IN THE CIRCUIT COURT OF KANE COUNTY
SIXTEENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
v.	)	No. 17 CM 2444
JAMES BRZUSKIEWICZ, Defendant.	)	

Supplement to the Record

The court wishes to supplement the ruling on the record on March 7, 2017 with this written opinion. Doing so is appropriate under Supreme Court Rule 18. Defendant (hereafter, "the Respondent") asserts that 725 ILCS 5/112A-11.5 is unconstitutional as it violates the Fifth and Sixth Amendments to the United States Constitution and Article II, Section I (the Separation of Powers Clause) of the Illinois Constitution. As stated on the record, the court found section 11.5 facially invalid as it does not provide adequate notice nor does it provide a meaningful opportunity to be heard.

Effective January 1, 2018, Public Act 100-199 (the Act) made significant changes to the statutes governing protective orders issued under the Code of Criminal Procedure. In part, it added section 112A-11.5, which states:

> (a) The court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence .... has been committed. The following shall be considered prima facie evidence of the crime:
>
> (1) an information, complaint, indictment or delinquency petition, charging a crime of domestic violence.

Statutes enjoy a strong presumption of constitutionality. To overcome this presumption, the party challenging the statute must clearly establish its invalidity. A court will affirm the constitutionality of a statute or ordinance if it is reasonably capable of such a determination and will resolve any doubt as to the statute's construction in favor of its validity. *In re A.C.*, 2016 IL App (1st) 153047.

An enactment is invalid on its face only if no set of circumstances exists under which it would be valid. If a statute can be validly applied in any situation, a facial challenge must fail. In examining a facial challenge, the particular facts of a party's case are irrelevant. *In re A.C.*, citing *Jackson v. City of Chicago*, 2012 IL App (1st) 111044.

The State admits in its response to Respondent's motion to declare the Act unconstitutional that the Act "does not expressly require notice to respondents or a hearing before issuing a protective order..." The State argues that since the Act requires the defendant to be present in court before the court issues the protective order, the Act is not unconstitutional as an ex parte proceeding. This argument ignores the reality. These are criminal proceedings. The defendant does not have the luxury of ignoring them. If the defendant fails to appear, the trial

court will issue a warrant for his arrest and the protective order will be entered when he next appears in court for his failure to appear. In addition, the State's argument does not address the Act's explicit failure to provide an opportunity to be heard.

The State argues that the request for the protective order must be in writing and, as such, defendants will receive notice just as they would for any papers filed with the court in their criminal cases. This argument ignores the statutory imperative of the Act that the protective order shall issue. The defendant finds himself with a protective order entered against him at the same time the petition is handed to him at the bench.

As to the issue of Respondent having an opportunity to be heard, the State directs the court's attention to *United States v. Wilson*, 19 F.3d 280, 290 (7th Cir. 1998), citing *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1985). The State argues that the Respondent has an opportunity to argue regarding the balance of hardships in assigning a particular piece of property to one party or the other. While this is true, it does not address the lack of opportunity to contest the entry of the protective order. The *Loudermill* case actually supports the Respondent's assertion that the Act is unconstitutional. The Respondent must have an opportunity to participate in a meaningful manner. This is further defined as the opportunity to "present reasons, either in person or in writing, why proposed action should not be taken." *Loudermill*, *Id.* The Act requires the court to enter the protective order and only then deals with the particular remedies to be imposed.

Respondent alleges a deprivation of property in that he desires to serve in the armed forces and has been accepted to do so. The automatic entry of the protective order, he believes, prevents him from doing so and has significant impact on his status. According to the Respondent, he will lose his position in the U.S. Marine Corps and be dishonorably discharged if the protective order enters against him. See 18 U.S. Code 922 (g)(9). From this court's reading of that statute, the federal law relates to those convicted of misdemeanor charges of domestic violence. See the definition of "convicted" set out in 18 USC 921 (a)(33)(B)(i). The issue before this court is the entry of the protective order and not a conviction for domestic violence.

The end result is the same as alleged by the Respondent in that he will lose his right to a Firearm Owner's Identification Card and therefore he is barred from possessing firearms and ammunition in Illinois. The Department of State Police shall revoke and seize a Firearm Owner's Identification Card previously issued if the Department finds that the applicant or person to whom such card was issued is subject to an existing order of protection. See 430 ILCS 65/8.2 (West 2012).

The right to bear arms is a "fundamental right." *McDonald v. Chicago*, 561 U.S. 742 (2010). Any statute that impairs a fundamental right must survive strict scrutiny, i.e., it must be narrowly tailored to serve a compelling government interest. *In re H.G.*, 197 Ill. 2d 317 (2001). Although the parties did not specifically argue this point, the court believes that the State has a compelling interest in protecting victims of domestic violence. See 750 ILCS 60/102. Section 11.5 is not narrowly tailored to achieve this goal. The Act leaves no room for a respondent to participate meaningfully in a hearing. The respondent does not get his day in court. He has no opportunity to present a defense.

A statute is narrowly tailored if it uses "the least restrictive means consistent with the attainment of its goal." *In re H.G.* at 330. The Act is not narrowly tailored. It presumes that all those accused of domestic violence in a criminal case are subject to a protective order with no opportunity to be heard. The only question is the extent of the remedies to be imposed.

The State argues that as to the remedies to be imposed, a respondent is entitled to a hearing. This "shoot first and ask questions later" approach leaves no room for a defense of alibi, false accusation, misidentification, etc. As explained above, the harm to the respondent and the constitutional deprivation comes not only at the remedy stage but also at the imposition of the protective order itself. The Act may impose protective orders on innocent respondents. There may well be many respondents who would agree to no further contact with the petitioner and who wish to assert no claim on the petitioner's property but who still object to the imposition of a protective order incorporating such remedies.

Consider the position of an innocent respondent who is faced with the most common request in a Petition for a Protective Order – the stay away remedy. Under the Act, the respondent has no hearing as to whether the protective order enters. The Act tells us that it shall enter. Next, consider whether the respondent may defeat the remedy. The stay away order is defined at 725 ILCS 5/112A-14, which states: "Order respondent to stay away from the petitioner or any other person protected by the order of protection, or prohibit respondent from entering or remaining present at the petitioner's school, place of employment, or other specified places at times when petitioner is present, or both, if reasonable, given the balance of hardships. Hardships need not be balanced for the court to enter a stay away order or prohibit entry if respondent has no right to enter the premises". Emphasis added. Respondent must then try to defeat the protective order by somehow proving that he has a right to be at the petitioner's home or place of employment. Unless these places are open to the public, it is impossible for the respondent to avoid the imposition of the protective order and the imposition of this remedy.

Supreme Court Rule 18 Findings

Supreme Court Rule 18 requires a clear identification of the law being held unconstitutional -- that Act is section 725 ILCS 5/112A-11.5. The Act violates the guarantee of substantive due process provided by the Fifth Amendment and Fourteenth Amendments, Section 1 to the United States Constitution and Illinois Constitution, Article I, Section 2 as discussed above.

Rule 18 also requires a finding of whether the Act is facially invalid, invalid as applied in this particular case, or both. Neither party addressed this issue directly. The Respondent argues that his livelihood will be jeopardized. This could lead a court to believe the deprivation is unconstitutional as applied. On the other hand, failure to provide adequate notice and an opportunity to be heard on a request for a protective order is common to all respondents accused of the crime of domestic violence. As such, this court believes the Act is facially invalid. See *In Re A.C.*, 2016 IL App (1st) 153047.

Can the Act be reasonably construed in such a way as to preserve its validity? In this court's opinion, it cannot. The trial court would have to write a notice provision into the Act to give respondents an opportunity to prepare a defense for the hearing on the protective order. As written, the Act allows, but does not require, a court to continue the matter for hearing. 725 ILCS 5/112A-5.5. Most egregious is the imposition of the protective order first with the details of the remedies to be worked out later.

This court has considered at length whether the hearing on remedies is sufficient to meet constitutional muster. Hypothetically, if a respondent could prevail in his hearing on each of the

requested remedies, the court would deny the request for a protective order. The difficulty with this is that many of the remedies provide no avenue for a defense. If the petitioner request a stay away order for a private location, how could a respondent deny the request? If the petitioner requests sole ownership of an item of property to which the respondent clearly has no ownership interest, what defense could a respondent propose.

The court can find no alternative grounds upon which to resolve the issue between the parties in this case short of adjudicating the constitutional issue. The parties have not presented any such grounds. The court invited the parties at an earlier hearing to consider whether the amendments to the Act are retroactive. If section 11.5 were not retroactive, it would not apply to this case and the court would not be called upon to adjudicate a constitutional violation. The parties have not addressed the issue. Both sides have operated under the assumption that the amendments to the Act are retroactive. This court's research does not differ with this conclusion. The Act does not state whether the amendments are to be considered retroactive. Therefore, the court must look to the Statute on Statutes. 5 ILCS 701. Under that law, if the amendments are substantive in nature they are not retroactive. If they are procedural in nature then they are retroactive. The amendments to the criminal protective order statute that went into effect on January 1, 2018 provide significant procedural changes and as such should be considered retroactive.

Notice has been given as required by Supreme Court Rule 19 and no party has asked for additional time in which to respond.

The State reminds the court to rule on whether the offending section of the Act can be severed from the law to allow the remaining sections in place. The court sees no way clear to sever section 11.5 and maintain the remaining portions of the Criminal Protective Orders. The Act sets the burden of proof for a protective order at mere probable cause. This leads to constitutional deprivations of the right to bear arms with no opportunity for a meaningful hearing.

As the Act is unconstitutional, the request for the protective order under the Act is denied.

Dated: 4-6-18

WJP

William Parkhurst
Associate Judge, Kane County