SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

PEOPLE OF THE STATE OF CALIFORNIA,	**Case No.: CR211376A**
Plaintiff,	**ORDER SUSTAINING DEMURRER TO COMPLAINT**
vs.	
MELISSANE VELYVIS,	
Defendant.	

Following a contested evidentiary hearing on May 2, 2018 during the couple's dissolution proceedings, the Family Law court granted petitioner John Velyvis' application for a Family Code § 6218 Domestic Violence Protective Order (DVPO) against his former wife Melissanne Velyvis (Velyvis or defendant), finding that she "harassed" petitioner in violation of Family Code § 6320(a) by posting a March 13, 2018 "blog" on WordPress.com, entitled: "Non-Fatal Strangulation Administered by Husband Dr., John H. Velyvis, from Victim to Survivor . . . The Untold Story 2018."

Among the prohibitions, the court ordered Velyvis to remove "all social media, blogs and internet" postings regarding petitioner and his children and barred her from making any new social media postings about them.

In open court the judge explained her ruling to the parties:

> I am making an order that you remove any posting on social media on Internet regarding Dr. John Velyvis and that you not post anything on social media regarding Dr. Velyvis or his children directly or indirectly. That means referring to ["]my husband, a person who owed me a fiduciary duty["] because that's all just an indirect reference to him. I am going to order that you prevent disseminating any information about Dr. Velyvis to any parties absent a court order or a subpoena.

Thereafter, the court issued a written form DV-130 protection order that included no-contact and stay-away orders from John Velyvis and his children. In an attachment to the DVPO, the court restrained these additional activities:

> The intent of this restraining order is to curtail ongoing posting and communications made by Melissanne Velyvis involving John Velyvis. While recognizing an individual's freedom of expression, in connection with this dissolution and given the relationship qualifying for a domestic violence restraining order, the court has found the statements to have been made for the purpose of harassing Petitioner, damaging Petitioner's reputation, interfering with Petitioner's professional livelihood and damaging Petitioner's personal relationships. Accordingly:
>
> Melissanne Velyvis shall remove any postings on social media/blogs/internet regarding Petitioner or his children. This includes direct and indirect postings (Example referring to Petitioner as ["]former husband/person with fiduciary duty["] and then using Melissanne Velyvis as identification of author).
>
> Melissanne Velyvis shall not post anything on social media, blogs, and internet regarding Petitioner or his children.
>
> Melissanne Velyvis shall cease and desist from publishing any information concerning Petitioner and his children for the duration of this restraining order. This includes, but is not limited to providing defamatory statements and documents to third parties about Petitioner. Melissanne Velyvis shall refrain from interjection into custody proceedings involving or related to John Velyvis, directly or indirectly, absent a court order.]
>
> Melissanne Velyvis shall remove John Velyvis' likeness from her own social posting and remove any references indicating they are currently married . . . .

Six months later, the Marin County District Attorney filed a misdemeanor complaint against Velyvis alleging one count of Penal Code § 273.6; i.e., between July 19 to July 25, 2019

Velyvis "willfully, unlawfully, and knowingly" violated the DVPO "issued by Marin County Superior Court case number FL1603174."

The complaint did not describe the offending activities. Defendant states, without contradiction, that she is charged with violating the "no speech" prohibition. (Supp. Response, p. 7.)

Defendant demurs to the criminal pleading (Penal Code § 1004), contending: 1 – the complaint fails to allege a public offense was committed since the DVPO is an unconstitutional prior restraint on defendant's right to free speech and is unenforceable; 2 – the DVPO is too vague to satisfy the Due Process guarantees of notice and fair trial; and 3 – the complaint does not comply with Penal Code §§ 950 and 952.

For the reasons discussed below, the court sustains defendant's demurrer to the criminal complaint.

DISCUSSION

1.

Demurrer is Procedurally Proper

A demurrer to a criminal complaint properly lies when it appears on the face of the pleading: "4. That the facts stated do not constitute a public offense"; or "5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution." (Penal Code § 1004 (a).)

"A demurrer is not a proper means of testing the sufficiency of the *evidence* supporting an accusatory pleading. (*People v. Williams* (1979) 97 Cal.App.3d 382, 391 & fn. 5.) Rather, a demurrer lies only to challenge the sufficiency of the *pleading.* It is limited to those defects appearing on the face of the accusatory pleading and raises only issues of law. (Pen. Code, § 1004; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1090.)" (*People v. Biane* (2013) 58 Cal.4th 381, 388.)

It is settled that a defendant may use a demurrer to collaterally attack the validity of a criminal complaint charging defendant with misdemeanor violation of an injunctive order on the ground the underlying order is unconstitutional, if the complaint sets forth the terms of the order or incorporates the order by reference. (See *People v. Gonzalez* (1996) 12 Cal.4th 804, 817 [violation of a void preliminary injunction barring certain street gang activity is not punishable as criminal contempt for willful disobedience of a lawfully issued court order under Pen. Code §166(a)(4)].)

In *Gonzalez*, the Supreme Court ruled that the municipal court improperly refused to hear defendant's demurrer to the contempt complaint, which demurrer asserted the underlying injunction issued by the Superior Court was constitutionally invalid. (*Id.* at p. 808.) Defendant was charged with misdemeanor criminal contempt in violation of Pen. Code § 166(a)(4), making it a misdemeanor to engage "willful disobedience of any process or order lawfully issued by any court."

Relying on settled California law "that a void order cannot be the basis for a valid contempt judgment", the Supreme Court held that an unconstitutional injunctive order is in excess of the issuing court's jurisdiction and the invalid order cannot produce a valid judgment of contempt. (*Id.*, 12 Cal.4th at p. 817, citing *In re Berry* (1968) 68 Cal.2d 137, 147 [a defendant cannot be tried in the municipal court for misdemeanor contempt when the superior court's injunctive order violates defendant's First Amendment rights].)

The *Gonzalez* court further held that the defendant was not required to directly attack the validity of the injunction in the issuing court, but instead he " '*could have* demurred to the misdemeanor complaint in the municipal court on the ground of the invalidity of the superior court's TRO, if the complaint in municipal court had set forth the TRO or referred to it other than 'generically.' [Citation.]" (*People v. Gonzalez, supra,* 12 Cal.4th at p. 818.)

Here, the misdemeanor complaint expressly incorporates the DVPO by referring to its Family Court case number. This court takes judicial notice of the contents of that order in the court files. (Evid. Code § 452(d).)

Pen. Code § 273.6 makes "any intentional and knowing violation of a protective order" issued pursuant to Family Code § 6320, to be a misdemeanor. The DVPO was issued pursuant to § 6320, which statute provides in part:

> (a) The court may issue an ex parte order enjoining a party from . . . harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.

(*Emphasis added.*)

Here, defendant Velyvis is being criminally charged with a misdemeanor for the "intentional and knowing" violation of the DVPO pursuant to Pen. Code § 273.6; an offense functionally similar to the charges of misdemeanor contempt for willful disobedience of a superior court's order (Pen. Code § 166(a)(4)) in the *Gonzalez* and *Berry* decision . If Velyvis is correct, under *Gonzalez* the Family Law judge exceeded her jurisdiction and that order cannot support a criminal judgment. (*Id.* 12 Cal.4th at p. 817.)

"Because under settled law there can be no contempt of a void injunctive order, and because we have long recognized the propriety of collateral attacks on void orders it seems evident that the trial court is a proper forum in which to raise the issue of the validity of the injunction." (*Gonzalez, supra,*, 12 Cal.4th at pp. 8200821.)

In fact, the California Judicial Council Criminal Jury Instruction 2701 recognizes the propriety of using a demurrer to mount a facial challenge to the misdemeanor complaint for violating the DVPO.

In its standard jury instruction describing the elements to support a conviction for violation of a court order for ***contempt*** under Pen. Code §166(c)(1) for the "willful and knowing

violation of a protective order" issued pursuant to Family Code § 6230, or the "intentional and knowing violation of a [§ 6230] protective order" under Pen. Code § 273.6, as alleged here, the Judicial Council's "Bench Notes" instruct that a demurrer can be brought in the criminal trial court to challenge the constitutionality of the underlying protective or contempt order:

> The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147.) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra,* 12 Cal.4th at pp. 821, 824; *In re Berry, supra,* 68 Cal.2d at p. 146.)

(CalCrim 2701, "Bench Notes.")

Under these circumstances at bench, a demurrer is the proper pre-trial vehicle to attack the complaint on the ground "the facts stated do not constitute a public offense" under Pen. Code § 1004(a)(4).

The People argue that this case is distinguishable from the contempt prosecutions in *Gonzalez* and *Berry*, since the Superior Court orders in those cases were preliminary injunctions issued without giving defendants a chance to challenge the validity of the order in the issuing court. (Oppo. p. 4.)

That is not an accurate reading of *Gonzalez.* The court made a point of noting that California courts do not follow the "collateral bar" rule, which requires persons affected by injunctive orders to challenge that order in the issuing court. (*Id.* at p. 818.) Instead, California affords the enjoined party two alternatives:

> As we said in *Berry, supra*, 68 Cal.2d 137, unlike in jurisdictions that do not permit collateral challenges to injunctive orders, "[i]n this state a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial declaration as to its jurisdictional validity. [Citation.] On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions *when he is sought to be punished for such disobedience.* If he has correctly assessed his legal position, and it is

> therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong." (*Id.* at pp. 148-149, italics added.)

(*People v. Gonzalez, supra,* 12 Cal.4th at pp. 818–819, quoting *Berry, supra,* 68 Cal.2d at pp. 148-149.)

The fundamental policy described by *Gonzalez* court applies with the equal force where the order is issued after a court reviews competing evidence submitted by declarations or affidavits at the hearing on the preliminary injunction, or as here, where the underlying restraining order was issued following a contested, evidentiary hearing with live testimony. The DVPO issued by the Family Law judge is as much an "injunctive order" as the preliminary injunctions reviewed in *Gonzalez* and *Berry.* If the § 6230 DVPO is constitutionally invalid, it cannot support a criminal judgment and defendant should not be made to stand trial for violation of that order. (See *Gonzalez, supra,* 12 Cal.4th at p. 817.) There is no logical reason to treat these two types of restraining orders differently.

Finding defendant may use this demurrer to assert the facial invalidity of the underlying DVRO, the court will now address the legal merits of defendant's claims.

2.

The No-Speech Portion of the DVPO is an Invalid Prior Restraint

Defendant asserts the broad language in the DVPO that directs: "Melissanne Velyvis shall not post anything on social media, blogs, and internet regarding Petitioner or his children."; and "Melissanne Velyvis shall cease and desist from publishing any information concerning Petitioner and his children for the duration of this restraining order", constitutes an invalid prior restraint that impermissibly infringes on her free speech rights under the federal and California constitutions.

Defendant contends this overbroad language of the DVPO unlawfully prevents her from sharing her life experiences and feelings she attributes to her marriage to petitioner with her family, friends and other adults willing to read her comments and criticisms, and the order was

made without the required showing of a compelling, countervailing public interest. (MPA p. 10-11.) She asserts this blanket restriction to disseminate any information regarding her ex-husband to adult friends and extended family (but not directed to Dr. Velyvis' minor children) is extreme and is not narrowly tailored to accomplish any lawful objective. (See *Gilbert v. National Enquirer* (1996) 43 Cal. App. 4th 1135, 1136.) (MPA pp. 12-15.)

The People respond by asserting that the restraining order may lawfully limit speech that exhibits a pattern of conduct the court deems "abusive". (Supp. Brief in Opposition to the Demurrer pp. 4-5.) As proof of this pattern of abuse, the People rely on evidence presented at the hearing which showed, in addition to posting the blog, *ante,* defendant interjected herself into other family law matters involving her ex-husband: she made unsolicited comments to a custody evaluator during the current contested custody hearing involving petitioner and his first ex-wife; and defendant made disparaging remarks about petitioner during his current girlfriend's divorce proceedings to another man. The People also cite defendant's plans to file a complaint against petitioner with the California Medical Board. (Oppo. p. 5-6.)

A.

Prior Restraint Generally

"'The right to free speech is ... one of the cornerstones of our society,' and is protected under the First Amendment of the United States Constitution and under an 'even broader' provision of the California Constitution. (*Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1241; see Cal. Const., art. I, § 2, subd. (a).) An injunction that forbids a citizen from speaking in advance of the time the communication is to occur is known as a 'prior restraint.' (*DVD Copy, supra,* 31 Cal.4th at p. 886; *Hurvitz v. Hoefflin, supra,* 84 Cal.App.4th at p. 1241.) A prior restraint is "'the most serious and the least tolerable infringement on First Amendment rights.'" (*DVD Copy, supra,* 31 Cal.4th at p. 886; *Near v. Minnesota* (1931) 283 U.S. 697, 713.) Prior restraints are highly disfavored and presumptively violate the First Amendment. (*Maggi v. Superior Court* (2004) 119 Cal.App.4th 1218, 1225; *Hurvitz v. Hoefflin, supra,* 84 Cal.App.4th

at p. 1241.) This is true even when the speech is expected to be of the type that is not constitutionally protected. (See *Near v. Minnesota, supra,* 283 U.S. at pp. 704–705 [rejecting restraint on publication of any periodical containing 'malicious, scandalous and defamatory' matter].)" (*Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1166–1167.)

"To establish a valid prior restraint under the federal Constitution, a proponent has the heavy burden to show the countervailing interest is compelling, the prior restraint is necessary and would be effective in promoting this interest, and less extreme measures are unavailable. [Citations.] A permissible order restraining future speech 'must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.' [Citation.]

"The California Constitution is more protective of free speech rights than the federal Constitution, and California courts require 'extraordinary circumstances' before a prior restraint may be imposed. (*Wilson v. Superior Court of Los Angeles County* (1975) 13 Cal.3d 652, 658-661; *In re Marriage of Candiotti* (1995) 34 Cal.App.4th 718, 724.) Nonetheless, in determining the validity of a prior restraint, California courts engage in an analysis of various factors similar to the federal constitutional analysis [citation], and injunctive relief restraining speech under the California Constitution may be permissible where the relief is necessary to 'protect private rights' and further a 'sufficiently strong public policy.' [Citation.]" (*Molinaro v. Molinaro* (2019) 33 Cal.App.5th 824 831–832, some internal citations omitted.)

B.

The Misdemeanor Complaint Does Not Charge An Actionable Offense

Because this is a demurrer to the misdemeanor complaint, the court is restricted to the face of the complaint in deciding if the allegations fail to state a public offense as a matter of law. (See *People v. Biane, supra,* 58 Cal.4th at p. 388.)

Defendant objects to the portion of the DVPO which prohibits her from "ongoing posting and communications made by Melissanne Velyvis involving John Velyvis", and that she "shall

cease and desist from publishing any information concerning Petitioner and his children for the duration of this restraining order." (MPA p. 8) The Family Law court's order found this prohibition to be necessary to prevent defendant from "harassing Petitioner, damaging Petitioner's reputation, interfering with Petitioner's professional livelihood and damaging Petitioner's personal relationships."

In California, a court must find that "extraordinary circumstances" exist in order to restrain the defendant's right to share independently obtained information about another adult with other willing adults. The fact the public sharing of these comments might be humiliating to the targeted adult, or cause emotional distress or even cause harm to the subject's professional reputation, does not rise to the level of a compelling or extraordinary circumstance.

In *In re Marriage of Candiotti* (1995) 34 Cal. App. 4th 718, the court struck down a protective order which permitted the ex-wife's (Debra) to share negative, independently obtained information about her ex-husband's new wife during contentious child custody proceedings, only to a specific set of adults and professionals associated with the court proceedings. (*Id.* at p. 721.)

The court held that while *the state has a compelling interest to restrain* Debra from disparaging the new wife to the divorced couple's children or in the children's presence, "the order here went further, actually impinging on a parent's right to speak about another adult, outside the presence of the children. Such an order, under these circumstances, constitutes undue prior restraint of speech. It would prevent Debra from talking privately to her family, friends, coworkers, or perfect strangers about her dissatisfaction with her children's living situation." (*Id.*, 34 Cal. App. 4th at p. 725, *emphasis added.*)

In reaching this conclusion, the court in *Candiotti, supra,* recognized that the emotional discomfort or harm to reputation that disparaging comments may cause to the targeted adult do not constitute sufficiently compelling reasons to restrain them:

> Thus, while we agree that the court certainly has the power to prevent Debra from undermining Thomas's parental relationship by alienating the children from Donna, the order here was much more far-reaching, aimed at conduct that might

> cause others, outside the immediate family, to think ill of Donna. Such remarks by Debra may be rude or unkind. They may be motivated by hostility. To the extent they are libelous, they may be actionable. But they are too attenuated from conduct directly affecting the children to support a prior restraint on Debra's constitutional right to utter them.

(*In re Marriage of Candiotti, supra,* 34 Cal.App.4th 718, 726.)

Likewise, in *Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135, the trial court issued a preliminary injunction prohibiting plaintiff actress Gilbert's ex-husband Brinkman from disclosing any information regarding Gilbert's drug or alcohol use or sexual relations with other men that Brinkman acquired before, during or after their marriage, to anyone (except as necessary to the current court proceedings). (*Id.* at p. 1142.)

The court held the preliminary injunction was an invalid prior restraint on Brinkman's free speech rights and that Gilbert's claimed emotional distress and reputational damage are not sufficiently compelling reasons to justify the prohibition. (*Id.* at pp. 1141, 1145-1146.) "Even if this were a family law action, the preliminary injunction went beyond precluding Brinkman from making disparaging remarks about Gilbert in [their child] Dakota's presence. As in *Candiotti*, the order in this case restrained Brinkman from talking privately to family, friends, and coworkers about his dissatisfaction with Gilbert as a parent." (*Gilbert, supra* 43 Cal.App.4th at p. 1146.)

The *Gilbert* court also found that since Gilbert actively sought publicity as a well-known actress, Brinkman's free speech rights outweighed her reduced privacy interest to keep these matters out of the public sphere. (*Id.* at p. 1146-1147.)

Under circumstances similar to our case, the trial court in *Molinaro v. Molinaro, supra,* 33 Cal. App. 5th 824 issued a DVPO prohibiting the husband Michael from posting anything about his pending divorce from Bertha on Facebook. Bertha complained that Michael had physically obstructed her from moving out of the couple's home and had physically intimidated her. (*Id.* at pp. 826-827.) At a contested hearing on her application for the DVPO, Bertha complained that Michael was posting everything about the divorce case on Facebook; he gave their children ages 18, 17 and 13 years old, copies of Bertha's pleadings; he posted on Facebook

false statements that Bertha ran away with $250,000 from the couple's home equity line of credit and that she is crazy and has hallucinations; and she said his behavior was getting worse and she feared for her life and her children's safety. (*Id.* at p. 828.)

The DVPO issued by the court included a stay-away order and ordered Michael not " 'to post anything about the case on Facebook'" and " 'not to discuss the case with the children.'" (*Molinaro, supra,* 33 Cal.App.5th at p. 830.)

On appeal from the DVPO, the appellate court held that the portion of the restraining order barring Michael from "posting anything about the case on Facebook" was unconstitutionally overbroad and impermissibly infringed on his free speech rights. (*Id.* at p. 408.) It found that his "posts were not specifically directed to the minor children, but in many cases invited comments from Michael's adult friends and extended family, . ." and that most of his posts "expressed his apparent despair about the divorce and his separation from the children. . . ."

The court concluded, as did the court in *Candiotti*, that such comments were " 'too attenuated from conduct directly affecting the children to support a prior restraint on [Michael's] constitutional right to utter them.' [Citation.]" (*Molinaro, supra,* 33 Cal.App.5th 824 [33 Cal.App.5th at p. 833.)

Our courts also recognize that a person has a constitutional right to repeat or comment upon public or private information, not previously found by a trial court to be defamatory. " 'The attempt to enjoin the initial distribution of a defamatory matter meets several barriers, the most impervious being the constitutional prohibitions against prior restraints on free speech and press....' [Citation.]" (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1158 [injunction may properly issue *after* a trial prohibiting the defendant from repeating specific statements found at trial to be defamatory]; accord. *Evans, supra,* 162 Cal.App.4th at p. 1169 ["[A] court may not constitutionally prevent a person from uttering a 'defamatory' statement before it has been determined at trial that the statement was defamatory."].)

There is nothing on the face of the complaint, or in the Family Court judge's judicially-noticed findings of fact to indicate any of defendant's communications were previously found to be defamatory.

As stated in the DVPO, the Family Law judge found that defendant's statements about Dr. Velyvis were intentionally harassing, damaged his reputation and interfered with his personal relationships.

Based on the authorities discussed above, these reasons are insufficient to justify such a broad prohibition. The court finds that the portion of the DVPO restraining defendant from posting on the internet or communicating any information about defendant's ex-husband or his children is impermissibly overbroad and constitutes an invalid prior restraint under the federal and California constitutions. Violation of this portion of the DVPO, therefore, is not an actionable offense.

Since, as the court has been informed, the misdemeanor complaint issued based on defendant's alleged violation of this "no speech" provision of the DVPO, the demurrer to the misdemeanor complaint is sustained.

There are no further issues pertinent to this demurrer that require the court to address defendant's remaining attacks on the DVPO.

SO ORDERED.

Dated: July 27, 2020

Roy O. Chernus
Judge

MARIN COUNTY SUPERIOR COURT
3501 Civic Center Drive
P.O. Box 4988
San Rafael, CA 94913-4988

THE PEOPLE OF THE STATE OF CALIFORNIA **vs.** **MELISSANE VELYVIS**	CASE NO. **CR211376A** **PROOF OF SERVICE BY FIRST CLASS MAIL** *Code of Civil Procedure Sections 1013a and 2015.5*

I am an employee of the Marin County Superior Court. I am over the age of 18 years and not a party to this action. My business address is 3501 Civic Center Drive, Hall of Justice, San Rafael, California.

On July 28, 2020, I served the following document(s): **ORDER SUSTAINING DEMURRER TO COMPLAINT** in said action to all interested parties, by placing the envelope for collection and mailing on the date shown thereon, so as to cause it to be mailed on that date following standard court practices. I am readily familiar with the court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

MARIN COUNTY DISTRICT ATTORNEY
ATTN; ROOPA KRISHNA, ESQ.
ROOM 130

WILL MOREHEAD, ESQ.
407 SAN ANSELMO AVENUE, #201
SAN ANSELMO, CA 94960

VIA INTER OFFICE MAIL

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

JAMES M. KIM
Court Executive Officer

Executed at San Rafael, California
On: July 28, 2020

By: _____
M, Murphy, DEPUTY