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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

SARA MANZULA,

Respondent,

v.

JONATHAN ISAAC KELLY,

Appellant.

F067196

(Super. Ct. No. 12CEFL05889)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Fresno County. Ronda Duncan,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Law Office of Martin H. Gamulin and Martin H. Gamulin, for Appellant.

No appearance for Respondent.

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Jonathan Isaac Kelly appeals from the trial court's order imposing a domestic  
violence restraining order pursuant to Family Code section 6200 et seq.<sup>1</sup> against him. He

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\* Before Levy, Acting P.J., Cornell, J., and Gomes, J.

<sup>1</sup> All statutory references are to the Family Code.

contends the court abused its discretion in failing to continue this matter because he was invoking his Fifth Amendment privilege against self-incrimination. We affirm the order.

### **FACTS AND PROCEDURAL HISTORY**

On October 5, 2012, Manzula filed a request for domestic violence restraining orders against Kelly, her “ex-fiancé.” The court entered a temporary restraining order and set the matter for hearing on October 30, 2012. That day, the court granted Kelly’s request to continue the matter to November 13, 2012, to allow his counsel to be present. The temporary orders remained in effect. Kelly was arrested shortly thereafter for violating the temporary restraining order. When he was released on bail he was told his cases had been consolidated and were set for hearing on January 28, 2013. As a result, he did not appear for the November 13, 2012 hearing after which the court found there were acts of abuse and issued permanent restraining orders. Kelly promptly filed a motion for reconsideration and to set aside those orders. In January 2013, the court granted reconsideration, set aside the permanent restraining orders, continued the temporary restraining orders and set the matter for hearing on February 26, 2013. Before the continued hearing date, Kelly hired new counsel who filed a motion to continue the hearing until the related criminal proceedings were resolved in order to preserve his Fifth Amendment and due process rights. The criminal arraignment “relating to the allegations contained within [Manzula’s] request” was scheduled for April 11, 2013. Manzula opposed the continuance, and the trial court denied the request.

At the hearing on February 26, 2013, Manzula and her witnesses testified. Kelly’s counsel cross-examined Manzula and one witness, but presented no evidence on Kelly’s behalf. Manzula described an incident on April 16, 2012, where she and Kelly argued. Kelly grabbed her wrists, pinned her to the bed and placed his body weight on her making it difficult for her to breathe. When she attempted to run away, he grabbed her

arm and pulled her back. Manzula's father and stepbrother arrived and tried to convince Kelly to leave. He refused, the police were called, and he was arrested.

Shortly after Kelly had been served with the temporary restraining orders, Manzula's mother saw Kelly standing just outside her condominium that was six "condos down" from Manzula's condominium. And, despite the temporary restraining order, Kelly had approached Manzula in the hallway outside the courtroom on October 30, 2012, and tried to speak with her, which she found intimidating.

At the conclusion of the hearing, the court found there were acts of abuse on April 16, 2012, and Kelly had violated the temporary restraining order. The court granted the request for a five-year restraining order.

### **DISCUSSION**

The trial court denied Kelly's request for another continuance reasoning that Kelly was not entitled to have this matter continued until his criminal case had resolved. *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686 (*Pacers*), on which Kelly relied, did not apply in a domestic violence restraining order situation. Under the statutes, Kelly was entitled to a reasonable continuance to prepare for the hearing, which he had received.

On appeal, Kelly argues that the court did not weigh the parties' competing interests with a view toward accommodating the interests of both parties, if possible. He submits, there was no reason to refuse to continue the matter until his criminal case was resolved. By not continuing the matter, he was penalized for exercising his Fifth Amendment right and not testifying at the restraining order hearing. Further, Manzula would not have been prejudiced by the continuance because she could have been protected by the temporary restraining orders, which provided the same relief as the requested injunction. We are not persuaded.

The decision whether to grant or deny a continuance is committed to the sound discretion of the trial court. We review the ruling for abuse of discretion. (*Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1249.)

A number of decisions address a criminal defendant's dilemma when faced with defending a related civil proceeding. In *Pacers, supra*, 162 Cal.App.3d 686, bar employees and undercover DEA agents were involved in a fight. The police were called and the agents were arrested. The agents sued the employees for assault and battery. The United States attorney sought indictments against the individual employees and maintained an open file on the case. (*Id.* at p. 687.) At the employees' depositions in the civil action, they asserted their privilege against self-incrimination and refused to answer any questions unless they were given immunity. The trial court granted the agents' motion to prohibit the employees from testifying at trial because they had failed to answer the deposition questions. (*Id.* at p. 688.) The appellate court reversed, finding that the trial court had abused its discretion by effectively penalizing the employees for exercising a fundamental constitutional right. Further, the agents had no right to information protected by the privilege against self-incrimination, which the employees reasonably believed might be used against them in a criminal prosecution. The proper remedy was to stay discovery until expiration of the criminal statute of limitations, thus allowing the agents to prepare their lawsuit while alleviating the employees' difficult choice between defending either the civil or criminal case. (*Id.* at pp. 689-690.)

Other cases reached a different result. In *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322 (*Keating*), which Kelly also cites, Keating claimed his due process rights were violated by respondent's refusal to stay administrative proceedings until the conclusion of related criminal proceedings. The pending criminal proceedings forced him to invoke his Fifth Amendment privilege during the civil hearing and deprived him of an opportunity to testify on his own behalf. (*Keating, supra*, 45 F.3d at

p. 324.) The court found his rights were not violated. The Constitution did not require that civil proceedings be continued until parallel criminal proceedings were resolved. (*Keating, supra*, 45 F.3d at p. 324.)

The decision whether to stay civil proceedings until parallel criminal proceeding were resolved was to be made in light of the circumstances and competing interests involved in the case. Relevant factors included the extent to which the defendant's Fifth Amendment rights were implicated; the plaintiff's interest in proceeding expeditiously with the litigation and the potential prejudice to the plaintiff of a delay; the burden the proceedings may impose on the defendant; the efficient use of judicial resources; and the interest of the public in the pending civil and criminal litigation. (*Keating, supra*, 45 F.3d at pp. 324-325.) The *Keating* court concluded the administrative court's refusal to stay the civil proceeding was not an abuse of discretion. The defendant had no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. The civil proceeding could proceed at the same time as a related criminal proceeding, even if that necessitated invocation of the Fifth Amendment privilege. (*Keating, supra*, 45 F.3d at pp. 325-326.)

In *People v. Coleman* (1975) 13 Cal.3d 867, the California Supreme Court noted that the defendant may have to make incriminating admissions in a civil proceeding if he is to have a meaningful chance of avoiding financial loss. While some courts had stayed civil proceedings until disposition of the related criminal prosecution, other courts had merely allowed civil defendants to refuse to answer particular questions during discovery by invoking their privilege against self-incrimination. In neither situation, however, did the courts recognize a constitutional need for accommodation. Instead, resolution of the issue fell within the trial court's discretion. The court noted there may be cases where requiring a criminal defendant to participate in a civil action, at peril of being denied some portion of his worldly goods, violates concepts of fairness in view of the

defendant's position in a related criminal prosecution. On the other hand, a criminal defendant could not block all civil litigation on the underlying subject matter. Justice was meted out in both civil and criminal litigation and justice may well require that a civil plaintiff not have her remedy delayed. Therefore, the court, in its sound discretion, must assess and balance the nature and substantiality of the injustices claimed on either side. (*Id.* at pp. 884-885; accord, *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 882.)

Under the applicable case law, the trial court did not abuse its discretion in denying Kelly an additional continuance. First, the record does not indicate the extent to which Kelly's Fifth Amendment rights were implicated. He argues that had he testified, the district attorney's office could have monitored the proceedings and obtained his potentially incriminating testimony. Kelly did not disclose the misdemeanor charges that were pending and he chose the more drastic course of action. Rather than responding to Manzula's petition and asserting the privilege in regard to only potentially incriminating events or questions, he offered no evidence in opposition. However, Kelly was represented by counsel who ably cross-examined Manzula and her witnesses, who were not represented by counsel. In short, no substantial injustice to Kelly is apparent on the record.

Second, section 242 requires that the hearing following the issuance of a temporary restraining order be held promptly: "[w]ithin 21 days, or, if good cause appears to the court, 25 days from the date that a temporary order is granted ..., a hearing shall be held on the petition." And Manzula had an interest in expediting the restraining order process and obtaining resolution both to avoid further contact with Kelly necessitated by additional court appearances and to put the matter behind her. While the temporary restraining orders may have provided similar temporary relief, Manzula—and

her family members who testified at the hearing—were entitled to have this matter resolved for the safety and peace of mind of all concerned.

Third, a proceeding under the Domestic Violence Prevention Act (DVPA) is different than a civil tort action. Unlike the *Pacer* civil litigation, the hearing on the restraining order did not put Kelly's worldly goods at risk. The purpose of the DVPA proceedings was not to punish Kelly, but to prevent future domestic abuse and to put separation between the parties.

Fourth, additional continuances to a date uncertain, and the monitoring such continuances would have entailed, would not foster the efficient use of judicial resources.

For all of these reasons, as well as Manzula's objection to the proposed delay and Kelly's apparent violation of the temporary restraining order, the trial court did not abuse its discretion by denying a continuance. Kelly's assertion of his Fifth Amendment privilege against self-incrimination did not compel the court to delay the hearing further.

#### **DISPOSITION**

The orders are affirmed. Respondent is awarded costs.