No. 83677-9

SANDERS, J.* (dissenting) — We are asked whether a *permanent* protection order requires an unambiguous statutory finding for it to extend beyond one year. To issue a permanent protection order, RCW 26.50.060(2) requires an explicit finding that "respondent is likely to resume acts of domestic violence against the petitioner." The boilerplate "finding" at issue here is at best vague and inadequate; accordingly, I dissent.

FACTS AND PROCEDURAL HISTORY

Though the majority's limited recitation of the facts is accurate, several key details have been omitted. Robert May and Desiree L. Douglass dissolved their marriage in 1995 in a "high-conflict" divorce proceeding. Douglass requested an order of protection against May in September 1996 in King County Superior Court; this request was denied by Judge Johnson because of *insufficient factual basis*. Again on October 3, 1996, Douglass appeared before the King County Superior Court; Commissioner Shlesser issued a default domestic violence protection order against May pursuant to chapter 26.50 RCW.[1] May was

[1] I note the growing trend to use protection orders as tactical weapons in divorce cases.

* Justice Richard Sanders is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

not present at this default hearing. An amended order was issued on December 30, 1996; May was present at this hearing.

The order prohibited May from physically harming Douglass or their son, from coming near or contacting Douglass "except by telephone regarding child for emergency purposes only,"[2] from entering Douglass' residence or workplace, and from interfering with Douglass' "physical or legal custody" of their son.

"Restraining orders . . . are granted to virtually all who apply . . . . In many [divorce] cases, allegations of abuse are now used for tactical advantage." Elaine Epstein, *Speaking the Unspeakable*, Mass. Bar Ass'n Newsl., June-July 1993, at 1. "Many divorce lawyers routinely recommend pursuit of civil protection orders for clients in divorce proceedings, either because they assume abused women are not candid about being abused or as a tactical leverage device." Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2, 62 n.257 (2006) (citing Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C. L. Rev. 441, 448 (1997) (describing protection orders as "an affirmative element of divorce strategy")); *see also* Lynette Berg Robe & Melvyn Jay Ross, *Extending the Impact of Domestic Violence Protective Orders*, Fam. L. News, Vol. 27 No. 4, at 26-27 (2005) ("[P]rotective orders are increasingly being used in family law cases to help one side jockey for an advantage . . . . While clearly these protective orders are necessary in egregious cases of abuse, it is troubling that they appear to be sought more and more frequently for retaliation and litigation purposes rather than from the true need to be protected from a genuine abusive batterer.") *available at* http://www.cafcusa.org/docs/family-law-news_TRO_RO_Pages%2026thru30_Vol27-Number4_2005-1.pdf (last visited June 21, 2011); Scott A. Lerner, *Sword or Shield? Combating Orders-of-Protection Abuse in Divorce*, Ill. State Bar J., Nov. 2007 ("[N]ot all parties to divorce are above using [protection orders] not for their intended purpose but solely to gain advantage in a dissolution."), *available at* www.cpr-mn.org/.../OFP%20Sword%20or%20Shield%20Illinois%20Bar.doc (last visited June 21, 2011).

[2] The orders can prohibit any communication, directly or indirectly, and require that any limited communication go through the victim's attorney. *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End The Abuse Without Ending the Relationship?*, 29 Cardoza L. Rev. 1487, 1504, 1507 (2008). The implications of a total ban on communication mean a domestic violence defendant cannot even contact the "victim" to arrange child visitation.

Clerk's Papers (CP) at 132. The order also stated that any violation of the order was a "criminal offense under chapter 26.50 RCW and 10.31.100," subjecting the "violator to arrest." *Id*. at 133. Finally, it stated the order for protection was "[p]ermanent" and contained boilerplate language stating, "If the duration of this order exceeds one year," it was the court's finding "that an order of less than one year will be insufficient to prevent further acts of domestic violence." *Id*.

Nine years later, on March 11, 2005, May left a message on Douglass' voicemail inquiring about contact with their son. Thirteen days after that, May sent an e-mail to Douglass seeking visitation. As a result May was charged in Seattle Municipal Court with two counts of violating the protection order. May challenged the admissibility of the predicate protection order, arguing the permanent order was facially invalid because it did not contain a finding May was likely to resume acts of domestic violence after a one year period, as required by RCW 26.50.060(2) for a permanent order.[3]

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[3] RCW 26.50.060(2) states:

> If a restraining order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year. This limitation is not applicable to orders for protection issued under chapter 26.09, 26.10, or 26.26 RCW. With regard to other relief, if the petitioner has petitioned for relief on his or her own behalf or on behalf of the petitioner's family or household members or minor children, *and the court finds that the respondent is likely to resume acts of domestic violence* against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.
>
> If the petitioner has petitioned for relief on behalf of the respondent's minor children, the court shall advise the petitioner that if the petitioner wants to continue protection for a period beyond one year the petitioner may either petition for renewal pursuant to the provisions of this chapter or may

The municipal court rejected May's argument, concluding the issuing court could have found likelihood of future domestic violence absent the order, based on the *allegations and various petitions* by *Douglass*. Over objection, the protection order was admitted into evidence; May was found guilty on stipulated facts.

On appeal, the King County Superior Court reversed, reasoning the order was facially defective because it lacked the factual finding required by statute. Division One of the Court of Appeals accepted discretionary review and reversed. *City of Seattle v. May*, 151 Wn. App. 694, 695, 699, 213 P.3d 945 (2009). Misfortune seemed his lot, but May again sought review of this decision, arguing the trial court erred by admitting an inapplicable order. We granted review. 168 Wn.2d 1006, 226 P.3d 781 (2010).

ANALYSIS

May argues the trial court should not have admitted the permanent domestic violence protection order into evidence because it did not comply with the underlying statute, namely it lacked the required statutory finding necessary to extend it beyond one year. Whether a protection order satisfies statutory requirements is a question of law. We review questions of law de novo. *Labriola*

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seek relief pursuant to the provisions of chapter 26.09 or 26.26 RCW.

(Emphasis added.)

v. Pollard Grp., Inc., 152 Wn.2d 828, 100 P.3d 791 (2004).

Challenge to the Facial Validity of an Order Is Not a Collateral Attack

The collateral bar rule generally states judicial orders may not be collaterally attacked in a subsequent proceeding to enforce that order. *State v. Noah*, 103 Wn. App. 29, 46, 9 P.3d 858 (2000); *State v. Miller*, 156 Wn.2d 23, 31 n.4, 123 P.3d 827 (2005). A collateral attack challenges "the sufficiency of the evidence supporting the protection order." *State v. Joy*, 128 Wn. App. 160, 161, 114 P.3d 1228 (2005). Essentially, the "collateral bar rule" precludes a challenge to the underlying factual basis of an order that a respondent is charged with violating. It does not bar a challenge to the facial validity of an order: a "defendant may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void." *State v. Morris*, 120 Wash. 146, 158, 207 P. 18 (1922); *Joy*, 128 Wn. App. at 164 (recognizing a right to challenge the facial validity of a protection order). "A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved." *Bresolin v. Morris,* 86 Wn.2d 241, 245, 543 P.2d 325 (1975).

Domestic violence protection orders are creatures of statute. The courts have no inherent authority to issue such orders; they have no power to issue

protection orders that do not *strictly* comply with the governing statute. Here, May raises a question of statutory authority to issue a permanent domestic violence protection order lacking a statutorily required finding. As correctly recognized by the Court of Appeals, May's challenge to the applicability of the order is not a collateral attack. *May*, 151 Wn. App. at 698 n.9. May has a right to challenge the facial validity of the permanent protection order in an enforcement action. *See Miller*, 156 Wn.2d at 31 (issues relating to whether the order complied with the underlying statute are part of the court's gate-keeping function). However a challenge to the sufficiency of the evidence supporting the order may only be brought on direct appeal. *Id.* at 32; *Joy*, 128 Wn. App. at 164.

Threshold Finding of Validity Required by Miller

In *Miller* this court held the validity of a no-contact order was not an implied element of a violation of a no-contact order. *Miller*, 156 Wn.2d at 24. "[T]he 'validity' of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court's gate-keeping function." *Id*. "The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged." *Id*. at 31. Issues relating to "applicability" of the order to the crime charged include: whether the court granting the order was

authorized to do so; whether the order was adequate on its face; and *whether the order complied with the underlying statute*. *Id*. Inapplicable orders should not be admitted into evidence. *Id*. "If no order is admissible, the charge should be dismissed." *Id*.

RCW 26.50.060(1) authorizes a trial court to issue a protection order after notice and hearing. *Spence v. Kaminski*, 103 Wn. App. 325, 331, 12 P.3d 1030 (2000); *City of Seattle v. Edwards*, 87 Wn. App. 305, 310, 941 P.2d 697 (1997), *overruled on other grounds by Miller*, 156 Wn.2d 23. The court issuing the protection order is required to make *all* findings mandated by the underlying statute. CR 52(a)(2)(C); *Wold v. Wold*, 7 Wn. App. 872, 503 P.2d 118 (1972). A permanent protection order requires the issuing court to find "the respondent is likely to resume acts of domestic violence against the petitioner" after expiration of the order. RCW 26.50.060(2); *Spence*, 103 Wn. App. at 331. May asserts a valid permanent protection order must expressly include this finding on its face.

A permanent protection order "does not require any particular wording." *Edwards*, 87 Wn. App. at 310; *see* RCW 26.50.060. The governing statute, however, does require that a particular finding be made before the issuance of a permanent order, namely that "the respondent is likely to resume acts of domestic violence against the petitioner" when the order expires.[4] RCW 26.50.060(2). The City properly concedes, "The findings themselves must of

course be made . . . ." Br. of Appellant at 3-4. As a condition of applicability, it is the State's burden to prove the existence of a clear and explicit finding that satisfies the statutory prerequisites.

Here the only evidence of such finding was the "boilerplate" language on the face of the order. Consequently, the boilerplate language, the only indication of a finding, must satisfy the statutory mandate.

Permanent Order Lacked a Finding of Likelihood of Future Domestic Violence

> The order states,
>
> THE ORDER FOR PROTECTION IS PERMANENT ✓
> If the duration of this order exceeds one year, the court finds that an order of less than one year will be insufficient to prevent further acts of domestic violence.

CP at 133. This language merely states an order of *less than one year* is insufficient to prevent further acts of violence; it does not, however, address whether domestic violence is likely to resume after one year. This abbreviated "finding" does no more than state why the order is being issued in the first place, to prevent future acts of domestic violence for a period of one year. It does not establish the need for an order that exceeds one year. Moreover, this "finding" is conditional; it is not an affirmative statement the court has entered a finding.

[4] RCW 26.50.060(2) does not allow issuance of permanent protection orders restraining respondent from contacting his or her minor children. These orders shall not exceed one year. RCW 26.50.060(2).

Rather, the "finding" is effective only if the duration of the order exceeds one year; the court did not actually find upon expiration of the order acts of domestic violence were likely to resume. At best, this language glosses over the threshold requirement and treats it like a formality. At worst, this boilerplate language appears to be an anticipatory attempt to justify every order that exceeds one year.

The Court of Appeals, relying on *Spence*, held this "boilerplate" language, though not a positive statement that domestic violence would likely resume after one year, was sufficient to show the trial court had made the required finding. *May*, 151 Wn. App. at 695. That reliance is misplaced. *Spence* was a direct appeal challenging an order issued pursuant to chapter 26.50 RCW. Spence challenged the order on several constitutional grounds, but the primary question before the court was whether due process requires the court to find a recent act of domestic violence before issuing a protection order. *Spence*, 103 Wn. App. at 328. The section relied on by the Court of Appeals holds the language on the preprinted form in *Spence* – which is nearly identical to the boilerplate language used in this case – sufficiently stated findings to support the issuance of the order. But *Spence* is distinguishable because the order in that case contained additional handwritten findings that supported the issuance of a permanent

[5] The handwritten findings, which track the infliction of imminent harm language in the definition of domestic violence, state that "the long history of allegations back to . . . 1992 have been investigated by law enforcement[,] ICPS or others. All this court can determine is that Mr. Kaminski has threatened Ms. Spence in the past and she is afraid of him." *Spence*,

order.[5] *Id*. at 329. *Spence* does not control here because that trial court complied with the statutory mandate; the court made the requisite finding and the evidence in the record supported that finding.

But the order here is ambiguous and so does not satisfy statutory requirements: the boilerplate language is not an adequate finding that a permanent order was necessary to prevent May from engaging in future acts of domestic violence.

The jurisdiction of courts in cases involving domestic violence protection orders is derived from the statute, chapter 26.50 RCW. RCW 26.50.020(5); *Puget Sound Navigation Co. v. Dep't of Pub. Works*, 152 Wash. 417, 423-26, 278 P. 189 (1929). In *Pearce*, this court held an order void, as being in excess of a court's jurisdiction, when a trial court exceeds its statutory authority. *Pearce v. Pearce*, 37 Wn.2d 918, 922-23, 226 P.2d 895 (1951); *Davidson v. Ream*, 97 Misc. 89, 113-14, 161 N.Y.S. 73 (1916) ("'In its most general sense the term "jurisdiction," when applied to a court, is the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity . . . .'" (quoting 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 129, at 153-54 (4th ed. 1918))),

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103 Wn. App. at 329 (alterations in original); *see* RCW 26.50.010.

aff'd by Davidson v. Ream, 178 A.D. 362, 164 N.Y.S. 1037 (1917). Because a permanent protection order cannot issue without this required finding, the issuing court exceeded its statutory authority when it issued this permanent protection order.[6] "The failure to make such a finding is fatal to the validity of the order." *State v. Dep't of Pub. Works*, 164 Wash. 237, 242, 2 P.2d 686 (1931). Thus, the protection order issued against May was void, and it was error for the trial court to admit it. Absent a valid domestic violence protection order, leaving a voicemail and sending an e-mail are not criminal; consequently, no violation of law occurred.[7]

CONCLUSION

A clear and explicit statutory finding that "respondent is likely to resume acts of domestic violence against petitioner" is required for a valid permanent protection order. Only applicable protection orders supporting conviction of the crime charged are admissible. This order was inapplicable to the crime charged and it was therefore error for the trial court to admit it into evidence or base a

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[6] The majority's analysis completely disregards a court's limited authority when its authority is derived *solely* from statute. The majority would allow the judicial branch to usurp power explicitly limited by the legislature. Since the legislature only granted authority to issue *permanent* protection orders with a finding of likelihood of future violence, courts only have jurisdiction to enter permanent orders when such finding is present.

[7] I recognize domestic violence as a serious crime against society and in no way do I excuse or support violent behavior. However, the rule of law applies even to alleged domestic violence perpetrators. Only by following the law can we continue to "assure the victim[s] of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010.

criminal conviction on its violation. The Court of Appeals must be reversed and May's conviction vacated.

I dissent.

AUTHOR:
Richard B. Sanders, Justice Pro Tem.

WE CONCUR:

Justice James M. Johnson