
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 264 **Hearing Date:** June 6, 2017
Author: Low
Version: March 28, 2017
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Protective Orders*

HISTORY

Source: California District Attorneys Association

Prior Legislation: SB 352 (Block) Ch. 279, Stats. of 2015
AB 307 (Campos) Ch. 291, Stats. of 2013
AB 723 (Pavley) Ch. 155, Stats. of 2011
SB 834 (Florez) Ch. 627, Stats. of 2010
AB 289 (Spitzer) Ch. 582, Stats. of 2007

Support: Crime Victims United of California; San Diego County District Attorney

Opposition: California Public Defenders Association

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this bill is to require the court to consider issuing a restraining order for up to 10 years in gang cases, and to expand the court's authority to issue post-conviction restraining orders to cover witnesses to the qualifying crimes.

Existing law provides that any person who knowingly and maliciously prevents or dissuades, or attempts to prevent or dissuade, any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law is guilty of a crime. (Pen. Code, §§ 136.1, subd. (a)(1); subd. (a)(2).)

Existing law authorizes the trial court in a criminal case to issue protective orders when there is a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. (Pen. Code, § 136.2, subd. (a).)

Existing law provides that a person violating a protective order may be punished for any substantive offense described in provisions of law related to intimidation of witnesses or victims, or for contempt of court. (Pen. Code, § 136.2, subd. (b).)

Existing law requires the court to issue a protective order as a condition of probation in domestic violence cases, as specified. (Pen. Code, § 1203.097.)

Existing law requires a court to consider issuing a protective order, that may be valid for up to 10 years, to protect the victim of the crime when a defendant is convicted of any of the following crimes:

- a) A crime involving domestic violence, as specified;
- b) Cases of rape, spousal rape, and statutory rape;
- c) Any offense requiring sex offender registration;
- d) Stalking cases; and
- e) Elder and dependent adult abuse cases. (Pen. Code, §§ 136.2, subd. (i)(1); 646.9, subd. (k); 368, subd. (l).)

Existing law allows the court to issue civil harassment protective orders for up to five years upon a showing of clear and convincing evidence. (Civ. Pro. Code, §§ 527.6.)

Existing law allows the court to issue workplace violence protective orders for up to three years upon a showing of clear and convincing evidence. (Civ. Pro. Code, § 527.8.)

This bill extends the court's authority to issue post-conviction no-contact orders lasting up to 10 years in cases involving gang activity, as specified.

This bill allows the court to issue post-conviction restraining orders to cover percipient witnesses to any of the crimes for which the court is authorized to issue such an order if it can be established by clear and convincing evidence that the witness has been harassed.

This bill defines harassment as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner."

COMMENTS

1. Need for This Bill

According to the author:

Assembly Bill (AB) 264 will allow a court to issue a protective order for victims and witnesses in crimes involving domestic violence, sexual assault, and certain gang related crimes for up to 10 years after a defendant's final sentencing, in cases that warrant such protection. Under current law, Penal Code section 136.2(a)(1) allows a court to issue a protective order in a criminal case through to the defendant's final sentencing. By contrast, section 136.2(i) allows a court to

issue a protective order for domestic violence and sexual assault victims for up to 10 years after a defendant's sentencing. Once a defendant is sentenced, those victims and witnesses currently must seek protections on their own in a separate, civil proceeding from a court that will necessarily be less familiar with the facts. Moreover, if the defendant is serving a jail or prison term for a period of time, effectuating legal process and obtaining such an order in civil court will be arduous if not impossible.

AB 264 will not only offer more protections to victims and witnesses but also increase efficiency in the court system. A court familiar with the facts and circumstances of a criminal case should be empowered to grant a protective order in the appropriate circumstances to victims and witnesses of domestic violence, sexual assault, and certain gang-related crimes. Our justice system should enable our courts to offer protection for victims or witnesses of these crimes, and minimize the risk of retaliation that arises from not only reporting the crime, but also participating in the criminal justice process afterward.

The proposal seeks to expand the ability of the court to issue a protective order not only to prevent dissuasion and intimidation before a victim or witness participates in the judicial process, but also to prevent retaliation for a victim or witness's participation afterward. The proposal also addresses the current law's failure to account for other legislative changes that have put victims and witnesses of crime at greater risk for retaliatory contact by offenders. With the advent of sentencing pursuant to section 1170(h), for example, a court can sentence a defendant to prison locally for as little as a day and with an extensive mandatory supervision period instead of state prison. Thus, additional persons that previously would remain in custody serving a prison sentence are now in the community, and have the potential to contact the victims of, and witnesses to, their crimes. There are also other examples of legislative and court reforms in favor of rehabilitation over incarceration that result in defendants being in custody for less time, and thus increasing their potential to harm victims and witnesses in retaliation. In light of these reforms, additional potential safeguards for victims and witnesses are appropriate.

With the increase in use of social media, victims and witnesses of crimes are at greater risk now than in years past. Social media now makes it easier for a defendant to locate and retaliate against a victim or witness for participating in the criminal justice system. Critically, it has now become a societal norm for persons to have a publicly available social media presence through Facebook, Twitter, Linked-In, etc. Also, there are several publicly available resources that can scour the internet and other public resources to locate and communicate with individuals, including victims and witnesses. These resources have made it easier for defendants to locate and contact victims and witnesses for purposes of retaliation for participating in criminal prosecutions.

The proposal does not undermine criminal justice reforms resulting in less custodial time. Rather, it enables courts to provide protection to those members of the public that are placed at greatest risk by those reforms. The current standards for issuing a protective order are unaffected by the proposal and will continue to

strike the appropriate balance between restricting a convicted criminal's conduct and further securing a victim's or witness's safety. Specifically, "a criminal protective order must be based on a finding of good cause to believe an attempt to intimidate or dissuade a victim or witness has occurred or is reasonably likely to occur . . . but a mere finding of past harm to the victim or a witness is not sufficient." *Babalola v. Super. Ct.*, 192 Cal. App. 948, 964 (2011).

In sum, in light of other criminal justice reforms, the courts are now required to balance the various societal goals in a criminal case, even after sentencing. This proposal provides the courts a necessary tool to protect victims and witnesses as necessary in crimes involving domestic violence, sexual assault, and certain gang-related offenses.

2. Protective Orders Generally

As a general matter, a court can issue a protective order in any criminal proceeding pursuant to Penal Code Section 136.2 where it finds good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. Protective orders issued under this statute are valid only during the pendency of the criminal proceedings. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382.)

When criminal proceedings have concluded, the court has the authority to issue protective orders as a condition of probation in cases where probation was granted. In some cases in which probation has not been granted, the court also has the authority to issue post-conviction protective orders. The court is authorized to issue no-contact orders for up to 10 years when a defendant has been convicted of willful infliction of corporal injury to a spouse, former spouse, cohabitant, former cohabitant, or the mother or father of the defendant's child. The court can also issue no-contact orders lasting up to 10 years in cases involving a domestic violence-related offense, rape, spousal rape, statutory rape, or any crime requiring sex offender registration. (Pen. Code, § 136.2, subd. (i)(1).) The same is true of stalking cases. (Pen. Code, §646.9, subd. (k)). Similarly, in cases involving a criminal conviction or juvenile adjudication for a sex offense in which the victim was a minor, the court may issue an order "that would prohibit . . . harassing, intimidating, or threatening the victim or the victim's family members or spouse." (Pen. Code, § 1201.3, subd. (a).) Lastly, the court has authority to issue no-contact orders lasting up to 10 years in cases involving the abuse of an elder or dependent adult. (Pen. Code, § 368, subd. (l).)

3. Criminal Contempt

Disobedience of a court order may be punished as criminal contempt. The crime of contempt is a general intent crime. It is proven by showing that the defendant intended to commit the prohibited act, without any additional showing that he or she intended "to do some further act or achieve some additional consequence." (*People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.) Nevertheless, a violation must also be willful, which in the case of a court order encompasses both intent to disobey the order, and disregard of the duty to obey the order." (*In re Karpf* (1970) 10 Cal.App.3d 355, 372.)

Criminal contempt under Penal Code Section 166 is a misdemeanor, and so proceedings under the statute are conducted like any other misdemeanor offense. (*In re McKinney* (1968) 70 Cal.2d 8, 10; *In re Kreitman* (1995) 40 Cal.App.4th 750, 755.) Therefore, the criminal contempt power

is vested in the prosecution; the trial court has no power to institute criminal contempt proceedings under the Penal Code. (*In re McKinney*, supra, 70 Cal.2d at p. 13.) A defendant charged with the crime of contempt is “entitled to the full panoply of substantive and due process rights.” (*People v. Kalnoki* (1992) 7 Cal.App.4t Supp. 8, 11.) Therefore, the defendant has the right to a jury trial, regardless of the sentence imposed. (*People v. Earley* (2004) 122 Cal.App.4th 542, 550.)

4. Effects of Restraining Orders

The consequences of having the court issue a restraining order against a person can be very severe. For example, the restraining order may prohibit the defendant from being within a certain distance of the person named in the order, thereby implicating the defendant’s right to travel. Depending on the facts, such an order may implicate an individual’s property interests by forcing him or her to vacate his or her own home.

A restraining order may affect a person’s immigration status. A violation of a protective order is a deportable offense. Section 237(a)(2)(E)(ii) of the Immigration and Nationality Act (INA) states: “Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.”

The restrained person will generally not be able to own a gun and will have to turn in, sell, or store any guns he or she has, and will not be able to buy a gun while the restraining order is in effect. (Pen. Code, § 29825.)

5. Gang Statutes

Penal Code section 186.22 has three separate charging provisions. The first provision is contained in 186.22, subdivision (a), and is a substantive offense for actively participating in and willfully furthering felonious conduct by members of a criminal street gang. The second provision is an enhancement allegation contained in section 186.22, subdivision (b)(1). The allegation is applicable to felony charges committed for the benefit of any criminal street gang with the specific intent to further criminal conduct by gang members. The third provision, contained in section 186.22, subdivision (d), is an alternate penalty provision for committing a public offense for the benefit of a criminal street gang with the specific intent to further criminal conduct by gang members. The provisions share some common elements and also have unique elements unto themselves.

The “criminal street gang” component of the gang provisions (i.e., the gang’s existence) is a component of all three provisions and requires proof of three essential elements: (1) that there be an “ongoing association” involving three or more participants, having a “common name or common identifying sign or symbol”; (2) that the group has as one of its “primary activities” the commission of one or more specified crimes; and (3) the group’s members either separately or as a group “have engaged in a pattern of criminal gang activity.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466-467.)

The substantive gang offense, section 186.22, subdivision (a), is chargeable as either a felony or misdemeanor. The gravamen of the offense is the “participation in the gang itself.” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. omitted.) The crime of participation in a criminal street gang requires proof of two elements which are not part of the enhancement: *active participation* in a gang, and *knowledge* that its members engage or have engaged in a pattern of criminal activity. (*People v. Bautista* (2005) 125 Cal.App.4th 646, 656, fn. 5; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467.) A person need not be a gang member to be guilty of the offense. (*People v. Robles, supra*, 23 Cal.4th at p. 1114, fn 4; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466; *In re Lincoln J.* (1990) 223 Cal.App.3d 322.) All that is required is “active participation,” which means “more than a nominal or passive involvement.” (*People v. Castenada* (2000) 23 Cal.4th 743, 749-750; *In re Jose P.* (2003) 106 Cal.App.4th 458, 466.)

The sentencing enhancement, section 186.22, subdivision (b)(1), cannot be imposed unless the defendant is convicted of a felony. To receive a gang enhancement, the defendant need not be a current and active member of a gang. (*In re Ramon T.* (1997) 57 Cal.App.4th 201.) In addition to the criminal street gang components discussed above, there are two other essential elements that must be proven: (1) that the charged crime(s) were committed for the benefit of, at the direction of, or in association with the gang; and (2) that they were committed with the specific intent to promote, further or assist in criminal conduct by gang members. (CALCRIM 1401; *People v. Gardeley* (1996) 14 Cal.4th 605, 619; *People v. Louen* (1997) 17 Cal.4th 1, 11; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207-208; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484-485.)

Finally, section 186.22, subdivision (d), is neither a crime nor an enhancement. Rather, “[i]t provides for an alternate sentence of one, two, or three years when it is proven that the underlying offense has been committed for the benefit of, or in association with, a criminal street gang.” (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899.) Application of the provision is not limited to “wobblers.” (*Id.* at p. 901-903.) The provision applies to all felonies and all misdemeanors. (*Id.* at p. 903.)

6. What This Bill Does

This bill extends the court’s authority to issue no-contact orders lasting up to 10 years in cases involving gang activity under Penal Code section 186.22, which includes a gang substantive offense and gang enhancements.

This bill would authorize the court to issue post-conviction restraining orders to cover percipient witnesses to domestic violence, specified sex offenses, and gang activity if it can be established by clear and convincing evidence that the witness has been harassed.

7. Argument in Support

According to the sponsor of the bill, the California District Attorneys Association:

Currently, Penal Code section 136.2(a)(1) allows a court to issue a protective order in a criminal case through to the defendant’s final sentencing – i.e. when the court has “jurisdiction over a criminal matter.” By contrast, PC 136.2(i) allows a court to issue a protective order for domestic violence and sexual assault victims that will remain in place for up to 10 years after a defendant’s sentencing. AB 264 will extend the court’s ability to issue a 10-year protective

order for all victims and witnesses, when the circumstances warrant such protection.

A court familiar with the facts and circumstances of a criminal case should be empowered to grant a post-conviction protective order in the appropriate circumstances to victims and witnesses of all crimes – not simply domestic violence and sexual assault – especially when those crimes involve violence, weapons, or gang activity.

Once a defendant is sentenced, those victims and witnesses currently must seek those protections on their own in a separate, civil proceeding from a court that will likely be less familiar with all of the facts. Moreover, if the defendant is serving a jail or prison term for a period of time, effectuating legal process and obtaining such an order in civil court will be arduous, if not impossible. Our justice system should enable our courts to offer protection for any victim or witness of a crime, and minimize the risk of retaliation that arises from not only reporting the crime, but also participating in the criminal justice process afterward.

8. Argument in Opposition

The California Public Defenders Association opposes this bill stating:

AB 264 would amend Penal Code 136.2 to allow a court to issue a 10-year restraining order prohibiting any contact by an individual convicted of any crime with a victim or witness for 10 years. Under existing law, Penal Code section 136.2(i) provides that the court shall consider issuing 10-year restraining orders prohibiting any contact with the victim or witness to a crime in cases in which the individual has been convicted of domestic violence or sexual assault. Existing law is carefully tailored to protect both the rights and security of the victims and the defendants who are more likely to have had familial bonds or have been seriously traumatized.

This unwarranted wholesale expansion has the potential to create many unintended consequences. First, busy calendar courts will find themselves being asked to impose these orders in every case with a victim or civilian witness. Unable to take the time in every misdemeanor shoplifting, disturbing the peace and hit and run or county jail felony case to consider whether a victim or witness is likely to be contacted, courts will just impose the order on the theory “better safe, than sorry.” Making such orders will have extraordinary costs because clerks must enter them in the minutes and law enforcement will be tasked with ascertaining if they have been violated.

Ten-year restraining orders will make the community less safe because they will make rehabilitation for the individuals enjoined difficult. It will affect their chances of finding work, thus affecting their families and potentially forcing the tax payers to shoulder an additional burden of providing for their families. These proposed 10-year orders would last long past the expiration of the individual’s

summary court or felony probation, Study after study has shown that individuals who are reintegrated into the community are less likely to reoffend. Finally, there is no evidence that 10-year restraining orders would provide any additional layer of safety or peace of mind to victims or witnesses in non-violent cases.

9. Related Legislation

AB 270 (Gallagher) would expand the court's authority to issue a post-conviction restraining order in cases involving domestic violence to cover a child witness who is physically present at the time of an act of domestic violence but who is not a victim. AB 270 is scheduled to be heard by this committee on June 13, 2017.

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