling changes, of the verdict, notification of changes in the custody of the defendant, and notice of a scheduled hearing for shock probation or for bail pending appeal and any orders resulting from that hearing
- advised of how to register to be notified when a person has been released from custody
- consulted on the disposition of the case including any plea agreement, entry into any pretrial diversion program or dismissal of the case, release of the defendant pending judicial proceedings, and any conditions of release
- assisted in contacting his or her employer when prosecution requires time away from work
- given back their property held as evidence as soon as possible
- heard by means of a written impact statement to the court describing the effects of the crime on the victim before sentencing of a defendant⁷

⁶For purposes of KRS 421.500 to 421.575 "Victim" is defined as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications, intimidating a witness, criminal homicide, robbery, rape, assault, sodomy, kidnaping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, or incest. If the victim is a minor or legally incapacitated, 'victim' means a parent, guardian, custodian or court-appointed special advocate." KRS 421.500. This statute also provides a definition of "victim" for purposes of exercising these rights if the victim is deceased.

- heard by means of a victim impact statement to the parole board and notified of any hearing on release

- notified by the Attorney General's Office if a conviction is appealed and of any decision by the court

The Act, however, also specifically provides that nothing in KRS 421.500 to 421.575 shall provide grounds for the victim to challenge a charging decision or a conviction, to obtain a stay of trial, or to compel a new trial.

Additionally, three recent changes to the statutes aid all crime victims, including victims of domestic violence and one change specifically assists victims of domestic violence. First, 1998 the General Assembly enacted KRS 15.247. This new statute provides for a protection program for crime victims and witnesses and their immediate families. Under the program funding is provided for services for physical protection and physical security measures for the person's residence, vehicle, workplace, or a combination thereof and for short term relocation. However, no person may receive these services for more than six months.

Second, KRS 196.280 established the nation's first statewide computerized victim notification system, referred to as V.I.N.E. (Victim Information and Notification Everyday). The Department of Corrections has created this system and jails and detention facilities are required to provide information to the Department prior to the release of the incarcerated person. The Department then provides to members of the public, upon request, notification of the release of an incarcerated person from a juvenile detention facility, county jail or regional jail. The law specifically requires release notification relating to juveniles who have been charged with a felony offense pursuant to KRS Chapters 507, 508, 509, 510, 515, 530.020, 530.064 or 531.310. Although the statute as initially enacted did not include prisons, the Department of Corrections established a release notification system, also accessed through the V.I.N.E. system, to cover those being released from prisons. In 2000, the General Assembly amended KRS 196.280 to specifically require that state prisons be a part of the V.I.N.E. System.

Third, in 1996, KRS 421.575 was enacted. This statute specifically permits a victim advocate, upon request of the victim, to accompany the victim to all court proceedings to provide moral and emotional support. The statute specifically permits the victim advocate to confer orally and in writing with the victim in a reasonable manner. However, the victim advocate is specifically prohibited from providing legal advice.

⁷See also KRS 532.055 which provides that during the sentencing phase of any felony case the Commonwealth may introduce evidence of "[t]he impact of the crime upon the victim. . . including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim."

Finally, the 2000 General Assembly enacted KRS 237.095 to provide that any agency with the responsibility of entering domestic violence records into LINK, upon receiving notice that a person barred from purchasing a firearm under 18 U.S.C. sec. 922(g)(8) has purchased or attempted to purchase a firearm shall notify "the court in the jurisdiction where the domestic violence order was issued" and "the law enforcement agencies, as designated by the Kentucky State Police, that have jurisdiction in the county where the domestic violence order was issued and in the county of the victim's residence if different from the county where the domestic violence order was issued." The designated law enforcement agency, upon receiving notice pursuant to this statute, "shall make reasonable efforts to ensure that the petitioner who obtained the domestic violence order is notified that the respondent has purchased or attempted to purchase a firearm." This statute applies only to domestic violence orders issued or reissued on or after July 14, 2000.

Chapter 8: Criminal Matters Related to Domestic Violence

Section 8B: The Role of the Prosecutor in Domestic Violence Cases

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THE ROLE OF THE PROSECUTOR IN DOMESTIC VIOLENCE CASES¹

What Constitutes Domestic Violence?

As a general rule, in criminal actions Kentucky does not distinguish cases which involve domestic violence from any other criminal case, be it in charging or disposition.² However, statutory definitions can be found in KRS 403.720³ which may assist prosecutors in identifying cases where the risk of future harm may occur. Prosecutors may wish to red flag criminal case files which fall under these definitions with a D.V. stamp or colored sticker for the purpose of sticker monitoring by all prosecutors and victim advocates who work on the case.

Policy For Filing Actions In Cases Of Domestic Violence

- The prosecutor's office should not serve as an obstacle to the initiation of domestic violence actions. When considering a charge, the prosecutor needs to consider the dynamics of domestic violence. Additionally, once a charge is made, risks to the victim and lethality of the perpetrator should be accessed. The prosecutor's office, in cooperation with the court should provide for 24-hour accessibility for warrants, protective orders and prompt relief when protective orders or conditions of release are violated.

¹Adapted from Office of the Attorney General, *Domestic Violence Prosecution Policy and Procedure Manual* (1997, Revised).

²The only exception being KRS 508.032 which provides for an enhanced penalty if an individual is adjudged guilty on a third or subsequent offense of assault fourth degree upon a victim who meets the definition of family member or member of an unmarried couple as defined in KRS 403.720.

³"*Domestic Violence and Abuse*" means not only causing physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple, but also causing fear of such imminent physical injury, serious physical injury, sexual abuse or assault. KRS 403.720(1). "*Family Member*" means a spouse, including a former spouse, a parent, a child, a stepchild or any other person related by blood or marriage within the second degree 403.720(2). "*Member of an Unmarried Couple*" means each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together. KRS 403.720(3).

- A charge should be pursued by the prosecutor without regard to the marital status or availability of the victim. Moreover, a prosecutor should not decline to prosecute solely on the basis of reluctance expressed by the victim. Instead, the decision to prosecute a domestic violence related case should be based on the same probable cause standard upon which all other criminal charges are based. Unlike other criminal actions, prosecutors will find that domestic violence cases will require ongoing or further investigation following a probable cause charge in order to sustain the burden of proof beyond a reasonable doubt later on in the process. Therefore, prosecutors should be mindful of this and facilitate the initiation of warrants without requiring extensive pre-charging investigation.
- When charges are not filed, there should be documentation retained by the prosecutor's office on their decision. When appropriate, the matter should be referred to an agency for follow up and contact with the victim (e.g. law enforcement, Department for Social Services, spouse abuse shelter). If previously identified evidentiary problems are resolved, the case should be returned promptly to the prosecutor to determine whether it should now be charged.

Assignment Of Domestic Violence Cases

- *Designation of specific prosecutor.*
The complexity and dynamics of domestic violence cases require special attention and training to insure successful prosecution. The prosecutor's office should designate a specific prosecutor or unit to prosecute domestic violence cases and use vertical prosecution, when possible.
- *Priority for domestic violence cases.*
Prosecutors should give priority to the prosecution of domestic violence cases, expediting them through the criminal justice system due to the inherent danger to the victim and the psychological dynamics of domestic violence cases which, over time, can cause a deterioration of evidence. In most cases, the prosecutor should seek the earliest possible trial date and object to the defendant's motions for continuance.
- *Pursue additional charges during prosecution of original charges.*
One of the main reasons victims are reluctant to initiate domestic violence proceedings is their fear of retaliation by the perpetrator against them or their family members. Therefore, the prosecutor must be willing to pursue additional charges against the perpetrator if he or his attorney attempts to harass, threaten, injure or intimidate the victim or other witnesses during the pendency of the original charges.

Possible charges to consider may be under KRS Chapter 52, such as Intimidating a Witness, Tampering with a Witness or Violation of a Condition of Pretrial Release. When prosecuting additional charges, the prosecutor should consider higher bonds and the availability of consecutive sentences since these offenses are committed while the

perpetrator is on bond for the original charges.

Additionally, given the cycle of violence common in most domestic violence cases, there is likely a history of violent contact by the perpetrator upon the victim. The prosecutor or the victim advocate should make a thorough inquiry into past violence. In all probability other crimes have been committed in the past. Such criminal conduct could (1) be the basis of additional charges, if within the statute of limitations; (2) be used under KRE 404(b), "Other bad acts" to show intent, lack of mistake, motive, identity, etc.; or (3) be the basis for a Stalking First Degree or Stalking Second Degree charge when prior acts are used to satisfy the stalking element of "two or more acts" or to show the victim's state of mind at the time of the stalking charge.

The prosecutor should encourage the victim to obtain an EPO or DVO if such an order has not previously been obtained. Such orders not only provide an additional measure of protection but can possibly result in additional charges if violated. In addition, domestic violence orders may be issued for up to three years. As a result, the protection provided by these orders may be longer than the jail sentence, period of probation or conditional discharge for a criminal conviction.

Case Presentation and Disposition

- *Establishment of Prosecution Policy.*
Each prosecutor's office should develop a domestic violence policy. The purpose of the policy is to provide prosecutors and support personnel with clear definitions, direction and guidelines for providing and promoting a consistent, effective response to domestic violence crimes. The policy will serve as a structure rather than establish a rigid formula.

- *"Zero Tolerance"/Pro-Prosecution Policy.*
A "Zero-Tolerance"/Pro-Prosecution Policy should be adopted by all prosecutors' offices within the Commonwealth. This policy recognizes the dynamics of the crime of domestic violence by not allowing the strength or weakness of the abused victim to dictate whether a perpetrator is punished for his criminal conduct. By allowing the victim to make these prosecutorial decisions, the Commonwealth rewards perpetrators who are successful in the manipulation of their victim. The effect of disposing of a case according to the victim's wishes actually reinforces the perpetrator's conduct, giving him ultimate control over the disposition of his case.

A domestic violence case should not be dismissed solely because the victim has made a request that the charges be dismissed. Instead of focusing on the desires of the victim in deciding whether to prosecute domestic violence cases, the prosecutor should focus on the conduct of the perpetrator and make a legal determination regarding the criminality of the conduct. This procedure will alleviate the pressures applied to victims once the

perpetrator realizes that the victim does not control the prosecutor's decision making process. Likewise, a domestic violence case should not be dismissed due to a heavy caseload, or availability of a civil remedy or settlement. Absent a clear determination by an experienced prosecutor that insufficient evidence exists to go forward, the prosecutor should be committed to prosecuting the case to its appropriate conclusion.

Case Conferencing Among Agencies

The prosecutor should organize case conferencing to encourage review and exchange of information in domestic violence cases with law enforcement officials, victim advocates, protective service workers, mental health treatment providers, coroners and victims. Such a multidisciplinary approach is showing success in the area of child sexual abuse. While an organized meeting with all these agency representatives may not be feasible, a procedure to insure each is providing necessary information should be established within each jurisdiction. Case conferencing can be particularly effective in complex or "revolving door" types of domestic violence cases where there is a history within the system.

After consultation with the victim and the various agency representatives, the prosecutor will determine whether the case should proceed to trial, be plea bargained or otherwise resolved. The prosecutor is mandated under KRS 421.500(6) to communicate these decisions and any position regarding probation of the offender to the victim.

The Role of the Victim Advocate

Effective and sensitive prosecutors are increasingly turning to lay advocates in order to assist victims in staying safe and also in order to improve conviction rates. Such a lay advocate may be from a program internal to the legal system, such as a victim witness worker within the prosecutor's office, or an advocate from a community advocacy program such as a battered women's shelter. Each may serve a different purpose, and may have different strengths and weaknesses.

Services Provided

Victim advocates may assist crime victims in a number of ways such as: obtaining housing, government benefits, counseling and/or legal assistance; with safety planning, securing civil protection orders, insuring compliance with the crime victim's bill of rights, providing information about the Kentucky Crime Victims Compensation Board and the VINE system as well as accompanying the victim to court to provide moral and emotional support.⁴

⁴KRS 421.575 provides that in all court proceedings, a victim advocate upon request of the victim, shall be allowed to accompany the victim during the proceeding to provide moral and emotional support. When read with KRS 610.060, KRS 421.575 provides victim advocates the right to accompany victims to juvenile proceedings.

Confidentiality

Confidentiality of the advocate-battered woman relationship is a central feature for many reasons. KRS 422A.506/KRE 506 amended the Counselor-Client privilege to provide for a testimonial privilege for confidential communications between non-prosecutor based victim advocates and their clients. To come within the privilege the victim advocate must meet the definition of victim advocate as defined in KRS Chapter 421 which requires training for all victim advocates.

Defense counsel have attempted on many occasions to subpoena advocates and records. Bringing motions to quash such attempts is a critical role prosecutors can and should play to protect local advocacy programs as a resource for victims. If a prosecutor needs testimony from an advocate in a non-prosecutor based program, that advocate will need to get a release from the victim/witness.

However, recent case law⁵ has called into question the validity of the amendment to KRS 422A.506/KRE506 related to non-prosecutor based victim advocates and has raised the possibility that if the issue of victim advocate-victim privilege is raised in a case the Court will not recognize the privilege. As a result, even non-prosecutor based victim advocates should understand and convey to victims the possible outcomes. If the potential limits of confidentiality are not explained to the victim, the victim may feel not only that a violation of trust has occurred, but also may lose confidence in the entire victim assistance system should a court ultimately order that the confidential communications be revealed.

⁵*Weaver v. Commonwealth, Ky.*, 955 S.W. 2d 722 (1997); but compare *Mullins v. Commonwealth, Ky.*, 956 S.W.2d 210 (1997).