

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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December 22, 2005

Opinion No. 05-183

Effect of Public Chapter No. 394, Public Acts of 2005, on *ex parte* Orders of Protection and Domestic Abuse Bail Conditions

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**QUESTIONS**

1. Is an *ex parte* order of protection issued under Tenn. Code Ann. § 36-3-605 a type of protective order whose violation is a Class A misdemeanor under Public Chapter No. 394?
2. Has Public Chapter No. 394 repealed by implication any portion of Title 36, Chapter 3 of the Tennessee Code, including specifically Tenn. Code Ann. § 36-3-610?
3. In light of Public Chapter No. 394, does a trial court still retain authority under Tenn. Code Ann. § 40-11-150(i) to hold a defendant in contempt of court and to revoke bail for violating a bail condition in a domestic abuse case?

**OPINIONS**

1. No. A respondent's violation of an *ex parte* order of protection issued under Tenn. Code Ann. § 36-3-605 cannot constitute a violation of the Class A misdemeanor criminal offense established in Public Chapter No. 394 for violating an order of protection. The new act does not apply if the respondent has not had an opportunity to appear and be heard in connection to the underlying order of protection, nor does it apply if the trial court has not made specific findings of fact in the protective order that the respondent committed domestic abuse as alleged in the petition. Neither condition exists in an *ex parte* order of protection.
2. No. The only portion of Title 36, Chapter 3 modified by Public Chapter 394 is Tenn. Code Ann. § 36-3-612, which the new act replaces. By enacting Public Chapter No. 394, the General Assembly did not repeal by implication Tenn. Code Ann. § 36-3-610, authorizing a trial court to hold a respondent to an order of protection in civil or criminal contempt, or any other statute in Title 36, Chapter 3.
3. Yes. Under Tenn. Code Ann. § 40-11-150(i), if a defendant violates a bail condition imposed under Tenn. Code Ann. § 40-11-150(b), the trial court must punish such violation as contempt of court and may revoke bond. This is above and beyond any further action authorized by Public Chapter No. 394.

## ANALYSIS

1. Prior to the enactment of Public Chapter No. 394, Public Acts of 2005, Tenn. Code Ann. 36-3-612 stated that any respondent arrested for violating an order of protection must be taken before a magistrate or court with jurisdiction to answer a charge of contempt, and the magistrate or court must (1) set a hearing on the violation within ten days of the arrest, (2) set a reasonable bond on the violation and (3) notify the petitioner to show cause why the respondent should be held in contempt for the violation. Public Chapter No. 394 rewrote Tenn. Code Ann. § 36-3-612 by creating a Class A misdemeanor offense for knowingly violating an order of protection, provided the following conditions exist:

- a. The person must have received notice of the request for an order of protection or restraining order.
- b. The person must have had an opportunity to appear and be heard in connection with the order of protection or restraining order; and
- c. The court must have made specific findings of fact in the order of protection or restraining order that the person had committed domestic abuse as defined in this part.<sup>1</sup>

Under Tenn. Code Ann. § 36-3-605, a trial court presented with a petition for an order of protection may issue an *ex parte* order of protection for good cause shown, including an immediate and present danger of domestic abuse. The *ex parte* order remains binding on the respondent only until the hearing on the petition, which must occur within 15 days of service of the *ex parte* order on the respondent.

A violation of an *ex parte* order of protection cannot constitute a violation of Public Chapter No. 394. A respondent under an *ex parte* order of protection has received notice of the request for an order of protection. However, the respondent has not yet had an opportunity to appear and be heard on the petition, nor has the court made findings of fact that the respondent committed the alleged domestic abuse. Consequently, Public Chapter No. 394 is inapplicable to a respondent's violation of an *ex parte* order of protection.

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<sup>1</sup>The new act also clarified that the conduct constituting the offense of violating a protective order is subject to arrest under Tenn. Code Ann. § 36-3-619; that a person arrested for violating a protective order shall be considered within the provisions of Tenn. Code Ann. § 40-11-150(a) and subject to a 12-hour hold under Tenn. Code Ann. § 40-11-150(h); that, when considering bond for the violation offense, the court must notify the petitioner of the violation; that an arrest or the issuance of a warrant or capias for violating the order of protection does not affect the validity or enforceability of the underlying order; and that the sentence for the violation offense must be consecutive to any sentence on the violating conduct, unless the sentencing court makes the sentences concurrent.

2. By enacting Public Chapter No. 394, the General Assembly rewrote Tenn. Code Ann. § 36-3-612. In so doing, it did not expressly modify Tenn. Code Ann. § 36-3-610, which authorizes a trial court to hold a respondent in contempt of court for violating an order of protection, nor any other portion of Title 36, Chapter 3. Nor did the General Assembly repeal any portion of Title 36, Chapter 3 by implication. The Tennessee Supreme Court recently reiterated that a repeal of a prior statute by implication, in light of a subsequent statute's enactment, "will only be found when the statutes cannot be construed together harmoniously." *State v. Davis*, \_\_\_ S.W.3d \_\_\_, No. E2003-00765-SC-R11-CD, 2005 WL 2396294, slip op. at \*3 (Tenn. Sept. 29, 2005) (copy attached). When resolving statutory conflicts, courts must strive to give effect to the legislative intent and adopt a reasonable construction of the prior and subsequent statutes that avoids conflict and allows for a harmonious operation of the laws. *Id.*

Public Chapter No. 394, by its express terms, purports only to modify Tenn. Code Ann. § 36-6-612. When enacting this new act, the General Assembly elected to leave unchanged a trial court's authority, under Tenn. Code Ann. § 36-6-610, to hold the respondent to an order of protection in civil or criminal contempt for violating the order. "[T]he legislature is presumed to know its prior acts, so repeals by implication will only be found when the statutes cannot be construed together harmoniously." *Id.* In light of the new act, a respondent commits a Class A misdemeanor when he or she violates an order of protection, provided the three above-stated conditions apply, but the court issuing the order still retains authority to punish the violation as contempt of court under Tenn. Code Ann. § 36-3-610. Likewise, the court retains its inherent contempt powers under Tenn. Code Ann. §§ 16-1-103 and 29-9-102 to punish a violation of a valid court order.

3. Under Tenn. Code Ann. § 40-11-150(a), certain criminal defendants, including those in violation of an order of protection issued under Tenn. Code Ann. §§ 36-3-601, *et seq.*, may only be released on bail after the trial court has considered the following circumstances:

- a. A threat to the alleged victim;
- b. A threat to public safety; and
- c. Reasonably likely to appear in court.

Under Tenn. Code Ann. § 40-11-150(b), the court must impose on the defendant one of the following bail conditions:

- a. An order enjoining the defendant from threatening to commit or committing specified offenses against the alleged victim;
- b. An order prohibiting the defendant from harassing, annoying, telephoning, contacting or otherwise communicating with the alleged victim, either directly or indirectly;

- c. An order directing the defendant to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be;
- d. An order prohibiting the defendant from using or possessing a firearm or other weapon specified by the magistrate;
- e. An order prohibiting the defendant from possession or consumption of alcohol or controlled substances; and
- f. Any other order required to protect the safety of the alleged victim and to ensure the appearance of the defendant in court.

This Office has previously opined, in light of *Wallace v. State*, 245 S.W.2d 192, 193 (Tenn. 1952), that these conditions do not violate the right to bail guaranteed by Article I, Section 15, of the Tennessee Constitution. *See Op. Tenn. Att’y Gen. 95-057*. If a defendant subsequently violates a bail condition imposed under Tenn. Code Ann. § 40-11-150(b), then under Tenn. Code Ann. § 40-11-150(i), the defendant is subject to immediate arrest, and the defendant’s violation shall be punished as contempt of the court. In addition, the court may revoke the defendant’s bail.

Public Chapter No. 394 in no way modifies the authority of a trial court to punish the violation of a bail condition under the clear and unambiguous language of Tenn. Code Ann. § 40-11-150(i). Just as the new act does not repeal by implication a court’s authority under Tenn. Code Ann. § 36-3-610 to hold a respondent in contempt of court for violating an order of protection, the act does not repeal by implication a court’s authority to hold and defendant in contempt of court and to revoke bail under Tenn. Code Ann. § 40-11-150(i).

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