

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	<b>: No. 99-10,369</b>
	<b>:</b>
<b>vs.</b>	<b>: CRIMINAL DIVISION</b>
	<b>:</b>
<b>TERRELL A. SCOTT,</b>	<b>:</b>
<b>Defendant</b>	<b>:</b>

**OPINION AND ORDER**

This matter came before the Court on the defendant's Motion to Dismiss. In the Motion, the defendant asserts that the Commonwealth's prosecution of the defendant in the above-captioned matter is barred by double jeopardy since the defendant was found in contempt of a Protection From Abuse (PFA) Order for the same conduct.

The relevant facts are as follows: On or about July 30, 1999, Michelle Fox obtained a PFA Order against the defendant which prohibited him from abusing, stalking, harassing or threatening Ms. Fox or the parties' minor son as well as having any contact with Ms. Fox. Fox v. Scott, Lycoming County No. 98-20,964 (Order 7/30/98, Smith, P.J.). This Order also completely evicted and excluded the defendant from the residence at 1817 Hazel Drive, Williamsport, Pennsylvania. Id.

On or about February 3, 1999 at approximately 5:30 p.m., the defendant was at the 1817 Hazel Drive residence. He and Ms. Fox were attempting to feed their young son. The defendant became angry when the child refused to eat so he took the child from his highchair over to the sofa and repeatedly dropped him onto the sofa from a height of two to three (2-3) feet. On February 17, 1999, the defendant was arrested for endangering the welfare of a child, recklessly endangering another person, and harassment, as well as for a violation of the PFA Order.

Although the affidavit of the complaint for indirect criminal contempt only alleges that the defendant met Ms. Fox at Taco Bell, left with her and went to the residence at 1817 Hazel Drive where he spent the night, in violation of the no contact and exclusive possession provisions of the PFA Order, the Commonwealth did not limit itself to these allegations when presenting evidence at the contempt hearing. Instead, the Commonwealth also introduced evidence regarding the incident involving the defendant's son. Initially, the Court indicated it would find the defendant in contempt for his contact with and conduct toward Ms. Fox; however, after the Commonwealth asked the Court to consider the conduct toward the child, the Court entered its Order of March 24, 1999 finding the defendant in contempt in regard to his conduct toward Ms. Fox and the child. Regrettably, because of this finding, the Court is constrained to agree with the defense and find the current prosecution is barred by double jeopardy.

Under the facts and circumstances of this case, the elements for the defendant's harassment and abuse of the child in violation of the PFA Order are the same as the elements for the criminal charges in this case. The defendant is charged with harassment, recklessly endangering another, and endangering the welfare of a child.

Harassment for purposes of the PFA order and the criminal charges are identical.

The definition of abuse under the Protection from Abuse Act includes, in relevant part: (1) attempting to cause or intentionally, knowingly or recklessly causing bodily injury, or serious bodily injury or (2) child abuse as that term is defined in the Child Protective Services Law between family or household members. 23 Pa.C.S. §6102.

Child abuse includes any recent act or failure to act by a perpetrator which creates an imminent risk of serious physical injury to a child under 18 years of age. 23 Pa.C.S. 6303. An individual recklessly endangers another if he unlawfully and recklessly engages in conduct which placed or may have placed another in danger of death or serious bodily injury. A comparison of the relevant portion of child abuse to recklessly endangering charge under the facts of this case shows that these offenses are not sufficiently different to avoid double jeopardy. In order for double jeopardy not to apply, each offense must contain an element that the other does not. Child abuse requires: (1) any act (including reckless acts);<sup>1</sup> (2) by a perpetrator, i.e., a parent, care-giver, or paramour of a parent; (3) which creates an imminent risk; (4) of serious physical injury; (5) to a child under 18 years of age. Recklessly endangering involves (1) conduct; (2) toward another (in this case a child); (3) which placed or may have placed him in danger (4) of serious bodily injury. Basically, child abuse under this portion of its definition is a parent recklessly endangering a child.

Similarly, the definition of abuse includes endangering the welfare of a child. Endangering the welfare of a child requires a parent to knowingly endanger the welfare of a child by violating a duty of care, protection, or support. Factually, the violation of duty of care, protection or support would be attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury or creating a risk of serious bodily injury all of which are included in the definitions of abuse.

In conclusion, harassment, recklessly endangering another and endangering

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<sup>1</sup>It appears that the act could be intentional, knowing, reckless or negligent.

the welfare of a child involve the same elements as harassment and abuse under the PFA Order. If the defendant's conduct constitutes harassment, recklessly endangering and endangering the welfare of a child, it also constitutes harassment and abuse under the PFA Order. The defendant has already been found in contempt for his conduct toward the child. Therefore, this criminal prosecution is a second prosecution for the same offenses and is barred by the Double Jeopardy clauses of the United States and Pennsylvania Constitutions.

**ORDER**

AND NOW, this \_\_\_\_\_ day of August, 1999, for the foregoing reasons, the Court GRANTS the defendant's Motion to Dismiss.<sup>2</sup>

By The Court,

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Kenneth D. Brown, J.

cc: District Attorney  
Colleen Shedlock, Esq. (APD)  
Work File

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<sup>2</sup>In the future, we would recommend that the Commonwealth defer litigating an indirect criminal contempt of an abuse order where the incident or conduct in question is also the basis for pending criminal charges. This situation creates inherent double jeopardy issues which could be avoided. The Commonwealth may also want to investigate the possibility of consolidating the abuse contempt with the criminal charges so all could be heard at one time without the creating the risk of a double jeopardy issue.