FAIRFIELD POLICE DEPARTMENT
DOMESTIC VIOLENCE TRAINING
March 2024

Legal Updates:

PC 136.1 – Prevent/Dissuade/Intimidate a Victim/Witness

PC 836(c)(2) – Verbal Service of Restraining Order

PC 136.1 – Prevent/Dissuade/Intimidate a Victim/Witness:

On December 15, 2022, the California First District Court of Appeals upheld a conviction of Def. Brandon Sherman (People V. Sherman 2022 Cal App.) for violation of PC 136.1(b)(1). During a kidnapping and sexual assault where Sherman posed as an Uber driver, he took the victim's cell phone from her possession and powered off the device which prevented her from making a report of victimization to a peace officer.

Sherman argued that the PC 136.1 statute only applied to crimes that were completed, not crimes that were still in progress. The First Court of Appeals rejected the argument and upheld the conviction for the violation of PC 136.1(b)(1). Additionally, the Court provided clarity on the statute with their ruling that "The statute should be broadly interpreted to apply to preventing communication for assistance during an ongoing course of criminal conduct."

In further discussion, the Court specifically noted that the PC 136.1 statute was applicable in domestic violence incidents where a "primary aggressor denies phone access or damages a phone to prevent a victim from calling the police" (PC 591 & PC 591.5).

How does this apply to Fairfield Police Department personnel?

When the elements of a PC 591 or PC 591.5 charge have been met, the additional charging of PC 136.1 should be considered. In particular, if the elements are met, a violation of PC 136.1 (a felony) could be charged in lieu of, or in addition to, PC 591.5 (a misdemeanor).

PC 836(c)(2) – Verbal Service of Restraining Order:

On February 22, 2023, the California Fourth District (1st Div.) Court of Appeals upheld a conviction of Def. Christopher Kenney (People v. Kenney 88 Cal. App.5th 516) for violation of PC 148(a)(1). Kenney's mother obtained a restraining order to prevent him from remaining in her residence while using narcotics. Prior to the personal service of the restraining order, Kenney returned to the residence and barricaded himself in his bedroom.

San Diego County Sheriff's Deputies responded to the residence and were given a copy of the restraining order by Kenney's mother. The deputies made verbal contact with Kenney through the closed bedroom door and advised him of the existence of the restraining order, and the conditions that required him to vacate the property (836(c)(2) PC). Kenney was given ample time to comply with the conditions of the restraining order but continued to barricade himself inside the room. Deputies forced entry into the room and took Kenney into custody for PC 69. Kenney was convicted for the lesser charge of PC 148(a)(1).

On appeal, Kenney argued that the conviction should be dismissed because the deputies were not "performing (their) lawful duties" when they attempted to arrest him for violating the restraining order when he had never been given a copy of the restraining order. Both the trial court and the Court of Appeals denied the motion to dismiss and upheld the conviction for PC 148(a)(1).

The Court noted that "Merely being told that a DVRO existed and that it prohibited him from being in C.K.'s house, and that he was thereafter given the opportunity to comply, was held to be "adequate" to satisfy the requirements of P.C. 836(c)(2)."

How does this apply to Fairfield Police Department personnel?

Verbal notice by a Peace Officer of the existence of a restraining order and the protections listed therein can meet the requirement for service in lieu of providing a written copy of the order to the restrained party. When the notification requirements for service of a restraining order are met per PC 836(c)(2) and the opportunity to comply with the order has been given, officers may then arrest for violation of the restraining order (PC 273.6 / PC 166).

Additional Information

PC 836(b) / FPD Policy 319.10(b) – Requirement to notify of the right to make a Citizen's arrest:

Under conditions where an officer responding to a reported domestic violence assault ***cannot*** make an arrest, it is mandatory that the officer "make a good faith effort to inform the victim of his or her right to make a citizen's arrest" (836(b) PC). The advisement should be made out of the presence of the suspect and shall include advising the victim how to safely execute the arrest (FPD Policy 319.10(b) – Standards for arrest). These sections **do not** apply when an officer makes an arrest "for a violation of paragraph (1) of subdivision (e) of Section 243 or 273.5."

How does this apply to Fairfield Police Department personnel?

When FPD officers make an arrest for domestic violence, it is not required to advise the victim of their right to make a citizen/private person arrest. Additionally, an arrest for domestic violence in accordance with PC 13701 & FPD Policy 319.10, **does not** require the victim to *desire or request the arrest/prosecution of the offender*. Further, a victim of domestic violence cannot be compelled by the Court to testify at any proceedings.

Due to the unique relationship of domestic/intimate partners, when an arrest will be made for domestic violence, the California District Attorneys Association (CDAA) discourages officers from asking victims of domestic violence if they want the offender "arrested" or "prosecuted" for the reported assault. The victim's response does not change the District Attorney's charging decision and increases the likelihood that the victim could be negatively impacted if the offender believes the victim was the reason for the arrest.

The prosecuting attorneys from the Solano County District Attorneys – Family Violence Unit agree with the recommendation of the CDAA and have advised that there is no need for officers making an arrest for domestic violence to ask if a victim wants a suspect arrested and/or prosecuted. The Fairfield Police Department – Special Victims Unit concurs that victims of domestic violence ***should not*** be asked if they want the offender arrested and/or prosecuted, as recommended by the CDAA and the Solano County District Attorney's Office.

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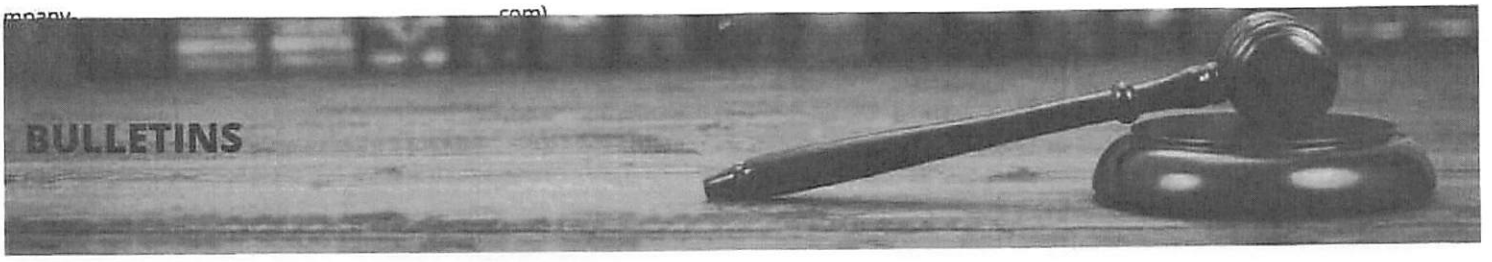
Distribution: All employees



CASE ALERT: Clarity in New Ruling on Dissuading a Victim Access to a Phone

Ray Hill (/user/ray-hill)
January 15, 2023

LU Ref# CAB00193

By Ray Hill
Professor emeritus, Santa Rosa Junior College

Ruling

Defendant's Act of Turning Off a Victim's Cell Phone and Denying Her Access Supports a Conviction for Preventing or Dissuading a Victim from Reporting a Crime (136.1(b)(1) P.C.) (Peo. v. Sherman (2022) 2022 WL 17726696; 2022 Cal App. Lexis 1022).

Case Background

Victim was visiting the United States from Mexico for the first time. Defendant posed as an Uber driver and picked up the victim. (He had previously worked for Uber and Lyft and the company decals were still on his car windows.) He drove victim to a remote location, parked and lunged into the back seat, held the victim down, pulled down her pants and underwear, and attempted to rape her. Defendant's DNA was found on the victim's underwear. During the attack, the victim was able to gain possession of her cell phone. Defendant grabbed the phone, turned it off, said "I'm not going to let you have it" and put it aside. When the victim told the defendant she was pregnant, he returned to the front seat, drove to another location, stopped the car and dropped the victim off.

Defendant was convicted of kidnapping, assault with force likely to produce great bodily injury and dissuading the victim from reporting the crime. He was sentenced to 11 years in CDC&R. Defendant argued on appeal that the statutory interpretation of 136.1(b) (1) P.C. applies only to crimes that have already occurred, not to crimes in progress.

Appeals Decision

The First District Court of Appeals ruled that 136.1(b)(1) applies to attempts to prevent a victim/witness from seeking assistance during an ongoing crime, not just attempts to dissuade a report of a past crime. The statute should be broadly interpreted to apply to preventing communication for assistance during an ongoing course of criminal conduct, the ruling states.

Discussion

This decision can particularly apply in domestic violence cases where a primary aggressor denies phone access or damages a phone to prevent a victim from calling the police.

Cases supporting a conviction for 136(b)(1) P.C. in domestic violence incidents include: Forcibly taken a phone from a victim and hanging it up (Peo. v. McElroy (2005) 126 Cal. App. 4th 874); When victim tried reporting, defendant ripped the phone from the wall, threw it on the floor and broke the phone (Peo. v. Lock (2021) 59 Cal. App. 5th 586); Defendant "head butted" the victim, grabbed the cordless phone she was holding, removed the battery and put the phone in a closet (Peo. v. Navarro (2013) 212 Cal. App. 4th 1336).

Related Statutes

591 P.C. – Damaging a Phone Line or Equipment (felony wobbler).

This statute covers maliciously disconnecting, removing or injuring any telephone line, mechanical equipment or appurtenances, or apparatus connected thereto. The legal argument here is damaging or denying access to a wireless device constitutes preventing the communication link necessary to call for assistance. "Mechanical equipment" includes a telephone (2022 Cal. Crim. Jury Instructions No. 2902; Peo. v. Tafoya (2001) 92 Cal. App. 4th 270); Peo. v. Kreiling (1968) 259 Cal. App. 2nd 698). This act speaks to "fair probability" for making an arrest (836(a)(2) P.C. – Probable Cause to Believe a Felony Was Committed Outside Your Presence). "Prevention of help" is not a necessary element in the corpus delicti of 591 P.C.

591.5 P.C. – Maliciously Damaging or Obstructing a Communication Device to Prevent Someone from Using It to Call for Help (misdemeanor). A lesser and included offense of 591 P.C.

The advantage of 591 P.C. over 591.5 P.C. is the potential of a felony arrest for the offense that occurred outside your presence. Even if the charged is later plea bargained to a misdemeanor, upon conviction, mandatory sentencing provisions come into play. Amongst these conditions, the defendant serves a three-year term of probation, will be subject to a "no contact with victim" order and must attend a 52-week domestic violence batterer's program.

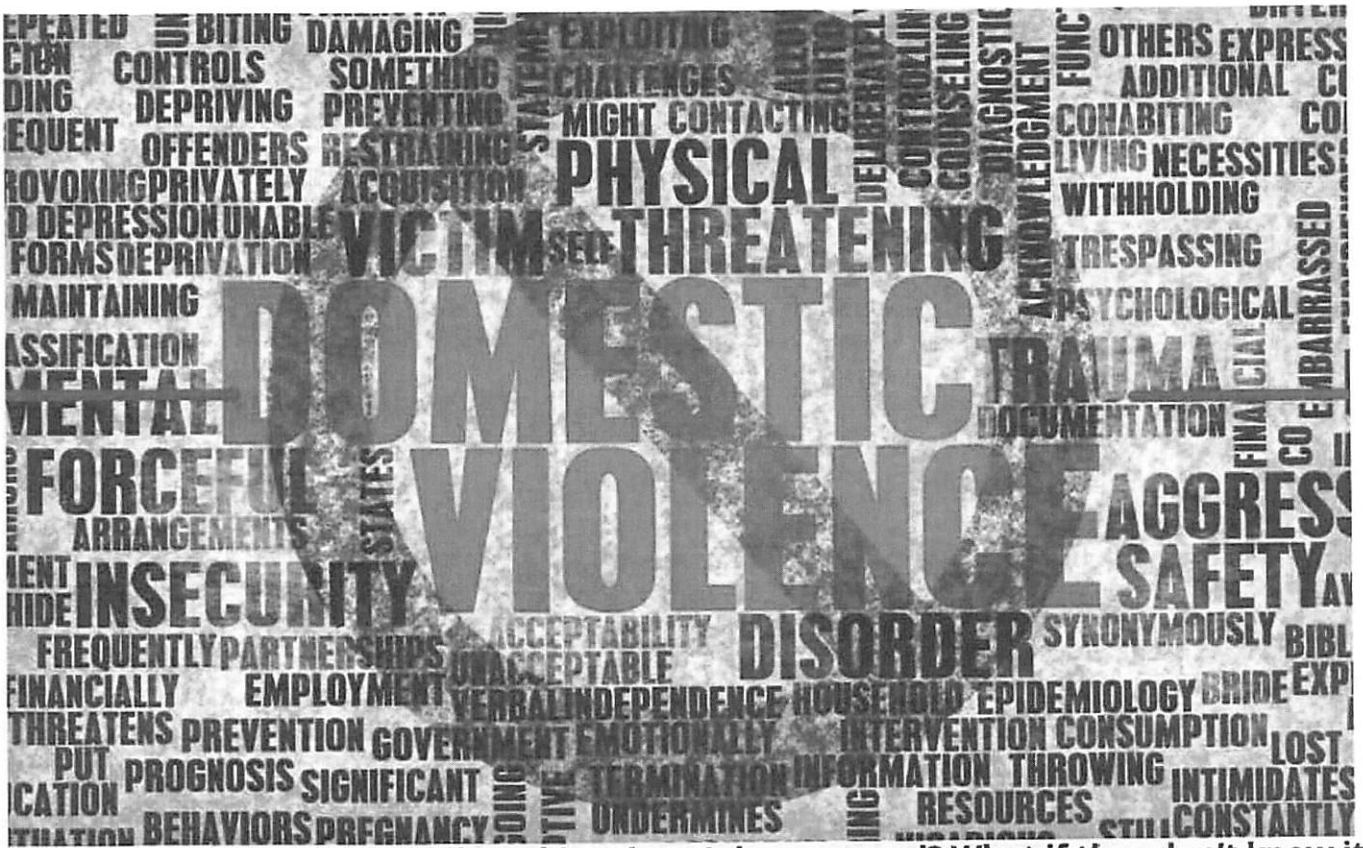
594(b)(3) P.C. – Vandalism.

Damaging property includes another's property or interest in "community property" (Peo. v. Kahanic (1987) 196 Cal. App. 3rd 462). In Kahanic, an angry wife saw their jointly owned Mercedes Benz driven by her husband parked in front of another woman's house. She threw a beer bottle through the windshield. On appeal, defendant argued "community property" is not "property of another" as defined by the vandalism statute. The Fifth District Court of Appeal ruled the crime was a malicious act against the husband's property interest in the vehicle. A crime occurred regardless of which spouse physically possesses the vehicle at the time the act occurred.

If a phone is damaged, you may be able to make a probable cause felony arrest for vandalism exceeding $400 in value based on 594(b)(1) P.C. (836(a)(3) P.C. – Probable Cause to Believe a Felony Has Been Committed Whether the Felony Was in Fact Committed. An Internet search show the costs of an iPhone 14 Pro ranges from $1,099 to $1,698. You can include in value the sales tax (Peo. v. Seals (2017) 14 Cal. App. 5th 1210) and any purchased cover on the phone. Even with depreciation, the phone's value could exceed the $400 threshold. Less than $400, a misdemeanor. Just be reasonable here. The Opinion Evidence Rule (800 E.C.) allows you to form an opinion on value to establish the "fair probability" for a probable cause felony arrest. You will then need to have a phone dealer give you a more complete fair market value estimate based upon age and model of the phone to submit to the District Attorney's Office for complaint-filing purposes.

Stay safe!

RH



Temporary DVROs: What if the subject hasn't been served? What if they don't know it exists?

June 11, 2023 Robert Phillips (/user/robert-phillips)

LU Ref# CAC00105

CASE LAW

- Pen. Code § 836(c)(2) and a Temporary Domestic Violence Restraining Order
- Pen. Code § 148(a)(1) and a Suspect's Resistance to the Enforcement of a Temporary Domestic Violence Restraining Order

RULES

Upon notice of the existence of a temporary domestic violence restraining order and after given an opportunity to comply, a person violates P.C. § 148(a)(1) by resisting officers who are attempting to enforce the order by refusing to comply with the terms of the order.

FACTS

Defendant Christopher James Kenney's mother ("C.K.") decided one day in January 2021 that it was time to exercise a little "tough love" with her 29-year-old druggie son and 86 the bum out of the house. The idea was that once he was made homeless, defendant might voluntarily move into a residential drug rehab treatment facility. (Fat chance.)

To enforce the eviction, C.K. obtained a temporary domestic violence restraining order ("DVRO"), although defendant (not being present) was not aware of this at the time. Pending a hearing scheduled for 15 days later, the court ordered absent defendant to "take only personal clothing and belongings needed until the (pending) hearing and move out immediately." In an accompanying order, the San Diego County Sheriff's Department was directed to "remove" defendant from the residence.

Upon C.K. telling defendant to leave, he did so on Jan. 6. But two days later, defendant returned. C.K. asked him "What are you doing here?" She also told him: "You know you could be arrested." Showing his disrespect for his mother by telling her "F—k you," and that he'd leave after taking a shower, he stomped off to his bedroom. Having to drive her grandson to school, C.K. told defendant, "That's not how restraining orders work," and that they would talk about it when she returned. However, C.K. had a live-in boyfriend who was not as patient. Before C.K. returned, the boyfriend called the sheriff's department to report the presence of "a disorderly druggie" who was "loaded to the gills" and "not supposed to be on the property." He told the dispatcher there was a "restraining order out" but that "it hasn't been served" and "he's here for you to get him right now."

By the time C.K. returned, the deputies were already at her house. She gave them a copy of the temporary DVRO. The deputies first checked with their records division to confirm its existence. (The DVRO's legal validity was not an issue in this case.) C.K. told the deputies that defendant had not yet been served with it. As evidenced by the bodycams worn by the deputies, one of the deputies at the scene, Deputy Evan Maldonado, knocked on defendant's locked bedroom door and told him through the door that he would not be arrested, but that they had a temporary DVRO that they needed to serve on him. Defendant refused to open the door.

Deputy Maldonado, and his partner Deputy Brett Germain explained that there was a restraining order on file that prevented him from being in the house. Defendant questioned the validity of any order that sought to prevent him from being in his own home. The deputies attempted to convince him that "as of right now" he was not going to be arrested, but that they needed to serve the order on him.

Defendant's not-unexpected response (still through the locked bedroom door) was that, "(t)his was bull s—t" and "f—k you guys." The deputies continued to try to reason with defendant, telling him to come out and "talk about it," and submit to being served with the order so that he "can get going." Defendant continued to argue that he was in his own home and that the deputies would have to break down the door.

Using a piece of flexible plastic, the deputies were able to get the door open (albeit with some effort) and -- after a scuffle -- arrested the defendant. He was charged in state court with resisting an executive officer with force, per P.C. § 69. He was convicted of the lesser offense of resisting, obstructing, or delaying a peace officer in the performance of his or her duties, per P.C. § 148(a). The defendant appealed.

HELD

The Fourth District Court of Appeal (Div. 1) affirmed the ruling.

The issue on appeal was whether, in arresting defendant for violating a temporary domestic violence restraining order, the deputies were "performing (their) lawful duty;" an element of P.C. § 148(a)(1) as well as P.C. § 69. (See CALCRIM Nos. 2652 & 2656).

At trial, after the prosecution rested its case, defendant brought a motion to dismiss pursuant to P.C. § 1118.1, arguing that the deputies had violated the notice requirements of a DVRO; i.e., that he "had never been lawfully noticed or served." The motion was denied by the trial court.

The defendant raised the same issue on appeal. Penal Code § 836, in subdivision (c)(2), provides the notice and service requirements for a DVRO, as well as any other court-issued protective order.

The section reads: "The person against whom a protective order has been issued shall be deemed to have notice of the order if the victim presents to the officer proof of service of the order, the officer confirms with the appropriate authorities that a true copy of the proof of service is on file, or the person against whom the protective order was issued was present at the protective order hearing or was informed by a peace officer of the contents of the protective order."

The defendant was not present at the protective order court hearing, so that alternative can be scratched. What was left to be determined by the court was whether, under the requirements of P.C. § 836(c)(2), the defendant had been given notice of the existence of a restraining order and the opportunity to comply before being arrested.

The court held that he had. Under subdivision (c)(2) of section 836 (https://plus.lexis.com/search/?pdmfid=1530671&crid=263a7cf2-b67a-4374-b1d9-5e97664d6a03&pdsearchterms=2023+Cal.App.+LEXIS+114&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pd 657a-4d95-bec5-9ff9baa72d78), a person who has not been served with a DVRO is nevertheless "deemed to have notice of the order" if "informed by a peace office[r] of the contents of the protective order." As evidenced by the deputies' bodycams, the defendant was told several times (albeit through a locked bedroom door) that a DVRO existed, and that under the terms of the order, defendant was not allowed to be there. "The obvious purpose of the notice requirement in section 836 (https://plus.lexis.com/search/?pdmfid=1530671&crid=263a7cf2-b67a-4374-b1d9-5e97664d6a03&pdsearchterms=2023+Cal.App.+LEXIS+114&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pd 657a-4d95-bec5-9ff9baa72d78) is to afford the restrained person a meaningful opportunity at the scene to conform his or her conduct to law." (Italics in the original.) In other words, he must then be given an opportunity to comply.

In this case, after the defendant was told police had such a DVRO, he was also told that he would not be arrested so long as he complied with the terms of the order and left the premises. The fact that he was not told about the pending hearing or that he was also prohibited from being in contact with his mother or her grandson was irrelevant. Merely being told that a DVRO existed and that it prohibited him from being in C.K.'s house, and that he was thereafter given the opportunity to comply, was held to be "adequate" to satisfy the requirements of P.C. § 836(c)(2).

It was also held to be irrelevant, for purposes of determining whether the deputies were "performing (their) lawful duty" as an element of P.C. § 148(a)(1), that C.K. had allegedly threatened defendant some 20 other times with getting a restraining order, that Deputy Maldonado did not read the entire temporary DVRO to defendant, or that no one actually showed him the order. The fact that defendant had been told by the deputies that there was "a restraining order on file," and that as a result he was not allowed to be at the residence, was held to be legally sufficient. The trial court therefore properly denied defendant's motion to dismiss.

There was also an issue as to whether the trial court had failed to properly instruct the jury. Specifically, the jury was not instructed that there was no duty on the part of the deputies to serve defendant with a physical, printed copy of the restraining order. In closing arguments, the defense counsel argued that such a duty existed, while the prosecution argued to the contrary. The jury expressed their confusion on this issue by asking mid-deliberations via a note to the judge whether such a duty existed; a question the trial court declined to answer.

The Appellate Court held "no harm, no foul," noting that the prosecution had been allowed to correctly argue that no such duty existed (i.e., that so long as "the defendant was informed by a peace officer of the contents of the protective order," the notice requirements of P.C. § 836(c)(2) had been met), and the jury convicted based upon that argument. The trial court's instructional error was held to be harmless beyond a reasonable doubt. Defendant's conviction, therefore, was upheld.

AUTHOR NOTES

There's really not much further discussion needed about this case; the law is clear. But because serving a DVRO is one of the duties with which law enforcement officers are occasionally entrusted, it's helpful for you to know the rules.

A person in violation of such an order must be aware that such an order exists, and then after being so informed, be given the opportunity to comply. As written into section 836(c)(2), to arrest someone for a violation of a temporary DVRO, the officer must be able to as confirm "with the appropriate authorities" that such an order exists and then have "proof of service" on the suspect.

Only if the suspect was present at the court hearing, or "proof of service" is on file, can you assume that he or she is aware of the order and its contents. If no such proof exists, then the officer must inform that person of the contents of such an order and then give him or her a reasonable opportunity to comply. Simple enough.

But might I suggest that you err on the side of caution, as the deputies did in this case, and give the suspect the benefit of any doubt that all the elements for a lawful arrest exist.

Recognizing that the prosecution has to prove all these elements beyond a reasonable doubt, and the defendant likely will argue that the notice was insufficient, pouring it on heavier than might really be necessary can help ensure a conviction.

Court Case Name