IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,	)	
	)	
Respondent,	)	No. 83677-9
	)	
v.	)	En Banc
	)	
ROBERT J. MAY,	)	
	)	
Petitioner.	)	Filed June 23, 2011
	)	

OWENS, J. -- In 2005, Robert May violated a domestic violence protection order that prohibited him from contacting his ex-wife. As a result, May was convicted, under a city of Seattle ordinance, of violating the protection order. May contends that the order he is charged with violating is invalid and that he lacked notice that violating the no-contact provision of the order was a criminal offense. The superior court reversed the municipal court convictions, and the Court of Appeals reversed the superior court, reinstating the convictions. We affirm the Court of Appeals on different grounds, concluding that May's first challenge is precluded by the collateral bar rule and that his second challenge fails in light of *State v. Bunker*, 169 Wn.2d 571,

238 P.3d 487 (2010).

FACTS

On December 30, 1996, the King County Superior Court issued an amended order for protection to Desiree Douglass, May's ex-wife.[1] In that order, the court found that May had "committed domestic violence as defined in RCW 26.50.010." Clerk's Papers (CP) at 16. As a result, the order prohibited May from, among other things, "having any contact whatsoever, in person or through others, directly or indirectly with" Douglass. *Id*. The final paragraph of the order included the following statement:

> THIS 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.

Id. at 17. The check mark is handwritten. The order also plainly advised May that

> [v]iolation of the provisions of this order with actual notice of its terms is [a] criminal offense under chapter 26.50 RCW and RCW 10.31.100 and will subject a violator to arrest.
>
> . . . .
>
> . . . You have the sole responsibility to avoid or refrain from violation [of] the order's provisions. Only the court can change the order upon written application.

Id. May signed the order, indicating receipt of a copy.

In spite of the provisions of the domestic violence protection order clearly

[1] This order largely paralleled an order for protection issued by a commissioner of the King County Superior Court on October 3, 1996.

prohibiting "any contact whatsoever," *id*. at 16, May nonetheless contacted Douglass several times in 2005 regarding nonemergency matters.[2] As a result, May was charged in the Seattle Municipal Court with four counts of violating the domestic violence protection order. This prosecution was pursuant to former Seattle Municipal Code 12A.06.180(A) (2000). May was ultimately convicted of two counts of violating a domestic violence protection order, and the court imposed a deferred two-year sentence. The superior court subsequently reversed the municipal court, finding that "[t]he protection order was facially invalid because the language in the last paragraph of the order . . . is not the finding required by RCW 26.50.060(2)." CP at 98. The Court of Appeals, in turn, reversed the superior court and reinstated May's conviction. *City of Seattle v. May*, 151 Wn. App. 694, 699, 213 P.3d 945 (2009). May petitioned this court for review, which we granted. *City of Seattle v. May*, 168 Wn.2d 1006, 226 P.3d 781 (2010).

ISSUES

1. Does the collateral bar rule prohibit May from challenging the validity of the domestic violence protection order in a prosecution for violation of that order?

2. Does the prosecution of May violate due process because the order failed to give May fair warning of what conduct is prohibited?

[2] The record also suggests previous uncharged violations of the no-contact provision. CP at 61.

ANALYSIS

A. The Collateral Bar Rule Precludes May's Challenge to the Domestic Violence Protection Order[3]

The collateral bar rule prohibits a party from challenging the validity of a court order in a proceeding for violation of that order. *State v. Noah*, 103 Wn. App. 29, 46, 9 P.3d 858 (2000); *State v. Wright*, 273 Conn. 418, 426-28, 870 A.2d 1039 (2005). An exception exists for orders that are void.[4] An order is void only if there is "an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant." *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 278, 284, 534 P.2d 561 (1975). However, "[t]alismanic invocation of the phrase 'lack of jurisdiction'" is insufficient to collaterally attack the court order. *Id*. at 282. In *Mead School District*, the court acknowledged that "[t]echnically, the [issuing] court lacked jurisdiction." *Id*. at 281. The court went on, however, to find that the collateral bar rule precluded a challenge to that order. *Id*. at 284. For an order to be void, the court must lack the power to issue the *type* of order. *Id*. Provided that such power exists,

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[3] As a preliminary matter, we deny May's motion to strike that portion of the city's brief concerning the collateral bar rule. One issue raised in May's petition for review was whether "the municipal court [erred] by failing to suppress the order as inapplicable to the prosecution." Pet. for Review at 1. The city's argument directly responds to this issue. Moreover, May was granted leave to file a second supplemental brief addressing the city's argument.

[4] In the context of orders amounting to prior restraints on speech, we have also recognized an exception for orders that are "patently invalid." *State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 74, 483 P.2d 608 (1971); *State v. Coe*, 101 Wn.2d 364, 372, 679 P.2d 353 (1984).

any error in issuing an order may not be collaterally attacked. In sum, May can challenge the validity of the underlying domestic violence protection order only insofar as he can show that the order is absolutely void; the collateral bar rule precludes him from arguing that the order is merely erroneous.

May's order is not void. The superior court possessed jurisdiction "to issue the type of order," *id*., that is, to issue a permanent domestic violence protection order. RCW 26.50.020(5) creates such jurisdiction. Any defects within the order simply go to whether the order was "merely erroneous, however flagrant" and cannot be collaterally attacked. *State ex rel. Ewing v. Morris*, 120 Wash. 146, 158, 207 P. 18 (1922); *see Noah*, 103 Wn. App. at 47 ("A court does not lose jurisdiction by interpreting the law erroneously."). May contends that his order is invalid because the issuing court allegedly failed to find that May was likely to resume acts of domestic violence. This assertion of factual inadequacy does not go to the court's jurisdiction to issue a permanent domestic violence protection order, and, accordingly, the collateral bar rule precludes May's challenge.

State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005), is entirely consistent with the collateral bar rule. In *Miller*, the defendant in a prosecution for violation of a domestic violence no-contact order, Clay Jason Miller, contended that the validity of the underlying no-contact order was an element of the crime that the State had to

prove beyond a reasonable doubt to the jury. *Id*. at 25. We held that the validity of the order, as opposed to its existence, was neither a statutory nor an implied element of the crime. *Id*. at 31. Instead, we held that "[t]he 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*. We then expressly noted that "[w]e do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge." *Id*. at 31 n.4.

Our discussion of the applicability of orders in *Miller* was an effort to harmonize that case with the results in *City of Seattle v. Edwards*, 87 Wn. App. 305, 941 P.2d 697 (1997), and *State v. Marking*, 100 Wn. App. 506, 997 P.2d 461 (2000), both of which were overruled in part by *Miller*. *Miller*, 156 Wn.2d at 30-31. In *Edwards*, the language in a no-contact order regarding its date of expiration was ambiguous, and the Court of Appeals construed it to mean that the order expired one year after its issuance unless the trial court extended the order. 87 Wn. App. at 309. Because Edwards's charged violation occurred more than one year after issuance of the no-contact order and no further order extending the order's duration had been issued, *id*. at 307, 309, *Miller* holds that the trial court should have excluded the order as inapplicable to the charged violation. Similarly, in *Marking*, the Court of Appeals

confronted a situation in which a no-contact order lacked statutorily required notice that the no-contact provisions applied even if the contact occurred at the request of the protected party. 100 Wn. App. at 508 (citing former RCW 10.99.040(4)(d) (1997), *recodified as* RCW 10.99.040(4)(b)). The defendant was charged with violation of the no-contact order following an agreed meeting between the defendant and the protected party that led to an altercation. *Id*. at 507. At least arguably, the order failed to give the defendant notice that contact with consent of the protected party violated the order. This was an issue that should have been considered by the trial court prior to admitting the order; if the order failed to give the defendant notice that the charged conduct was prohibited, the order should have been excluded as inapplicable.

Today, we clarify that, in a proceeding for violation of a court order, the trial court's gate-keeping role includes excluding orders that are void, orders that are inapplicable to the crime charged (i.e., the order either does not apply to the defendant or does not apply to the charged conduct), and orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct). Though some language in *Miller* may be capable of being read more broadly when viewed in isolation, *Miller* specifically stated that no-contact orders issued pursuant to chapter 10.99 RCW may not be "collaterally attacked after the alleged violations of the orders." 156 Wn.2d at 31 n.4. We see no

reason this should apply differently to orders issued pursuant to chapter 26.50 RCW. The collateral bar rule precludes challenges to the validity—but not the applicability—of a court order in a proceeding for violation of such an order except for challenges to the issuing court's jurisdiction to issue the type of order in question. Void orders and inapplicable orders are inadmissible in such proceedings.[5]

In the present case, the court issuing the permanent domestic violence protection order against May had jurisdiction to issue such orders, and its subject matter and personal jurisdiction are unchallenged. As such, the order was not void. The collateral bar rule therefore prohibits May's challenge to the validity of the underlying protection order.[6] If May believes the domestic violence protection order against him is invalid, RCW 26.50.130(1) permits him to seek modification of that order by the issuing court.

B. May's Prosecution Does Not Violate Due Process

May next contends that the protection order failed to give him fair notice of what conduct the order criminalized and, as such, was unconstitutionally vague. *Cf. State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007) ("The due process clause of the

[5] Though an inapplicable order is not admissible in a given proceeding, it remains enforceable outside that proceeding until modified or terminated by the issuing court.
[6] Even if we were to reach the merits of May's claim, it appears clear to us that the order includes on its face a finding by the issuing court that May was likely to resume acts of domestic violence; this is implicit in the court's finding that "an order of less than one year will be insufficient to prevent further acts of domestic violence." CP at 133.

Fourteenth Amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe."). The essence of May's argument is that he lacked notice that violation of the no-contact provisions of the protection order could result in criminal, rather than contempt, penalties. This is so, May argues, because the notification of criminal penalties in the order of protection cites only chapter 26.50 RCW, which does not criminalize violation of no-contact provisions of domestic violence protection orders, only the Seattle Municipal Code does so, and the protection order issued against May does not notify him that he is subject to criminal penalties of the Seattle Municipal Code. We may assume without deciding that even where the conduct prohibited by a protection order is clear, failure to indicate that a violation will result in criminal penalties—as opposed to contempt penalties—gives rise to a vagueness challenge. Even so, May's argument lacks merit.

The protection order against May states, "Violation of the provisions of this order with actual notice of its terms is [a] criminal offense under chapter 26.50 RCW and RCW 10.31.100 and will subject a violator to arrest." CP at 133. May's argument is premised on the proposition that chapter 26.50 RCW does not criminalize violation of a no-contact provision of an order of protection. This premise is incorrect in light of *Bunker*. In *Bunker*, this court held that former RCW 26.50.110 (2000), which was in effect at the time May violated the order of protection, criminalized *all* violations of

no-contact and protection orders.[7] 169 Wn.2d at 574, 577 n.2. The Seattle ordinance under which May was convicted, Seattle Municipal Code 12A.06.180 (2000), is no broader, but is instead simply the type of "equivalent municipal ordinance" expressly contemplated by chapter 26.50 RCW. RCW 26.50.020(5). Thus, because May had notice that violation of the order of protection was a crime under chapter 26.50 RCW, May had "fair warning of the type of conduct" that was criminal. *State v. Wilson*, 117 Wn. App. 1, 11, 75 P.3d 573 (2003). Consequently his prosecution did not violate due process.

CONCLUSION

May made a choice to violate the plain and unambiguous terms of the domestic violence protection order that prohibited him from contacting his ex-wife. May might earnestly believe that the order is invalid, but his remedy is to seek modification of the order by the court that issued it; he is not free to violate the order with impunity. The collateral bar rule precludes May's challenge to the validity of the domestic violence protection order. In addition, because May had fair notice that violation of the no-contact provision of the domestic violence protection order would result in criminal penalties, his prosecution for such conduct does not violate due process. We affirm the Court of Appeals.

[7] Technically, the *Bunker* court interpreted former RCW 26.50.110(1) (2006). The two are substantively identical; the 2006 amendment simply added sexual assault protection orders to the list of orders covered by the statute. Laws of 2006, ch. 138, § 25.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice Tom Chambers