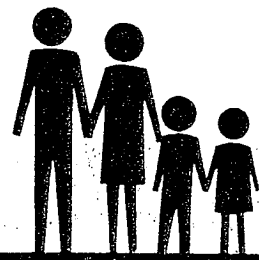


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VIRGINIA DOMESTIC RELATIONS LAW, CRIMINAL LAW AND FIREARMS

By Craig W. Sampson, Chesterfield

Family law practitioners in the Commonwealth of Virginia are generally aware that a person against whom a protective order has been entered cannot lawfully possess a firearm. They are aware also that a misdemeanor conviction for domestic assault and battery impacts one's ability to own or possess a firearm. However, the basis for these prohibitions and the details may not be so widely known. Nor are the criminal statutes and penalties, federal and state, very well known. What effect do protective orders and domestic assault and battery convictions have on the ability to carry a concealed weapon; own a gun; transport a gun, or have a gun in one's home?

This article will explore the nature and extent of the firearm prohibitions that apply when a protective order is entered and/or when a person is convicted of domestic assault and battery. This article will examine the punishments that apply under state and federal law when a prohibition is violated, as well as the impact of protective orders and assault and battery charges upon the right to carry a concealed firearm.

Protective Orders

While the exact wording of a protective order may vary depending upon the preprinted form a particular court uses, protective orders in Virginia generally contain language to the following effect:

Pursuant to § 18.2-308.1:4, you shall not purchase or transport any firearm while this order is in effect. If you have a concealed handgun permit, you must immediately surrender that permit to the court issuing this order. While this protective order is in effect, you may be subject to a federal penalty under the 1994 amendment to the Gun Control Act, 18

U.S.C. § 922(g)(8), for possessing, transporting or receiving a firearm.

In order to properly advise your client, it is critical to understand how both the state and federal laws apply in situations involving protective orders and firearms.

During the time a protective order is in effect, the person against whom the order has been entered is subject to the criminal sanctions found in § 18.2-308.1:4. That Code section states that:

It shall be unlawful for any person who is subject to (i) a protective order entered pursuant to §§ 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-279.1, 19.2-152.8, 19.2-152.9, or § 19.2-152.10; (ii) an order issued pursuant to subsection B of § 20-103; (iii) an order entered pursuant to subsection D of § 18.2-60.3; or (iv) an order issued by a tribunal of another state, the United States or any of its territories, possessions or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to those cited in clauses (i), (ii), or (iii) to purchase or transport any firearm while the order is in effect. Any person with a concealed handgun permit shall be prohibited from carrying any concealed firearm, and shall surrender his permit to the court entering the order, for the duration of any protective order referred to herein. **A violation of this section is a Class 1 misdemeanor.** (Emphasis added).

This prohibition applies even where a Virginia resident is subject to a protective order entered by another state or other designated governmental entity. A violation of the firearm prohibition, a Class 1 misdemeanor, carries a maximum sentence of twelve months in jail.

Note that the word "possess" is conspicuously absent from the language of Virginia Code § 18.2-308.1:4. It appears that a person could constructively possess a firearm in his own home without violating the terms of a protective order, so long as he does not purchase or transport a firearm. Of course, it is seemingly impossible to use or handle a firearm in any capacity without transporting it. Simply picking up the weapon could, and probably does, constitute transportation. Nevertheless, a person against whom an emergency or preliminary protective order has been entered arguably is not required to remove all guns from his home, at least as far as Virginia law is concerned.

Although the Virginia Code does not address the consequences of possessing a firearm while subject to a protective order, federal law does speak in terms of possession. 18 United States Code § 922(g)(8) says the following:

(g) It shall be unlawful for any person—

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; to ship or transport in interstate or foreign commerce, or **possess** in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. (Emphasis added).

The broad language found in § 922(g) applies to any person subject to a protective order where the person had actual notice of the hearing and opportunity to participate. If the protective order is entered ex parte, perhaps under Virginia Code § 16.1-253, § 16.1-253.1, or § 16.1-253.4, then the person might have a defense against a charge of violating 18 U.S.C. § 922(g)(8).

Note that federal criminal section 18 U.S.C. § 922(g)(8) applies not only to firearms, but to ammunition as well. A person could find himself running afoul of federal law for storing bullets or shotgun shells at home, even if he has no gun from which to fire them.

The federal law prohibiting possession of a firearm while subject to a protective order has significant teeth. The penalty provisions for violation of 18 U.S.C. § 922(g)(8) are found in 18 U.S.C. 924(a)(2). Unlike state law, which makes it a misdemeanor to purchase or transport a firearm while subject to a protective order, a violation of 18 U.S.C. § 922(g) is a felony that carries a maximum sentence of ten years in federal prison. A § 922(g) conviction also revokes your client's right to possess a firearm due to being a convicted felon. See Virginia Code § 18.2-308.2 and 18 U.S.C. § 922(g)(1).

Moreover, the federal sentencing guidelines in such cases can be harsh. Federal sentencing is driven by the United States Sentencing Guidelines. While the federal sentencing guidelines are now officially advisory only, they still carry significant weight and have an

impact upon every aspect of a federal criminal case, from plea negotiations through sentencing.



The federal sentencing guidelines establish a recommended sentencing range based on two factors. The first factor is the "offense level," which is a point system used to quantify the severity of the defendant's offense conduct. The second factor, "criminal history," quantifies the severity of the defendant's prior criminal record. After these two figures are computed, and certain other adjustments are made pursuant to the sentencing guidelines, the two figures are cross-referenced on a sentencing table which lists the sentencing guideline ranges.

The sentencing range that sits at the intersection of the defendant's offense level and criminal history category will, in most instances, contain a defendant's final sentence. Despite the fact that the United States Sentencing Guidelines are now advisory, the practical reality is that more often than not, federal judges in Virginia sentence within the guidelines range. According to statistics compiled by the United States Sentencing Commission for fiscal year 2006, 91.7% of Virginia defendants in firearms cases received prison time. Of the federal firearms convictions documented in Virginia for 2006, 76.1% were sentenced within the guidelines range, while 1.3% were sentenced above the guideline range.¹ Although these statistics address all federal firearms convictions in the Eastern District of Virginia and not just § 922(g)(8) convictions, the lesson is clear: a Virginia defendant can expect to receive prison time, most likely within the recommended guideline range.

The range of suggested punishment for a violation of 18 U.S.C. § 922(g)(8) is calculated using § 2K2.1 of the United States Sentencing Guidelines. A simple example demonstrates the harsh nature of the sentencing guidelines: Assume the client is subject to a protective order and violates the provisions of 18 U.S.C. § 922(g). Assume also that the client is found in possession of a single firearm (or ammunition) that is not used primarily for hunting purposes, and that the client has no prior criminal record.

Based on these assumptions, the client's offense level under the United States Sentencing Guidelines would be 14, and his criminal history category would be I. Assuming there are no other guidelines factors which would increase the offense level or criminal history category (an extremely dangerous assumption in reality), § 2K2.1 yields an advisory guideline range of 15 to 21 months in federal prison. (See U.S.S.G. § 2K2.1).

¹ See United States Sentencing Commission Statistical Information Packet, Fiscal Year 2006, State of Virginia. This publication can be found on the United States Sentencing Commission website.

If the client pleads guilty, he would receive a two point decrease in his offense level for accepting responsibility for his crime (see U.S.S.G. § 3E1.1), yielding an advisory guideline range of 10 to 16 months. Because the client would then fall within Zone C of the sentencing table, the judge could allow the client to serve half of his prison time on home detention. (See U.S.S.G. § 5C1.1). Nevertheless, five to eight months in a federal penitentiary, with another five to eight months of home incarceration, followed by federal probation can be quite distressing to a client with no prior criminal record.

Misdemeanor Convictions for Domestic Assault and Battery

Virginia law does not restrict firearm possession by persons convicted of domestic assault and battery. Immediately following a person's arrest for domestic assault and battery, an emergency protective order is automatically entered for seventy-two hours, which will restrict a person's right to purchase or transport a firearm during that time period. The firearm prohibition at this point flows from the protective order that comes with the arrest, however, and not from a status of being a person convicted of domestic assault and battery. See Virginia Code § 18.2-57.2(C) and § 16.1-253.4.

While state law does not restrict firearm possession by those with domestic assault and battery convictions, federal law is a different story. 18 United States Code § 922(g)(9) states that it is unlawful for any person "(1) who has been convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Convictions under § 922(g)(9) are felonies that carry the same ten year maximum as § 922(g)(8) offenses and are also addressed by § 2K2.1 of the United States Sentencing Guidelines. The sentencing range is calculated in a manner that is substantially similar to the calculation done for persons convicted of possessing a firearm while subject to a protective order under § 922(g)(8).

In addition to jail time and probation, there are possible collateral consequences to being tagged with a protective order or domestic assault and battery conviction. For example, if an active duty member of the United States Armed Forces is found guilty of a domestic assault and battery pursuant to Virginia Code § 18.2-57.2 or § 18.2-57.3, the court is required to report the conviction to family advocacy representatives of the United States Armed Forces. (See Virginia Code § 18.2-57.4).

For domestic assault and battery cases, the following question arises: What is the impact of having a domestic assault and battery case taken under advisement and ultimately dismissed pursuant to Virginia Code § 18.2-57.3? That Code section allows a court, upon finding that the facts are sufficient to find a violation of § 18.2-57.2, to defer entering a final conviction and take the matter under advisement for a period of two years. If the defendant successfully completes all probation, education and treatment programs required of him, then the domestic assault and battery charge will be dismissed.

The dismissal of the charge pursuant to Virginia Code § 18.2-57.3 appears to put the defendant in the clear under state and federal law. The defendant would not be prevented from possessing a firearm under Virginia law, as state law does not prevent possession even for those persons with domestic assault and battery convictions. It does not appear that the defendant would be subject to the criminal penalties found in 18 U.S.C. § 922(g)(9) which prohibits firearm possession by a person "convicted in any court of a misdemeanor crime of domestic violence." However, no controlling case law on the impact of dismissal of the charge pursuant to § 18.2-57.3 could be found in the Fourth Circuit, so perhaps some risk of federal prosecution remains.

Concealed Weapons Permits in the Commonwealth of Virginia

The Virginia Application for a Concealed Handgun Permit asks a number of questions regarding one's eligibility to carry a concealed weapon. Those questions include whether or not the applicant has been convicted of any felony or misdemeanor, whether he is subject to a restraining order or protective order, and whether he has any criminal charges pending. An affirmative answer to any of these questions will likely trigger enhanced scrutiny of the application.

As has already been demonstrated, Virginia Code § 18.2-308.1:4 requires that any person subject to a protective order surrender his concealed weapon permit for the duration of the order. (See § 18.2-308.1:4 ("Any person with a concealed handgun permit shall be prohibited from carrying any concealed firearm, and shall surrender his permit to the court entering the order, for the duration of any protective order referred to herein.")). A person subject to a protective order who does not yet have a concealed weapon permit is specifically disqualified from obtaining one. (See Virginia Code § 18.2-308(E)(5)).

Although Virginia Code § 18.2-57.3 allows a person guilty of domestic assault and battery to ultimately keep his criminal record clean, the right to possess a concealed weapon is still impacted. Virginia Code § 18.2-57.3 specifically states that "whenever a court places an individual on probation upon terms and conditions pursuant to this section, such action shall be deemed as a conviction for purposes of Virginia Code § 18.2-308."

There are two potential avenues under § 18.2-308 whereby a person who underwent the § 18.2-57.3 diversionary process might lose his right to possess a concealed weapon. Virginia Code § 18.2-308(E) identifies those persons who are ineligible for a concealed weapon permit. § 18.2-308(E)(7) disqualifies "an individual who has been convicted of two or more misdemeanors within the five-year period immediately preceding the application, if one of the misdemeanors was a Class 1 misdemeanor. . . ." Virginia Code § 18.2-308(E)(14) disqualifies "[a]n individual who has been convicted of any assault, assault and battery, sexual battery, . . ." etc.

The question is whether a diversionary sentence pursuant to § 18.2-57.3 strips a person of the right to possess a concealed weapon only during the two-year probationary period, or whether the prohibition continues after the charge is dismissed following successful completion of the statutory requirements. While no controlling case law exists, a 2007

Attorney General opinion indicates that the concealed weapon prohibition applies only during the probationary period. According to Virginia Attorney General Opinion 2004 Va. AG 96, 04-066 (2004) a deferred finding of guilt relating to a first-offense assault and battery under §18.2-57.3 is a "conviction" for purposes of applying § 18.2-57.3 in subsequent proceedings and for purposes of §18.2-308 during a defendant's term of probation. The Attorney General opinion further explains that the "conviction" terminates once a person completes probation and the deferred findings against him are dismissed, except for purposes of applying § 18.2-57.3 in any future proceedings under the statute.

Conclusion

What is the bottom line if your client is either subject to a protective order or convicted of domestic assault and battery? Advise your client to avoid firearms and ammunition. Tell him to surrender his concealed weapon permit, if he has one, and to refrain from applying for a permit during the time he is subject to the protective order. Finally, if your client wishes to petition for the restoration of his right to possess a firearm, refer him to a lawyer qualified to advise him on this rather arduous and confusing process.

THE BROAD APPLICATION OF THE THERAPIST-PRIVILEGE STATUTE

Practice in a post-Schwartz World

By David A. Hirsch, Fairfax

This year, I returned to child custody and visitation litigation for the first time in twenty years. I quickly discovered how much the landscape had changed. With the assistance of skilled practitioners in my firm I got a quick new education on how to frame old issues in today's legal environment. This environment changed dramatically largely due to the enactment of Virginia Code Section 20-124.3:1. This article will review the case law development since this statute's enactment. After a review of the case law, it will discuss the applicability of the statute's abuse and neglect exception and offer suggestions for presentation of an abuse and neglect case so as to persuade trial courts to apply the statute's abuse and neglect exception.

Prior to 2002 the issue of the admissibility of mental health and therapy records in custody and visitation cases was governed by Virginia's privilege statutes. The General Assembly changed this practice with the passage of Virginia Code Section 20-124.3:1, which took effect July 1, 2003. The new statute dramatically limited the use of testimony and evidence from mental health providers in custody and visitation litigation.

