CITY COURT: CITY OF RYE
WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against- DECISION AND ORDER

ANN R. HAYNES,

Defendant.

Appearances:
Plaintiff by Janet DiFiore, District Attorney (Valerie Livingston, Ass't Dist. Atty.)
Defendant by Piscionere & Nemarow, P.C., Rye, NY by Anthony G. Piscionere, Esq.

This is a sad case. The defendant had her first husband taken from her in the terrorist attack on the World Trade Center on September 11, 2001. Defendant had her second husband taken from her by the alleged victim here, who began dating defendant's second husband while he was still married to the defendant. Now, by this case, the second husband and the alleged victim are conniving to take away the custody of defendant's children from her. The Court's olfactory sense is more than sufficient to detect the odor of the alleged victim and second husband's scheme and refuses to enable it.

At the trial, the alleged victim, Florence Mauro testified that she and defendant's second husband were counseled by a family law attorney to seek custody of the defendant's children. Thereafter, they began to video record encounters with defendant on defendant's second husband's cell phone, presumably in an attempt to marshal damaging evidence against the defendant so as to make a case for a change of custody of the children to them instead of defendant. This change of custody would also relieve the second husband from

his obligation for paying substantial child support. Ms. Mauro said the second husband made approximately 25 recordings of visitation drop offs and pick ups during a nine-month period. At some point, this recording of events morphed from recording events to what appears to be staging or instigating events.

In September of 2011, the alleged victim went with the defendant's second husband to defendant's home in the City of Rye to pick up the defendant's children for a visitation period. Apparently shortly before Ms. Mauro came to defendant's home, the defendant and her second husband had a heated discussion concerning his payment (or lack of payment) of child support. The video taken by the defendant's second husband showed the defendant emerging from her home and immediately questioning her second husband about the support payment. The defendant appeared upset. Her second husband deflected the issue and a lively discussion ensued. At some point, Ms. Mauro, who had been sitting in the second husband's car in defendant's driveway, got out of the car and interjected herself into this active discussion over support payments. The defendant told Ms. Mauro to mind her own business and called her a "piece of trash."[1] When Ms. Mauro continued, defendant walked up to her and spit in her face.[2] This action resulted in defendant being charged with Harassment in the Second Degree in violation of Penal Law § 240.26. Those charges were resolved by an Adjournment in Contemplation of Dismissal on November 22, 2011 and an extension of the Temporary Order of Protection ("T.O.P.") to May 15, 2012. That T.O.P. required the defendant to refrain from "assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats or any criminal offense or interference with" Ms. Mauro, although it did not direct the defendant to completely stay away from Ms. Mauro.

The Court recognizes the importance of protection of domestic violence complainants and witnesses. "Domestic Violence has come to be recognized as a social scourge of the first order. See First Report, New York State Governor's Commission on Domestic Violence, September 1986, pp. 3-4; Report

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[1] The Court considers this a mild sobriquet when referring to the person who had been dating one's spouse during the marriage. Restraint enjoins the Court from further describing what other appellations might apply.

[2] Compare this act with the fate of Cozbi, daughter of Zur - being impaled by a javelin thrust through her belly and her lover. Numbers 25, ch. 8.

of New York Task Force on Women in the Courts, Fordham Urban Law Journal, Vol. XV, No. 1, 1986-1987, p. 47. Not only does the State have a strong interest in combating domestic violence through criminal prosecutions, but that interest is severely undermined if victims of domestic violence are too frightened by further threats and acts of violence to participate in the criminal prosecution of their cases. . . . Moreover, the state has an interest in the issuance of the TOP at the earliest possible time, since the danger of intimidation and injury to the complainant, if it exists, is an immediate one. In a very real sense, the issuance of such a TOP as a condition of bail or recognizance at the time a defendant is arraigned is an emergency decision." *People v. Foeman*, 145 Misc2d 115, 546 NYS2d 755 [Crim Ct, New York County 1989].

The aim of a TOP, protecting the complaining witness or family member, is of predominant importance. As noted in *People v. Bongiovanni,* 183 Misc2d 104, 105-6, 701 NYS2d 613 [Sup Ct, Kings County 1999], "[u]ntil there is a determination of guilt or innocence the court is responsible not only to seek justice by safeguarding the rights of the defendant; it must also insure that the complainant is secure and that societal peace is preserved during the pendency of the action." The state's extraordinary interest in protecting victims of domestic violence from actual or threatened injury and children from the effects of exposure to domestic violence justifies the use of immediate measures to stop violence" (Breger, Elkins and Fosbinder, New York Law of Domestic Violence, at 509 [2nd ed.2007]). *Weiner v. State*, 27 Misc3d 1203(A), 910 NYS2d 409 (Table) Sup Ct, [Suffolk County 2010]. *See also*, *People v. Meggie*, 184 Misc2d 883, 712 NYS2d 316 [Dist Ct, Nassau County 2000]. *People v. Koertge*, 182 Misc2d 183, 701 NYS2d 588 [Dist Ct, Nassau County 1998] provides a good history of the history of legislation providing for temporary orders of protection.

Criminal Procedure Law ("CPL") § 530.12(1) empowers criminal courts to issue temporary orders of protection in conjunction with any securing order committing the defendant to the custody of the sheriff or as a condition of any order of recognizance or bail or an adjournment in contemplation of dismissal.

Unfortunately, in reality, Orders of Protection offer too little protection. To the extent the complainant or witness believes an Order of Protection offers any protection is more wishful thinking than reality. Protections of T.O.P.'s are reactive and remedial instead of prophylactic. An Order of Protection, a few pieces of paper, is particularly ineffective in stopping a bullet, a

knife thrust, or a punch.[3] Holding up an Order of Protection in front of an attacker would not render the attacker feeble as if it were a piece of Kryptonite[4] held before Superman. It does not physically prevent the subject from coming close to the complainant or witness. It does not stop the subject from committing one of the listed crimes[5]. It merely tacks on an additional charge and potential penalty if they do. It may enhance a lesser offense into a greater offense. Only to that extent does it potentially deter the subject. The perception of protection, however, remains powerful.

Courts freely grant Temporary Orders of Protection on request or *sua sponte* and mostly without evidentiary hearings. First, it maintains the illusion that the complainant or witness is actually being protected by the Court. Second, it insulates the Court from criticism that it did nothing to protect the victim in the unfortunate event the subject later injures or kills the complainant or witness. Finally and thankfully, in most cases, Orders of Protection are not needed to coerce the subject to refrain from violating the law or interacting with a person with whom they may have once had a relationship that has soured as most people obey the law most of the time without specific Court orders to behave properly.

It is already an offense under the Penal Law to do any of the acts listed in the T.O.P. that the subject must refrain from doing. Doing such a crime in violation of a T.O.P. simply adds a Criminal Contempt charge to the offense committed. The Court is unaware of, but would be interested in seeing any study of whether the potential additional charge of Criminal Contempt added because of the violation of the T.O.P. has any deterrent effect on the subject committing the offense that triggered the Criminal Contempt charge.[6]

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[3] A T.O.P. can no more guarantee future peace, than the Munich Accords afforded "peace in our time" and prevented World War II.. Neville Chamberlain, speech on return from Munich, September 30, 1938.

[4] Kryptonite is a fictional substance from the Superman comic book series. The material, usually shown as having been created from the remains of Superman's native planet of Krypton, generally has detrimental and debilitating effects on Superman.

[5] Curiously, the standard for T.O.P. does not specifically direct to subject to refrain from murdering the complainant or victim.

[6] Based on the number of Criminal Contempt charges this Court has seen compared to the number of T.O.P.s, this Court sees only a small deterrent effect.

Worse than the lack of real protection offered by a T.O.P. is the misuse of the T.O.P. as a sword against the subject of the T.O.P. Since some T.O.P.s are granted without hearings and almost for the asking, one party in a domestic relations case may seek a T.O.P. against the other party simply to hold the threat of prosecution over their head as a chip in the bargaining over the terms of a domestic relations settlement. Thereafter, any slight, real or imagined, could trigger a threat to the other party that could impact their desire to negotiate a settlement or adversely affect the outcome of the domestic relations litigation.

On May 8, 2012, a week shy of the expiration date of the T.O.P. entered by this Court based on the September 2011 incident, it is alleged in the Superceding Misdemeanor Information here that the defendant tried to open Ms. Mauro's car door and screamed "hi" in order to intimidate Ms. Mauro. At trial, Ms. Mauro testified that she was in front passenger seat of the second husband's parked car with the defendant's children in the back seat. The car was parked in the parking spaces perpendicular to First Street in Rye and across the street from the side entrance to Sunrise Pizza. Ms. Mauro testified she saw the defendant come toward the car from the rear, driver's side of the car. Ms. Mauro said she locked the doors and that defendant tried to open the driver's side door, waved and tapped on the glass and said "hi." Defendant's actions are alleged to have intimidated Ms. Mauro. While the second husband also videoed this incident, the quality of his cinematography work was abysmal. He managed to get a picture of the asphalt near the car and defendant's feet on the driver's side of the car, but little else. The Court is left to wonder whether his cinematography is completely lacking of skill, purposely directed away from what might have cast defendant in a good light, or the result of carrying a large pie with extra cheese and filming at the same time.

What does "intimidation" mean in the T.O.P? The Oxford Dictionary defines it as a noun meaning the action of intimidating someone, or the state of being intimidated. "Intimidate" means to "frighten or overawe (someone), especially in order to make them do what one wants" It is derived from the medieval Latin word *intimidat* translated as "made timid." This may be a bit overbroad in terms of the meaning of this T.O.P. If instilling fear or overawing someone was the test of intimidation, mere physical appearance alone might qualify. One might easily be frightened or in awe of the mere presence of, say, someone the size of an NFL defensive lineman, someone in a uniform, such as a police officer, or the Judge's ruggedly handsome good looks.

The better definition for the word "intimidation" in the T.O.P. can be gleaned by reference to the other surrounding words in the T.O.P.. All the acts listed in the T.O.P. from which the subject is mandated to refrain are already offenses under the Penal Law. Intimidating a victim or witness is prohibited by Penal Law §§ 215.15, .16 & .17. Under Penal Law § 215.15,

> *A person is guilty of intimidating a victim or witness in the third degree when, knowing that another person possesses information relating to a criminal transaction . . ., he: 1. Wrongfully compels or attempts to compel such other person to refrain from communicating such information to any court . . . by means of instilling in him a fear that the actor will cause physical injury to such other person or another person; or 2. Intentionally damages the property of such other person or another person for the purpose of compelling such other person or another person to refrain from communicating, or on account of such other person or another person having communicated, information . . . to any court. . .*

Penal Law § 215.16 says,

> *A person is guilty of intimidating a victim or witness in the second degree when . . . he: 1. Intentionally causes physical injury to another person for the purpose of obstructing, delaying, preventing or impeding the communication by such other person or another person of information relating to a criminal transaction to any court . . . or for the purpose of compelling such other person or another person to swear falsely; or 2. Intentionally causes physical injury to another person on account of such other person or another person having communicated information relating to a criminal transaction to any court . . . ; or 3. Recklessly causes physical injury to another person by intentionally damaging the property of such other person or another person, for the purpose of obstructing, delaying, preventing or impeding such other person or another person from communicating, or on account of such other person or another person having communicated, information relating to a criminal transaction to any court. . . .*

The office of the Order of Protection is to protect the criminal justice system by protecting victims and witnesses from being too frightened by further threats and acts of violence to participate in the criminal prosecution. Thus, the Penal Law § 215 sections definitions are most apt. Here, there was a total lack of evidence that the defendant's acts compelled or attempted to compel any action on the part of the alleged victim. There was no allegation of physical injury or damage to property, only the alleged victim's subjective fear.

However, the Penal Laws are not the only criminal laws that bar intimidation. 18 USC § 2113(a) proscribes intimidation as a method of bank robbery. A large majority of Federal Circuit Courts have addressed the meaning of intimidation. The court in *U.S. v. Alsop*, 479 F2d 65 [9th Cir. 1973], stated that the determination of whether there has been intimidation should be guided by an objective test focusing on the accused's actions. This test requires the application of the standard of the ordinary person. The court suggested "by intimidation," means in such a way that "would put an ordinary, reasonable person in fear of bodily harm." Whether intimidation exists is determined by objective test of whether an ordinary person in the bank teller's position could reasonably infer a threat of bodily harm from defendant's acts. *U.S. v. Henson*, 945 F2d 430 [1st Cir. 1991]; *U.S. v. Wagstaff*, 865 F2d 626 [4th Cir. 1989]; *U.S. v. Higdon*, 832 F2d 312 [5th Cir. 1987]; *U.S. v. Gilmore,* 282 F.3d 398 [6th Cir. 2002]; *U.S. v. Hill*, 187 F3d 698 [7th Cir. 1999] (The court defined intimidation as a defendant "saying or doing something in such a way as would place a reasonable person in fear." In other words, the court stated, the defendant's conduct must constitute a threat.); *U.S. v. Bartolotta*, 153 F3d 875 [8th Cir. 1998], *cert. denied*, 525 US 1093, 119 SCt 850 [1999](intimidation is "conduct reasonably calculated to put another in fear, and the acts of the defendant must constitute intimidation to an ordinary, reasonable person."); *U.S. v. Valdez*, 158 F3d 1140 [10th Cir. 1998] (an act "reasonably calculated to place another in fear, or conduct and words calculated to create the impression that any resistance or defiance by the individual would be met by force."). Of interest is that the federal statute was changed from the "putting in fear" element of the predecessor federal bank robbery statute to "intimidation" of the current law. The terms are treated as purely technical changes rather than substantive and as synonymous and interchangeable. *See, Coles v. State*, 374 Md. 114, 821 A.2d 389 [2003].

An example of what constitutes intimidation in violation of Order of Protection concerning a victim in a car in New York can be found in *People v. Clark*, 65 AD3d 755, 883 NYS2d 824 [3rd Dept, 2009]. Defendant was previously convicted of numerous crimes, including stalking in the third degree, arising out of his harassment of the victim, his former girlfriend. Thereafter, the County Court issued an order of protection directing defendant to stay away from her home and place of employment, and refrain from all contact with her. The defendant almost immediately disregarded that order and kept up his ongoing campaign of harassment and intimidation of the victim. The defendant placed a letter on the victim's car windshield and telephoned her numerous times. Defendant next accosted the victim at a gas station. The victim agreed to speak to him in order to tell him face-to-face that she wanted to be left alone. As the victim sat in her locked car with her window cracked open, defendant indicated that he was aware of the details of her recent activities, as well as the activities of her family. When the victim arrived at work, defendant ran up to her car and began screaming and pounding on the driver's side window, demanding to know how she could "do this to" him. It was dark outside at the time, and defendant was wearing dark clothes and a dark hat. Other egregious conduct occurred but is not relevant here.

The Appellate Division found that the People were "required to demonstrate that defendant "intentionally place[d] or attempt[ed] to place [the victim] in reasonable fear of physical injury, serious physical injury or death" through the calls" (Penal Law § 215.51 [b] [iii]). Thus, although the victim testified that she found the telephone calls threatening and disturbing, the People were required to demonstrate that her fear was "objectively reasonable" through, for example, evidence that defendant's course of conduct carried "an express or implied threat of violence (*People v Demisse*, 24 AD3d 118, 119 [2005], *lv denied* 6 NY3d 833 [2006])." Given the facts of that case, the Appellate Division found the jury could rationally conclude that the victim's fear of injury or death was objectively reasonable (*see e.g. People v McCowan*, 45 AD3d 888, 889-890 [3rd Dept], *lv denied* 9 NY3d 1007 [2007]; *Matter of Ivan F.*, 233 AD2d 210, 210-211 [1st Dept, 1996]; *People v Henderson*, 12 Misc 3d 60, 61 [App Term 1st Dept], *lv denied* 7 NY3d 902 [2006]).

Here, the Court is faced with allegations of much less offensive conduct - defendant is said to have approached the car, waved at the alleged victim or her own children, tapped on the glass and said "hi."

The Court, sitting as the trier of fact and based upon the facts as described above, finds that the People have failed to prove that as a matter of law, the actions of the defendant constituted acts of intimidation since they failed to show any physical injury, threat of physical injury or damage to property or that the alleged victim's fear of threat or injury was "objectively reasonable." Approaching a car, waving and saying "hi," unaccompanied by any other words or actions, is simply not enough to put a reasonable person in fear of physical injury or threaten damage to property. Accordingly, the defendant's motion for a trial order of dismissal is granted.

Trying to use the criminal justice system upon a person so previously victimized based upon these flimsy charges in order to gain custody of the children speaks volumes about the character and suitability of the second husband and the alleged victim to have custody of pets, let alone the children of defendant and the second husband. Their dragging these charges before the District Attorney to prosecute was shameful.

December 27, 2012

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JOSEPH L. LATWIN

Rye City Court Judge

Papers:

1 - Affirmation of Anthony G. Piscionere, Esq. dated November 11, 2012 and the exhibits thereto;

2 - Affirmation of Hon. Valerie A. Livingston dated December 18, 2012.