FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	)	**CRIMINAL CASE NO. 07-0148D** DPS Case Nos. 07-00942, -05969, -05938
Plaintiff,	)	
vs.	)	**DECISION DENYING DEFENDANT'S MOTION TO VACATE CONVICTION**
ROGER S. CASTILLO, d.o.b. 01/08/57	)	
Defendant.	)	

In this criminal case, a bench trial was held on March 25, 2008, before the Honorable Juan T. Lizama on the First Amended Information filed on July 30, 2007, containing eight counts, to wit: two counts of Stalking in the First Degree; two counts of Disturbing the Peace; one count of Theft; and three counts of Violating an Order for Protection for incidents that occurred on June 15 and 16, 2007.

At the conclusion of the trial, Judge Lizama announced his decision from the bench finding the Defendant guilty as to Counts I and VI (Stalking in the First Degree), Count II (Disturbing the Peace), Counts IV, V and VIII (Violating an Order of Protection), and reserved ruling on Count III (Theft). As to Count VII (Disturbing the Peace), the court concluded that it was covered by Count I. A sentencing hearing was thereafter set for June 11, 2008 at 10:00 a.m.

On April 1, 2008, Judge Lizama issued his written order finding the Defendant guilty of both counts of Stalking, both counts of Disturbing the Peace, and all three counts of Violating an Order for

Protection. The Defendant was found not guilty of Count III, the crime of theft. In the same order, the trial court concluded that the two counts of Stalking in the First Degree and Disturbing the Peace merged, so that Defendant is subject to punishment for only one count for each crime.

After the conviction was entered, a sentencing hearing was scheduled for June 11, 2008. Prior to the sentencing hearing, Judge Lizama retired from the bench, and Defendant filed his motion to vacate conviction based on a claim of double jeopardy. The Commonwealth opposed the motion, arguing that even if Defendant has a double jeopardy defense, his motion was untimely under the Commonwealth's Rules of Criminal Procedure and his claim has therefore been waived. Alternatively, the Commonwealth argued that there was no violation of the Defendant's constitutional protection against double jeopardy.

This Court finds the Commonwealth's objection to the untimeliness of Defendant's motion to be valid in this case with respect to the Information itself, but nevertheless also finds cause shown to excuse the Defendant's delay and grants relief from the waiver under Com. R. Crim. P. 12(f). *See, United States v. Zalapa*, 509 F.3d 1060, 1063 (9th Cir. 2007) (objections to the indictment can be waived, but objections to multiplicitous sentences and convictions cannot be waived). Here, Defendant's counsel did not learn of the double jeopardy claim until after the bench trial but before the sentencing hearing.

I. Defendant's claim of Double Jeopardy violation to vacate the convictions.

Defendant seeks to have the findings of guilty after the criminal bench trial voided on his claim that allowing the conviction to stand violates his constitutional right against double jeopardy. The factual premise for the defense's argument is that on July 3, 2007, over eight months prior to the March 25, 2008 criminal trial, Defendant Castillo was tried in an Order to Show Cause (OSC) proceeding in the Family Court before another judge for the same acts that were alleged by the prosecution as constituting

the crimes with which Defendant was charged and ultimately convicted in this criminal case[1]. A decision has not been issued by the Family Court judge because the matter was taken under advisement, so Defendant still faces the possibility of being found in contempt of court and sentenced to a term of six months imprisonment, a fine of $100, or both. 8 CMC § 1926(a).

Public Law 12-19, known as the Domestic and Family Violence Prevention Act of 2000, provides guidelines for the issuance of a protection order in the civil context. It expressly states that the following statement must be printed in bold-faced type or in capital letters on the order for protection: "Violation of this order may be punished by confinement in jail for as long as six months and by a fine of as much as $100.00 or both." 8 CMC § 1912(c). Yet, the Order of Protection that was issued in Defendant's family court case contains, at the bottom of the second page, the language appropriate to the crime of Violating an Order for Protection, enacted by Public Law 14-9, § 3 (1501) on May 28, 2004, and codified at 6 CMC § 1464(a), and erroneously cites to 6 CMC § 1504(a)(b)). The language expressly mandated by law and applicable to the nature of the family court proceeding is nowhere on the protection order. Furthermore, the noticed Order to Show Cause given to the Defendant in the family court case indicates that "[a] contempt proceeding is *criminal in nature*," and that Defendant was "ordered to appear in this court as follows to give any legal reason why this court should not find you *guilty of contempt*…." (Ex. C to Def.'s Motion) (emphasis added). Despite this discrepancy in the statutory notice and references to the proceeding being "criminal in nature" and requiring a finding of "guilty of contempt," the Family Court judge sitting in an OSC hearing for a violation of a protection order was limited, as a matter of law, to imposing the penalty provided for under the Domestic and Family Violence Prevention Act, not under the criminal code, and to *enforcing its orders* as contempt of

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[1] The Defendant's exhibits in his motion reflect the OSC hearing was in FCD-FP Civil Action No. 05-0619B. Def's Ex. C & D. However, the criminal case involves another protection order issued by another judge in FCD-FP Civil Action No. 05-634. Pl's Ex. A. Nevertheless, the same June 2007 facts were presented at both the OSC hearing and this criminal case.

court.[2] As Defendant correctly stated in his motion, only the Attorney General can initiate and prosecute violations of the Commonwealth's criminal laws. (Def.'s Mem. in Supp. of Mot. at 5, *citing*, N.M.I. Const. art. III, § 11: "The Attorney General shall be responsible for … prosecuting violations of Commonwealth law.").

At the time of the criminal trial, there had been no finding of contempt of court, and no sentence has been imposed. Defendant nevertheless claims that double jeopardy attached when the OSC hearing began and witnesses testified under oath. At the OSC hearing, petitioner appeared with private counsel, and respondent Castillo appeared *pro se*. (Ex. D to Motion; Partial Transcript of Proceedings). The partial transcript and an audio tape of the Family Court judge's statements at the conclusion of the OSC hearing clearly show that testimony was taken. Based on these facts, this Court concludes that double jeopardy did attach in the Family Court proceeding. *U.S. v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 2856 (1993) (the protection of the Double Jeopardy Clause attaches in nonsummary criminal contempt prosecutions just as it does in other criminal prosecutions).

The Commonwealth's Constitution provides that "[n]o person shall be put twice in jeopardy for the same offense regardless of the governmental entity that first institutes prosecution." N.M.I. Const. art. I, § 4(e). This provision guarantees at least as much protection from double jeopardy as provided by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *Commonwealth v. Oden*, 3 N.M.I. 186, 206 (1992).[3]

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[2] Title 8, Section 1926(a) of the Family Law states: Whenever an order for protection is issued pursuant to this Chapter, and the respondent has been served with, or otherwise notified of the order, violation of the order shall constitute **contempt of court** punishable by up to six months in jail, a $100 fine, or both. Source: P.L. 12-19 § 2 (216). Cf. 6 CMC § 3308 (criminal contempt of court).

[3] The Fifth Amendment of the U.S. Constitution applies in the Commonwealth via the Covenant. *See* COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1801 note, *reprinted in* CMC at lxxxi, § 501(a) ("Applicability of Laws"). Provisions of the

The Double Jeopardy Clause protects against three types of abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Commonwealth v. Atalig*, 2002 MP 20, ¶ 36, citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969); *Oden*, 3 N.M.I. at 206.

Defendant argues that the hearing in family court for violating a protection order was criminal in nature, that his protection from double jeopardy attached, and that the prior proceeding bars the Commonwealth from filing any subsequent criminal prosecutions for the same acts. (Def.'s Mem. at 3-4, *citing*, *People v. Wood*, 95 N.Y.2d 509 (Ct.App. 2000)). However, as Defendant noted in his brief, the New York Court of Appeals in *Wood* first applied the "same elements" test of *Blockburger v. U.S.*, 284 U.S. 299, 52 S,Ct. 180, 76 L.Ed. 306 (1932). The New York court found that double jeopardy barred prosecution of the criminal action after the family court had found that the defendant violated provisions of its civil protection order that included a prohibition on committing the same offense. Based on this authority, Defendant Castillo submits that this criminal case was for the same acts that were at issue in the OSC hearing, and therefore, this subsequent prosecution violated his constitutional right to be free from a second prosecution for the same offense, and from multiple punishments for the same offense. Accordingly, Defendant argues this Court should set aside the bench trial and vacate the verdict for all the criminal convictions. This Court disagrees.

In the case of *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849 (1993), the United States Supreme Court addressed a situation substantially similar to the one presented by Defendant in this case. In *Dixon*, the Supreme Court overruled its own precedent which had previously required double-

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Commonwealth Constitution that were adopted pursuant to Covenant § 501(a) are applied by using the same analysis applicable to the corresponding provisions of the U.S. Constitution. *Commonwealth v. Mettao*, 2008 MP 7, ¶ 16, n.2.

jeopardy questions to be determined by application of a two-part test consisting of the "same conduct" test that Defendant appears to rely upon, in addition to the "same elements" test that is still applicable and more commonly known as the *Blockburger* test.[4]

Prior to the 1993 *Dixon* decision, a double jeopardy claim required an analysis of the "same elements" test under the *Blockburger* case, *plus* a "same conduct" test under *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084 (1990). The latter test applied to bar subsequent prosecution or multiple punishments when the two offenses charged contained different elements, but when proof of the current charge would require the prosecution to prove conduct sufficient to constitute the prior offense. *Id.*, at 521. Under the former two-part test, this criminal case would be barred. However, the holding of the *Grady* decision that imposed the requirement of the "same conduct" test was overruled, and the only applicable test herein is the remaining "same elements" test. Under this test, a subsequent criminal prosecution for the same conduct is not automatically barred.

In *Dixon*, the Supreme Court considered two previously consolidated cases, and the case of petitioner Michael Foster is relevant here. Foster was subject to a civil protection order (CPO) obtained by his wife requiring that he not "molest, assault, or in any manner threaten or physically abuse" his wife. *Dixon*, 509 U.S. at 692. In a span of eight months, Foster's wife filed three separate motions to have her husband held in contempt of court for numerous violations of the CPO. The violations included three separate instances of threats, and two assaults. *Id.* After issuing Foster a notice of hearing and ordering him to appear, the court held a 3-day bench trial. The wife's mother and private counsel prosecuted the case; there was no government attorney prosecuting the case. The family court concluded that for the assault violation, the wife had to prove there was a civil protection order, and that

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[4] At the July 24, 2008 hearing on Defendant's motion, counsel for both parties acknowledged that neither of their legal briefs contained any reference to or analysis of the *Dixon* decision, however both counsel were aware of it and were prepared to argue the motion including a discussion of the *Dixon* decision.

the assault as defined by the criminal code in fact occurred. *Id*. at 693. The court granted Foster's motion for acquittal on various counts, including the two alleged threats. Foster himself testified and denied the allegations. In the end, the court found Foster *guilty beyond a reasonable doubt* of four counts of criminal contempt. Foster was sentenced to an aggregate of 600 days' imprisonment where the maximum punishment for each count was six months' imprisonment and $300 fine. *Id.*

The U.S. Attorney's Office for the District of Columbia subsequently obtained an indictment charging Foster with one count of simple assault, three counts of threatening to injure another, and one count of assault with intent to kill, all committed against the same victim as in the family court hearing, Foster's wife. 509 U.S. at 693. The first and last counts were based on the events for which Foster had been held in contempt, and the other three were based on the alleged events for which Foster was acquitted of contempt. Foster filed a motion to dismiss claiming a double jeopardy bar to all counts, and the trial court denied the motion. *Id.* On appeal, the District of Columbia Court of Appeals relied on *Grady v. Corbin* and ruled that the subsequent prosecution was barred by the Double Jeopardy Clause. In *Dixon*, the United States Supreme Court overruled *Grady*. *Id.*, at 704, 711. It did, however, conclude that the subsequent prosecution for assault was barred because it failed the *Blockburger* test. *Id.* at 700. The Supreme Court reasoned that the assault charge in the indictment was also the subject of the defendant's prior contempt conviction for violating the CPO provision forbidding him to commit simple assault. *Id.* However, it concluded that the remaining four counts (three counts of assault with intent to kill, and one count of threatening to injure) were not barred under *Blockburger*. *Id.* at 700-703, 711. Because the *Grady* "same conduct" test is no longer the law, Defendant Castillo's motion to vacate the conviction for violating the Double Jeopardy Clause based on this test is DENIED.

At the conclusion of the July 24th motion hearing, defense counsel argued that because the Order of Protection in FCD-FP Civil Action No. 05-0634 ordered the Defendant not to "molest, attack, strike, threaten, sexually assault, batter, telephone or *disturb the peace*" of the Petitioner, who is the victim in

the criminal case, the convictions for the crimes of Disturbing the Peace and Violating an Order for Protection are barred by double jeopardy even under the *Dixon* decision. Nevertheless, defense counsel conceded that under the *Blockburger* test, the most serious charge of Stalking in the First Degree is not barred.[5] Furthermore, the Commonwealth previously conceded at the conclusion of the bench trial, and the Court so ordered, that the crime of disturbing the peace merged with the crime of Stalking in the First Degree in this case.

However, the parties had not fully applied the "same elements" test to the Family Law penalty of contempt of court compared to the crimes that the Defendant has been convicted of in this case. Accordingly, the Court set a briefing schedule to allow the parties the opportunity to do so. Since the Court entered its oral decision on the original motion, counsel for the Commonwealth and the Defendant met in chambers and they both conceded that Stalking in the First Degree is not barred, and this Court agrees. Accordingly, Defendant's motion to vacate conviction of stalking in the first degree for a double jeopardy violation is DENIED.[6] The trial judge in this case has already concluded that Count VI, stalking in the first degree, merges with Count I, stalking in the first degree. Bench Trial Order at 1. Accordingly, Defendant is subject to a sentence on one count of Stalking in the First degree only.

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[5] A person commits the crime of **stalking in the first degree** if the person violates 6 CMC 1472 (Stalking in the Second Degree) and (1) the actions constituting the offense are in violation of an order of protection issued by a court of law; or (6)(B) the defendant has been previously convicted of a crime involving domestic violence, … under … assault, assault and battery, aggravated assault or assault with a dangerous weapon, under 6 CMC §§ 1201-1204. Stalking in the first degree is punishable by a term of imprisonment not to exceed five years, a fine not to exceed $2,000, or both. 6 CMC § 1471(c).

A person commits the crime of **stalking in the <u>second</u> degree** if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member. 6 CMC §1472(a).

A person commits the crime of **violating an order for protection** if the person is subject to an order for protection containing a provision listed in 8 CMC 1915(c) and 1916(b) and (c), respectively, and knowingly commits or attempts to commit an act in violation of that provision. 6 CMC § 1464(a). Violating an order for protection is punishable by imprisonment of not more than one year, by a fine of not more than $2,000, or both. 6 CMC § 1464(b).

[6] In this case, each of the Stalking counts in the First Amended Information alleged a violation of a protection order *and* the existence of a prior criminal conviction involving domestic violence. The defendant has been found guilty of three separate counts of violating an order of protection. Because proof of a violation of a protection order is an element of the crime of stalking as charged, this Court concludes that the crimes of violating an order of protection merge with the Stalking crimes.

II. This criminal case was not improperly initiated by a sitting Superior Court judge.

Defendant further argued that the prosecution of this case was improperly initiated by a sitting judge, and that even if double jeopardy did not bar his criminal prosecution, in order for Mr. Castillo to receive a fair trial, an independent trier of fact would have to be appointed. He based this argument on the statements made by the judge at the conclusion of the OSC hearing in family court. After taking the testimony from Ms. Santiago (the victim) and Mr. Castillo at the hearing, the judge stated the following:

> Alright Mr. Castillo, I don't want you to say anymore because you're just going to get yourself in trouble. Um, you can step down. Alright, what I'm going to do is um, I'm going to take this matter under advisement.
>
> What I'm really going to do is I'm going to notify the Attorney General's Office that I believe there is a violation of an order of protection and I want criminal charges brought against Mr. Castillo. It is time to say goodbye to Mr. Castillo. It is time that he went back to the Philippines, Ok. He's a problem, he doesn't follow court orders, he's a bully and it's time that he went "bye bye, adios." We don't need people like Mr. Castillo here. And since we're still in charge of the immigration it's time to say "PROBLEM! ADIOS PROBLEM!" back to the P.I. where you can be a problem there, OK. We have enough problem children here from the P.I. and it's time we get rid of them. Alright, So I am going to recommend that you be prosecuted. I am going to personally take this on myself Mr. Castillo. I want to see you leave the Northern Mariana Islands. And when you leave, I will be at the airport to go "ADIOS MUCHACHO! DON'T COME BACK." Alright!

(Def.'s Mem. at 6; Ex. D). He went on to state:

> "I'm going to call the AG's office after I finish and I am going to make it my personal, personal journey to make sure that Mr. Castillo leaves the CNMI. I want you out of here Roger." … "It is now time to start cleaning house in the CNMI. We don't need perpetrators of domestic violence here. I wish I could get rid of the locals but I can't. They're American citizens. But the ones who are not. There's no reason why we should have to put up with them."

(*Id.*)

As Defendant correctly stated, these statements violate the principles of decorum and temperance that the Judicial Canons seek to promote. The judge's tirade does appear to defy the mandates of Judicial Canon 3B(9), which states in part, that "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its

outcome or impair its fairness … [or] *that might substantially interfere with a fair trial or hearing*." Model Code of Judicial Conduct (2000 Ed.) (emphasis added). His concern is that the judge actually meant every word he said, and that this case was prosecuted as a result of the judge's "personal journey." (Def.'s Mem. at 6).

The judge's comments were at a minimum intemperate and improvident, and his vitriol casts an appearance of impropriety upon the entire Superior Court and brings the judiciary into disrepute. Defendant even postulates "Is the public to believe that [the judge's] personal journey would not include speaking with his colleagues on the bench as to what evidence he may have?" (Def.'s Mem. at 7). However, Defendant failed to provide any evidence that the criminal proceedings were in fact tainted by the judge's statements and/or actions. The prosecuting attorney who filed the Information in July, 2007, and who actually tried the case in March, 2008, unequivocally stated that he was never aware of the judge's statements in the family court proceedings until the instant post-trial motion was filed. Defendant did not provide any evidence that would even tend to show that former Judge Lizama knew anything of the family court judge's avowed personal quest against the Defendant. Furthermore, Defendant had the assistance of counsel throughout the criminal proceedings, and the testimonial evidence presented at trial was all received in open court, under oath, and subject to cross examination. All of Defendant's constitutional rights to a fair trial were satisfied. Accordingly, Defendant's alternative ground to set aside the conviction based on the alleged instigation of this criminal case by the family court judge fails, and the motion must be and is hereby DENIED.

IT IS SO ORDERED this 5th day of November, 2008.

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RAMONA V. MANGLONA, Associate Judge