Richmond County District Attorney

Daniel M. Donovan, Jr.

The Domestic Violence Act of 2010

Creating the Crime of Domestic Abuse

Strengthening Orders of Protection with GPS Technology

Holding "Deadbeat" Parents Accountable

Contents

I. Domestic Violence by the Numbers

- **1 in 4 women will experience domestic violence in her lifetime.** ***(National Coalition Against Domestic Violence)***

- **An estimated 1.3 million women are victims of physical assault by an intimate partner each year.** ***(NCADV)***

- **400,000 domestic incidents are reported in NYS each year.** ***(DCJS 2005-2006)***

- **In NYS, 50% of all adult women murdered were killed in domestic violence.** ***(DCJS, 2009)***

- **Women were victims in 75% of 81 intimate partner homicides in New York State in 2008.** ***(DCJS, 2009)***

- **Intimate partner homicides represent 11% of all homicides in New York State.** ***(DCJS, 2009)***

- **In 2005, in NYC, nearly 4,000 women were treated in ERs for injuries they acknowledged were caused by intimate partners.** ***(DCJS, 2007)***

- **In 2008, New York State Courts issued over 220,000 orders of protection in domestic violence cases.** ***(OCA, 2009)***

II. Existing Laws

§ 240.26. Harassment in the second degree

A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:

1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; …

Harassment in the second degree is a violation.

§ 120.15. Menacing in the third degree

A person is guilty of menacing in the third degree when, by physical menace, he or she intentionally places or attempts to place another person in fear of death, imminent serious physical injury or physical injury.

Menacing in the third degree is a class B misdemeanor.

§ 120.00. Assault in the third degree

A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

2. He recklessly causes physical injury to another person; or

3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

III. Proposed New Domestic Abuse Statute

MEMORANDUM IN SUPPORT

TITLE OF BILL: An act to amend the Penal Law to create the new crimes of Domestic Abuse in the First, Second and Third Degrees and to amend the Criminal Procedure Law with respect to deferred sentencing for felony domestic abuse offenders.

PURPOSE: Adds three new crimes to the penal law to create the crimes of Domestic Abuse in the First Degree [P.L. §120.85], Domestic Abuse in the Second Degree [P.L. §120.83] and Domestic Abuse in the Third Degree [P.L. §120.80]. Also adds a new section 217.10 to the Criminal Procedure Law to permit a court to defer a domestic abuse defendant's sentence for purpose of permitting the defendant to participate in a court-approved domestic violence or other related program.

SUMMARY: The penal law is amended by adding a new section 120.80, which creates the class B misdemeanor of Domestic Abuse in the Third Degree; and a new section 120.83, which creates the class A misdemeanor of Domestic Abuse in the Second Degree; and a new section 120.85, which creates the class E felony of Domestic Abuse in the First Degree. The criminal procedure law is amended by adding a new section 217.10, which provides for deferral of sentencing in felony domestic abuse cases.

JUSTIFICATION: Currently, police are not permitted to effectuate an arrest in domestic situations where the victim has been subjected to a course of continual harassment or physical contact which did not impair physical condition or cause substantial pain unless the physical contact occurred in the presence of the police. By elevating physical contact between those in a domestic relationship from a violation to a crime, the police will be mandated to make an arrest. Typically, such offenses occur out of the presence of the police, thus preventing them from making an arrest under current law.

Presently, physical injury committed against a family member or intimate partner is punishable as a misdemeanor, even when the abuser repeatedly assaults the victim. The creation of the felony of domestic abuse in the first degree increases the scope of punishment and provides a greater deterrent for those who commit serious domestic abuse or who are repeat offenders.

Many victims of domestic violence would prefer to have their partner undergo treatment rather than serve time in jail. Under current law there is no mechanism for a judge to accept a domestic abuser's guilty plea and then defer sentence to determine whether the abuser can successfully complete a court-ordered treatment program. This new law expands sentencing options by providing criminal justice motivation for offenders to complete court-ordered corrective programs. The proposed law provides a process whereby the offender can plead guilty to the most serious offense involved in the domestic abuse case and, with the permission of the judge and consent of the People, undergo treatment and education

programs. Thereafter, if the offender successfully completes these programs as ordered by the court, the initial guilty plea may be withdrawn with consent of the prosecutor and defendant will be allowed to plead guilty to a lesser charge carrying a reduced penalty in satisfaction of case.

P.L. § 120.80 Domestic Abuse in the Third Degree

A person is guilty of domestic abuse in the third degree when, with intent to harass, annoy, or alarm a member of the same family or household as defined by section 530.11 of the criminal procedure law, he or she strikes, shoves, kicks, or otherwise subjects such person to physical contact or attempts or threatens to do the same.

Domestic abuse in the third degree is a class B misdemeanor.

P.L. § 120.83 Domestic Abuse in the Second Degree

A person is guilty of domestic abuse in the second degree when:

(1) with intent to harass, annoy, or alarm a member of the same family or household as defined by section 530.11 of the criminal procedure law, he or she causes such person physical injury.

Domestic abuse in the second degree is a class A misdemeanor.

P.L. § 120.85 Domestic Abuse in the First Degree

A person is guilty of domestic abuse in the first degree when:

(1) (a) With intent to cause physical injury to a member of the same family or household as defined by section 530.11 of the criminal procedure law, he or she causes such injury to such person or to a third person; or

(b) He or she recklessly causes physical injury to a member of the same family or household as defined by section 530.11 of the criminal procedure law; or

(c) With criminal negligence, he or she causes physical injury to a member of the same family or household as defined by section 530.11 of the criminal procedure law by means of a deadly weapon or a dangerous instrument; or

(d) He or she recklessly engages in conduct which creates a substantial risk of serious physical injury to a member of the same family or household as defined by section 530.11 of the criminal procedure law; or

(2) He or she commits the crime of domestic abuse in the second degree and has previously been convicted of the crime of domestic abuse in any degree as defined in this article within the preceding five years.

Domestic abuse in the first degree is a class E felony.

IV. New York Needs *Effective* Domestic Violence Laws

- ***Provides law enforcement with important tool to more effectively combat domestic violence:*** Creates the new felony of Domestic Abuse in the First Degree for cases involving the most serious domestic abuse and/or recidivist domestic abuse offenders.

- ***Increase Punishment & Deterrence:*** Increase the scope of punishment and provide a greater deterrent for those who commit serious domestic abuse or who are repeat offenders.

- ***Mandatory arrest:*** Will be required in certain domestic abuse cases where police do not now have authorization to arrest because the offense was not committed in their presence.

- ***Make Court-Ordered Treatment Programs Work:*** Require the offender to plead guilty to the most serious charge in the case. Upon successful completion of the program, the previously-entered guilty plea may be withdrawn, with the consent of the court and the prosecution, and a guilty plea to a lesser charge carrying a lesser sentence would be substituted.

V. Putting the "Protection" in Orders of Protection

- ***Just a Piece of Paper:*** In 2008, over 220,000 orders of protection were granted by the courts in New York State Domestic Violence cases. When confronted by a violent assailant, the order of protection alone is only worth the paper it is printed on. Far too many victims have been assaulted or even murdered by someone whom they had an order of protection against. Requiring a GPS monitored ankle bracelet as part of an order of protection can save lives.

- ***GPS Technology Offers Solutions for Victims & Law Enforcement:*** Modern GPS technology makes it possible for ankle bracelets to be used to notify victims and law enforcement when the subject of the order is entering a "safety zone" near the victim. This technology has been adopted by the federal and state courts as a condition of bail and in some jurisdictions for orders of protection or alternatives to incarceration. It also provides undisputed proof that an order was or was not violated; eliminating "he said/she said" situations.

- ***At Little or No Cost to the Taxpayer:*** GPS technology, currently in use across the country, can be used to monitor offenders at a cost of just a few dollars a day. The cost of the equipment and monitoring should be paid by the offender and financed by the assessment of fees as part of the case disposition, or as condition of bail or release at arraignment.

VI. Proposal for GPS Monitoring

MEMORANDUM IN SUPPORT

TITLE OF BILL: An act to amend the penal law and criminal procedure law to provide for electronic monitoring in connection with orders of protection

PURPOSE OR GENERAL IDEA OF BILL: An act to amend Article 530 of the Criminal Procedure Law by adding a new section to authorize courts issuing orders of protection also to order electronic GPS monitoring under certain circumstances, to require such monitoring upon a violation of an order of protection, and to amend Article 60 of the penal law to provide funds for the electronic monitoring of indigent defendants.

SUMMARY OF SPECIFIC PROVISIONS: The criminal procedure law is amended by adding a new section 530.15 which authorizes courts issuing full, stay-away orders of protection also to require, in some circumstances, that the person wear an electronic monitoring device, and which punishes tampering with such a device as a felony offense. The criminal procedure law is further amended by adding an additional provision to the orders which may issue pursuant to sections 530.12(11) and 530.13(8) upon proof of a violation of an order of protection to require that, in the event the court does not commit such a violator to custody, the court will require electronic monitoring. Section 60.35 of the penal law is further amended to permit collection of a fee of $350 from those being sentenced for violating an order of protection.

JUSTIFICATION: Protective orders provide legal, but not physical, shields for domestic violence victims, and are but minimal safeguards against abusers. Individuals who have demonstrated violence and disregard for the law are highly unlikely to abide by an order of protection, and experience has shown that that is especially so in the context of domestic violence and stalking. Their victims are fully aware of this and live in constant fear of attack, often restricting their own movements in order to ensure their safety. Requiring offenders to wear an electronic monitoring device will cause the offenders to realize that there will be concrete evidence if they violate the restrictions, and they will therefore be less likely to do so. Similarly, their victims will have greater peace of mind and increased freedom of movement from knowing that their attacker's movements are being monitored.

GPS Electronic Monitoring

C.P.L. § 530.15 Electronic Monitoring

1. Any person against whom an order of protection is issued pursuant to paragraph (a) of subdivision (1) or paragraph (a) of subdivision (5) of section 530.12 of this article, or paragraph (a) of subdivision (1) or paragraph (a) of subdivision (4) of section 530.13 of this article, may be required to wear an electronic monitoring device upon the court's determination that under the facts and circumstances of the case, requiring the person to wear such a device is warranted. In making such determination, the court shall consider, but shall not be limited to consideration of, whether the order of protection is likely to achieve its purpose in the absence of such a condition, the person's conduct subject to prior orders of protection, prior convictions for crimes of violence, prior incidents of domestic abuse against the party for whose benefit the order is issued or any other party, and past or present injury, threats, drug or alcohol abuse, and access to weapons.

2. For purposes of this section, an electronic monitoring device means a device, worn by an individual, that transmits a signal and enables another person or entity to monitor, track, and/or pinpoint the location of the individual wearing the device through the reception of that signal. Electronic monitoring shall be used in accordance with uniform procedures developed by the division of probation.

3. Any person who, with the intent to impair its proper functioning, tampers with any electronic monitoring device or who, while wearing such a device, permits another person to tamper with such device shall be guilty of a class E felony.

GPS Electronic Monitoring Upon a Violation of an Order of Protection

C.P.L. § 530.12 (family offenses)

11. If a defendant is brought before the court for failure to obey any lawful order issued under this section, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, and if, after hearing, the court is satisfied by competent proof that the defendant has willfully failed to obey any such order, the court may:

(a) … (d)

(e) In the event the court does not commit the defendant to custody pursuant to paragraph (a), (b), (c), or (d), in cases of a violation of an order of protection issued pursuant to paragraph (a) of subdivision (1) of section 530.12 of this article, the court must require the defendant to submit to the use of an electronic monitoring device or to wear a global positioning satellite tracking device. Electronic monitoring shall be used in accordance with uniform procedures developed by the division of probation.

C.P.L. § 530.13 (non family offenses)

8. If a defendant is brought before the court for failure to obey any lawful order issued under this section, and if, after hearing, the court is satisfied by competent proof that the defendant has willfully failed to obey any such order, the court may:

(a) … (d)

(e) In the event the court does not commit the defendant to custody pursuant to paragraph (a), (b), (c), or (d), in cases of a violation of an order of protection issued pursuant to paragraph (a) of subdivision (1) of section 530.13 of this article, the court must require the defendant to submit to the use of an electronic monitoring device or to wear a global positioning satellite tracking device. Electronic monitoring shall be used in accordance with uniform procedures developed by the division of probation.

Funds for Electronic Monitoring Collected From Those Who Violate Orders of Protection

P.L. § 60.35 Mandatory Surcharge, sex offender registration fee, DNA databank fee, supplemental sex offender registration fee, electronic monitoring fee, and crime victim assistance fee required in certain cases.

(1) (a) …

(c) When the felony conviction in subparagraphs (i) or (iv) of paragraph (a) of this subdivision results from an offense defined in sections 215.51 or 215.52 of this chapter, the person convicted shall pay an electronic monitoring fee of $350 in addition to the mandatory surcharge and any other fee.

VI. Holding "Deadbeat" Parents Accountable

- ***Addresses Flaws in the Existing Law:*** The crime of *Nonsupport of a Child* is aimed at holding parents accountable when, although they are financially able to do so, they willfully fail to provide financial support for their children. This proposal fixes the problem with the current statute by making it possible to hold neglectful parents accountable for providing necessary financial support to their children.

- ***Targets Parents Who Deliberately Hide Assets:*** Persons who are legally obligated to provide child support should not be permitted to escape criminal prosecution where they have deliberately taken action to avoid paying child support by engaging in wasteful personal spending and concealment of funds.

- ***Makes the Parent Document Their Inability to Pay:*** Currently, parents who willfully fail to provide financial support for their children may escape criminal liability for nonsupport simply because it is the prosecutor who must prove the parent's ability to pay. This proposal places the burden of proving inability to pay on the parent, who alone possesses the necessary information to answer that question.

VII. Fixing New York's "Deadbeat" Parent Laws

MEMORANDUM IN SUPPORT

TITLE OF BILL: An act to amend the penal law in relation to non-support of a child.

PURPOSE OR GENERAL IDEA OF BILL: An act to amend the penal law, in relation to the crime of non-support of a child, to require a delinquent parent to demonstrate as an affirmative defense that inability to pay excuses his or her failure to provide for his or her minor child.

SUMMARY OF SPECIFIC PROVISIONS: The penal law is amended by deleting the defendant's ability to pay from the definition of the offense found in sections 260.05 and 260.10 of the penal law and adding to both a provision which allows a defendant to show inability to pay as an affirmative defense.

JUSTIFICATION: Persons who are legally obligated to provide child support should not be permitted to escape criminal prosecution where they have deliberately taken action to avoid paying child support by engaging in wasteful personal spending and concealment of funds. Currently, parents guilty of the crime of nonsupport of a child may escape criminal liability simply because the prosecutor is tasked with proving the unknowable, that is, the parent's ability to pay. The ability to pay is an inherently subjective question, which requires that the prosecutor submit evidence not only of the parent's income and spending, but proof which distinguishes between legitimate expenses and wasteful spending. This amendment will rightly place the burden of proving inability to pay on the parent, who alone possesses the necessary information to answer that question.

§ 260.05. Non-support of a child in the second degree

A person is guilty of non-support of a child when:

1. being a parent, guardian or other person legally charged with the care or custody of a child less than sixteen years old, he or she fails or refuses without lawful excuse to provide support for such child**.** ~~when he or she is able to do so, or becomes unable to do so, when, though employable, he or she voluntarily terminates his or her employment, voluntarily reduces his or her earning capacity, or fails to diligently seek employment~~; or

2. being a parent, guardian or other person obligated to make child support payments by an order of child support entered by a court of competent jurisdiction for a child less than eighteen years old, he or she knowingly fails or refuses without lawful excuse to provide support for such child**.** ~~when he or she is able to do so, or becomes unable to do so, when, though employable, he or she voluntarily terminates his or her employment, voluntarily reduces his or her earning capacity, or fails to diligently seek employment~~.

In any prosecution under this subdivision, it is an affirmative defense that the defendant is unable to provide support for the child. Nothing in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, non-support of a child in the second degree where the defendant becomes unable to provide support when, though employable, he or she voluntarily terminates his or her employment, voluntarily reduces his or her earning capacity, or fails to diligently seek employment.

Non-support of a child in the second degree is a class A misdemeanor.

§ 260.06. Non-support of a child in the first degree

A person is guilty of non-support of a child in the first degree when:

1. (a) being a parent, guardian or other person legally charged with the care or custody of a child less than sixteen years old, he or she fails or refuses without lawful excuse to provide support for such child ~~when he or she is able to do so~~; or

(b) being a parent, guardian or other person obligated to make child support payments by an order of child support entered by a court of competent jurisdiction for a child less than eighteen years old, he or she fails or refuses without lawful excuse to provide support for such child ~~when he or she is able to do so~~; and

2. he or she has previously been convicted in the preceding five years of a crime defined in section 260.05 of this article or a crime defined by the provisions of this section.

In any prosecution under this subdivision, it is an affirmative defense that the defendant is unable to provide support for the child. Nothing in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, non-support of a child in the first degree where the defendant becomes unable to provide support when, though employable, he or she voluntarily terminates his or her employment, voluntarily reduces his or her earning capacity, or fails to diligently seek employment.

Non-support of a child in the first degree is a class E felony.

DRAFT LETTER OF SUPPORT ON ORGANIZATION LETTERHEAD

Date

Hon. Daniel M. Donovan, Jr.
Richmond County District Attorney
130 Stuyvesant Place
Staten Island, NY 10301

Dear District Attorney Donovan:

I am writing to you today on behalf of **{Insert Name of Organization}**, an organization which **{Please Insert a brief description of organization's function and if possible general membership/board size}**.

We are pleased to add our support to your *Domestic Violence Act of 2010* to change the existing laws in New York State regarding: *Domestic Violence*, *"Deadbeat" Parents* and *Mandating Electronic Monitoring of Orders of Protection*. Your "Deadbeat" Parents proposal would shift the burden of showing inability to pay onto the "Deadbeat" parent where it belongs. Prosecutors should not have to prove someone's ability to pay before the payments are ordered. Your ankle bracelet program will better warn a victim that an abuser is near and, over time, will save lives. Your proposal for a new approach to our domestic violence laws will better define this special form of violence and better protect spouses in this state.

Clearly, existing laws in New York State do not do enough to protect domestic violence victims and fail to ensure that parents who owe child support pay their fair share. Your proposals will go a long way in giving victims, the courts and law enforcement the appropriate legal tools to meet these challenges that impact so many New Yorkers. We join in your call upon the New York State Legislature to move immediately on these important proposals.

Sincerely yours,

Signature

Printed Name, Title

This letter is only a suggestion and we certainly prefer that you use language that you are comfortable with to express your support for this legislation. Should you have any questions, please feel free to contact: William J. Smith @ 718-556-7150 or William.Smith@rcda.nyc.gov

Please send letters: Mail - District Attorney Daniel M. Donovan, Jr., 130 Stuyvesant Place, Staten Island, NY 10301, Fax to 718-556-7054, or E-mail to info@rcda.yc.gov