CIVIL RIGHTS

Due Process Denied — The Order of Protection Hearing

By Cory Morris

Domestic Violence ("DV") Defendants have due process rights when a Temporary Order of Protection issues. Prosecutors should understand the rights of the accused and the requirement that a hearing may be held as a result of routinely requesting such orders of protections while defense attorneys should discuss with their clients[1] the myriad of liberty interests at stake before regularly accepting the terms and conditions of the Temporary Order of Protection, which can perpetuate for months if not years after its issuance.

The Matter of Lopez v. Fischer

In *The Matter Of Lopez v. Fischer* ("*Lopez*"), 2009 NY Slip Op 32859(U) (Nass. Sup. Ct. Dec. 2, 2009), Paul Lopez (hereinafter "Petitioner") challenged the condition of bail that a Temporary Order of Protection ("TOP") be issued against him. When arraigned, the arraignment judge ordered a hearing be held. Petitioner was denied that hearing on his next court date. A writ of prohibition was brought against the district court judge under CPLR § 7801 to have the hearing held regarding the issuance of a TOP. The Nassau Supreme Court ordered that a hearing must be held before the district court judge as to whether the TOP should be continued.

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The Petitioner in *Lopez* was accused of violating Penal Law Section 120.00(2), Reckless Assault in the Third Degree, a class A misdemeanor. When Petitioner was arraigned, his defense attorney asked for a hearing that the arraignment judge (Hon. Bonnie Chaiken) ordered be held on the date of the next court appearance. However, on the next court date Petitioner appeared before Nassau County District Judge Rhoda Fischer (hereinafter "Respondent") who denied defense counsel's request for a hearing. "The defendant/petitioner when arrested in the criminal matter and for some time prior shared a residence with the complainant … and their child. Pursuant to the TOP, the petitioner was required, *inter alia* to stay away from the complainant at her home. This resulted in his inability to legally live in his home."[2] Accordingly, Petitioner was evicted from his home without any evidentiary finding or due process hearing.

In evaluating whether a writ of prohibition should issue, the Nassau Supreme Court required that a threshold finding be made: "whether the body or officer was acting in a judicial or quasi-judicial capacity; and whether the error was jurisdictional in nature." Should the error be jurisdictional in nature, the court must then examine the gravity of the harm; whether the harm can adequately be corrected on appeal or by recourse to ordinary proceedings; and whether prohibition would furnish "a more complete and efficacious remedy…even though other methods of redress are technically available."[3] In deciding what type of hearing is required, the liberty interests of the defendant are weighed against the government interests.[4]

The Nassau Supreme Court found that "the respondent exceeded her jurisdiction when she refused to comply with the bail order of a judge of concurrent jurisdiction, without good cause shown" and "when the respondent continued the TOP without holding a hearing, she was in effect changing an aspect of the petitioner/defendant's bail status without good cause." Practitioners should take note that the arraignment judge's order required the Respondent to hold the hearing or find good cause to warrant modification of the bail status of a concurrent judge. In evaluating the harm caused absent the hearing, the Nassau Supreme Court highlighted that

> In the instant case, the TOP resulted in the petitioner/defendant being totally excluded from his residence. By continuing the TOP without holding a hearing, the respondent deprived the petitioner/defendant of significant interests in his home to which he is constitutionally entitled (*Fuentes v. Shevin*, 407 US 67 (1972); *People v. Forman* 145 Misc2d 115, 129, (Crim. Ct., NY Cty. , 1989)).[5]

In addition to the above, practitioners should scrutinize the liberty interests of the defendant when challenging/evaluating the routine provisions of a TOP including but not limited to the client's First Amendment rights, associational (child/spouse) liberty inter-

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Debtor's Attorney Sanctioned for 707(b) BAPCPA Abuse (Continued from page 20)

facts to determine whether the client's representations are objectively reasonable and investigate further, if any inconsistencies are raised, by asking questions, obtaining additional documents, or by some other means.

The court then determined that there were two issues — whether Mr. Kassman failed to conduct a reasonable investigation into the circumstances that gave rise to the petition, and if so, whether the trustee's request for reimbursement of fees is appropriate. Judge Scarcella determined that Mr. Kassman failed to perform a reasonable investigation.

The schedules state that the debtor's retirement contributions were mandatory. However, Mr. Kassman made that statement now knowing if it was correct or not, and only sought further clarification after the trustee raised the issue. As such, Judge Scarcella concluded that Mr. Kassman failed to perform a reasonable inquiry.

Judge Scarcella found that the debtor used some of her disposable income to pay for her son's college tuition and expenses; yet this was not indicated in the original schedules. The judge concluded that Mr. Kassman had sufficient information to make further inquiry about this, as one of the debts was a student loan, and the 20-year-old son lived with the debtor as a dependent. The court took issue that Mr. Kassman did not disclose a joint account from which the tuition payments were made. The judge also pointed out that college tuition may not be a reasonable budget expenditure.

With regard to the new marriage and contributions from the husband, the judge concluded that Mr. Kassman, who claimed he had no knowledge of the marriage, had a duty to inquire further, considering that the debtor scheduled an engagement ring as an asset. There was a joint bank account with the soon-to-be spouse and the judge questioned whether Mr. Kassman ever reviewed the statements from that account. "A reasonable attorney under the same circumstances then would have inquired into who the joint account owner was in relation to debtor, whether debtor lived with the joint account owner, and whether the joint account owner contributed to debtor's monthly expenses."

Judge Scarcella also found other apparent deficiencies and determined that the means test was not fully completed and some of the information provided was inaccurate.

In deciding to award attorney's fees to the trustee, the judge noted that Mr. Kassman performed some of his due diligence after the petition was filed, when it should have been done prior to filing. Mr. Kassman did not file the petition after a reasonable investigation. Apparently, Mr. Kassman only offered limited opposition to the trustee's motion and failed to provide sufficient evidence demonstrate otherwise.

It was ironic that Judge Scarcella frequently cited the *Parikh* decision (*Desiderio v. Parikh*), 807-72869-reg, AP 808-8062-reg Bankr. E.D.N.Y. 2014, in which the trustee, himself, was a party (debtor's attorney), and he was sanctioned by Judge Grossman for his own failure to engage in due diligence. This column discussed that case in the June 2014 issue of the *Suffolk Lawyer*.

Another interesting fact is that the trustee in this case brought a 707(b) proceeding against another debtor several years ago and was successful in dismissing that case after neither the debtor nor the debtor's counsel opposed the motion. Like this case, the trustee also subsequently sought legal fees in a proceeding that was also before Judge Scarcella. However, in that case, the judge refused to award attorney's fees. Although the judge concluded that the debtor's attorney may have been lax in the preparation of the schedules, he determined that there was no evidence that the attorney had knowledge that the information in the schedules was incorrect at the time they were filed. *In re Hanson*, 2015 WL 891669)(Bankr EDNY Feb 27, 2015, Case No. 13-73855-las).

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ests, ownership or propriety rights[6] and Second Amendment rights as well as the host of other crimes that one may be subjected to for no other reason than the regular issuance of a TOP.

Finding that the TOP hearing is required, the *Lopez* Court held that

the form said hearing should take is left to the discretion of the judge conducting it. Clearly, although a full evidentiary hearing is permissible and of course desirable from the petitioner's point of view, it is not mandatory … What is required is that the judge ascertain the facts necessary to decide whether or not the TOP should be continued … Given the very limited scope of the hearing and the minimal drain on the courts' resources which would result, the petitioner/defendant's right to a hearing should prevail. [7]

The court noted that "[o]ral argument on the possibility of having a hearing is not, however, the equivalent of actually holding the hearing on the issue of whether the TOP should be continued." [8] Although "innocent until proven guilty,"[9] the host of liberty interests routinely eviscerated by the rubber stamping of a TOP can and should be met with some form of resistance by criminal defense lawyers.

The reality of the Temporary Order of Protection

Perhaps placed in the most difficult of positions, district court judges who sit in the arraignment and domestic violence parts are faced with large numbers of individuals with either a violent past, mental illness/substances abuse issues or significant previous contacts with the criminal justice system. These judges are expected to do the impossible — predict and prevent future criminal behavior. While legal practitioners and scholars may suggest an alternative to the routine ordering of the TOP, the judiciary must quickly make decisions fraught with peril — deny the TOP or give great weight to an accusation that may be intertwined with, *inter alia*, the nuances of an ongoing matrimonial dispute and the perceived (or actual) power imbalance in a domestic relationship.

What is clear, however, is that "[w]henever state action deprives a citizen of his or her liberty or property due process requires that he or she be afforded the opportunity for a hearing."[10] A TOP restraints the liberty interests of the DV Defendant. The rights of the DV complainant(s), who are not at all obliged to the continued appearances at our district courts under threat of incarceration, remain intact throughout this process. The TOP and the mandatory prosecution of the DV Defendant may serve to divest a complainant of his or her autonomy throughout the process. The judicial scrutiny of the TOP does not, however, divest the DV complainant of his or her ability to seek redress.

DV Complainants are free to start a proceeding in a New York Family Court and seek an order of protection. Perhaps the resolve to this dilemma does not lie within the arraignment judges and domestic violence judges who are often tasked with busy court dockets. Should it not be that such complainants who wish to have an Order of Protection or continue a TOP avail themselves of the judicial process? Would this not serve to resolve such criminal domestic violence matters in more fair and expeditious manner?

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[1] See *Weiner v. State*, 2010 N.Y. Slip Op 50533 (Suff. Sup. Ct. 2010) (J.S.C. Thomas F. Whelan) ("While an evidentiary hearing may be appropriate, the need for such a hearing and the form thereof, is best left to the discretion of the arraignment judge.")

[2] *In The Matter Of Lopez v. Fischer*, 2009 NY Slip Op 32859(U) at P. 2 (Nass. Sup. Ct. Dec. 2, 2009).

[3] *Matter of Rush v. Mordue*, 68 N.Y.2d 348, 354 (1986) (quoting *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 14 (1976)).

[4] See *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

[5] *Id.* (external quotation marks omitted and internal citations preserved).

[6] See *People v. Scott*, 195 Misc.2d 647 (N.Y. Sup. Ct. May 8, 2003) (citing *People v. Koertge*, 182 Misc 2d 183, 185 (1998)); see also *People v. Forman*, 145 Misc 2d 115, 121 (1989); and *People v. Derisi*, 110 Misc 2d 718, 718-719 (1981).

[7] *In The Matter Of Lopez v. Fischer*, 2009 NY Slip Op 32859(U) at P. 4 (external quotation marks omitted); see, e.g., *Matter of Brown*, 2016 N.Y. Slip Op 26361 (Kings Civ. Ct. 2016), see also, *Weiner*, *supra* note 1.

[8] *In The Matter Of Lopez v. Fischer*, 2009 NY Slip Op 32859(U) at P. 2.

[9] *Rinaldi v. Holt, Rinehart*, 42 N.Y.2d 369, 391 (1977).

[10] *People v. Forman*, 145 Misc 2d 115 (Crim Ct NY County 1989]) (citing *Schall v. Martin*, 467 US 253 ((1984)); *Mathews v. Eldridge*, 424 US 319 (1976); *Gerstein v. Pugh*, 420 US 103 (1975); *Matter of Jones v. Berman*, 37 NY2d 42 at 55 (1975); *Sharrock v. Dell Buick—Cadillac, Inc*., 45 NY2d 152 (1978).