



MEMORANDUM

TO: Hons. Vito C. Caruso, George J. Silver, and Edwina G. Mendelson
Deputy Chief Administrative Judges

FROM: Anthony R. Perri, Deputy Counsel: Criminal Justice

SUBJECT: *Crawford v. Ally*, No. 13911, 2021 WL 2582799, at *3 (1st Dep't June 24, 2021)
Due Process Hearings and Temporary Orders of Protection

DATE: June 27, 2021

Executive Summary

On June 24, 2021, the Appellate Division, handed down *Crawford v. Ally*, No. 13911, 2021 WL 2582799, at *1 (1st Dep't June 24, 2021), a unanimous decision affecting the issuance of temporary orders of protection ("TOP(s)").

Crawford emphasizes that, before a court of criminal jurisdiction may issue a full stay-away TOP, due process requires an "evidentiary hearing" if and where such order would immediately deprive the defendant of a significant personal liberty or property interest.

Crawford does not lay out the exact contours of this "evidentiary hearing" but **should not be read** as to require live witnesses and/or non-hearsay testimony as a matter of law.

The Appellate Division only requires that the hearing be held **(i) promptly, (ii) on notice to all parties, and (iii) in a manner that enables the court to ascertain the facts necessary to decide whether or not the TOP should be issued.**

Procedural Posture

- *Crawford* is an appeal of a dismissed Article 78 proceeding concerning a New York City Criminal Court matter where a female defendant in a subsequently dismissed domestic violence case involving her now ex-boyfriend challenged the issuance of a full stay-away TOP.
- The Article 78 proceeding had been dismissed on mootness grounds, but the Appellate Division decided to rule on the merits because (i) there was a likelihood of repetition; (ii) the issue typically evades review; and (iii) there were substantial and novel legal issues at stake. See *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-715 (1980).

Relevant Facts in the Underlying Criminal Court Matter

- Defendant was originally charged with third-degree assault, petit larceny, obstruction of breathing or blood circulation, and second-degree harassment based on her now ex-boyfriend's sworn allegations.
- At arraignment, the Criminal Court issued a full TOP after hearing from counsel.
 - Defense Counsel argued against its issuance noting (i) that the address on the TOP was the defendant's own apartment, (ii) that she was the lessee, and (iii) that she resided there with her young children for whom she was the primary caregiver.
 - The People responded that "there was no indication in their file that a limited TOP was 'necessary or appropriate.'"
 - The Court declined to issue a limited TOP emphasizing that they would not do so "without the People's consent."
 - The sworn allegations supporting the arrest do not seem to have been explicitly referenced as a basis for the full TOP.
 - The case was adjourned for five days for the People to "investigate" the appropriateness of the full TOP.
- The Court held a hearing on the next court date.
 - The People argued that the TOP should remain a full stay-away, "considering the nature of the charges" and the complainant's visible physical injuries. The People also asserted that both defendant and complainant resided in the apartment. This was based—at least in part—on approximately seventeen prior domestic incident reports.
 - NB: The prior Domestic Incident Reports ("DIR(s)") all were against the complainant, in favor of the defendant. There appears to have been no discussion of this fact or the details in the DIRs specifically at this proceeding.
 - Defense Counsel asserted that the lease allowed only the defendant, her brother, and her two children to live in the apartment and thus the complainant's refusal to leave the residence based upon the TOP created a significant risk that she could lose the apartment.
 - In subsequent motions, Defense Counsel produced a NYCHA lease substantiating this assertion.
 - The Court denied defendant's request for a modification of the TOP.
 - Defense Counsel then requested a due process hearing based on, what counsel referred to as, the property and family interests at stake.
 - The court stated that it was "hearing ... the issues [now]" and denied the request.
 - The case was then adjourned a month.
- A subsequent motion to amend the TOP was denied on the grounds that there had been "no change of circumstances."
- The defendant next sought "a writ of mandamus directing the Bronx Criminal Court to hold an evidentiary hearing concerning the appropriateness and scope of the [TOP]" issued in her criminal case.

- At a proceeding held soon thereafter (but three months after arraignment), a different Criminal Court judge ruled that a full TOP was not appropriate under the relevant CPL § 530.12 factors and issued a limited order after reviewing the following evidence:
 - Previous DIRs noting many prior incidents of abuse against the defendant by the complainant;
 - Photographs of the injuries where there was “nothing of any specificity indicating that [the defendant] was in fact responsible for those injuries;” and
 - That the complainant had previously threatened the defendant and had an alcohol abuse issue.
- The criminal case was later dismissed upon a motion by the prosecution.

Appellate Division Holding

- “This Court need not articulate the precise form of the evidentiary hearing required.”
- At a minimum, however:
 - **when the defendant presents the court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP,**
 - the Criminal Court should:
 - **conduct a prompt evidentiary hearing**
 - **on notice to all parties** and
 - **in a manner that enables the judge to ascertain the facts necessary to decide whether the TOP should be issued.**

Analysis/Implications

- The Appellate Division rightly was attempting to prevent the future issuance of unwarranted TOPs by re-articulating the reality that due process requires a thoughtful and thorough analysis of all the facts before and readily available to the Court before a TOP may issue.
- The actual missteps in *Crawford* are arguably confined to the arraignment and the first full hearing on the potential modification of the TOP.
 - *Crawford* suggests that the Criminal Court at arraignments incorrectly relied predominantly on the People’s “consent” rather than its own independent analysis of the facts in deciding to issue a full TOP.
 - The record at the TOP hearing (investigation appearance) is better but still deficient as the Court fails to fully evaluate the evidence that is before and readily available to it.
 - The final full hearing that modified the order arguably would satisfy the due process requirements that the First Department is attempting to impose and does not appear to have included any live testimony.
 - Therefore, what would be considered normal best practices in issuing a TOP—rather than a full-blown hearing with live testimony—could potentially address

the deprivation concerns this unique fact pattern raised for the Appellate Division.

- A “*Crawford* hearing” is only triggered when a defendant pleads that the TOP may cause an **immediate** and **significant** deprivation of a **substantial personal or property interest**.
 - Accordingly, a defendant who does not live with a partner or who is not in danger of actually losing whatever property interest may exist in a shared dwelling, may well fail to meet this threshold burden.
 - By contrast, the defendant in *Crawford* was not merely being excluded from a shared residence but also in danger of losing her actual lease and of being deprived of access to her children.
 - When adequately pled, however, the issuing court should review the sworn allegations, the current DIR, any prior DIRs, and any other evidence proffered and hear the defense and prosecution out fully on the record before exercising its independent judgement.
 - Although a more robust record is advisable where the defendant pleads a significant personal/property interest, courts should resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing due to the significant negative operational impact and real safety (physical and psychological) concerns for most domestic violence complainants.
 - The prompt hearing on notice may properly be conducted (or at least commenced) at arraignment if the People are present, and a full TOP may be reasonably issued at that time.
 - However, courts may also need to be more flexible in reopening such an evidentiary hearing as additional facts are gathered rather than merely examining later applications for a change in circumstances.
 - When the People are not represented at the arraignment and a “*Crawford* hearing” is warranted, a full TOP may nevertheless issue where appropriate under CPL § 530.12 after making as thorough a record as possible, and the matter should be adjourned to the shortest date where both sides could be present to continue the hearing.

Please let me know if you have any comments or questions regarding this memorandum.

Thank you.

2021 WL 2582799
Supreme Court, Appellate Division,
First Department, New York.

In the Matter of Shamika
CRAWFORD, Petitioner–Appellant,
v.
Honorable Shahabuddeen ALLY, etc.,
et al., Respondents–Respondents.
Lambda Legal Defense and Education Fund,
Inc., New York City Gay and Lesbian Anti-
Violence Project, the Sylvia Rivera Law Project,
Transgender Law Center, Brooklyn Defender
Services, the Legal Aid Society and Neighborhood
Defender Service of Harlem, Amici Curiae.

Appeal No. 13911

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[M-1224 & M-1403]

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Index No. 260054/20

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Case No. 2020-04520

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ENTERED June 24, 2021

Petitioner appeals from the order and judgment (one paper), of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 16, 2020, which denied as moot the petition seeking a writ of mandamus to compel respondent Criminal Court Judge to hold an evidentiary hearing concerning the appropriateness and scope of a temporary order of protection, and dismissed as moot this proceeding brought pursuant to CPLR article 78.

Attorneys and Law Firms

Covington & Burling LLP, New York (David L. Kornblau and Shira Poliak of counsel), for appellant.

Letitia James, Attorney General, New York (Blair J. Greenwald and Steven C. Wu of counsel), for Hon. Shahabuddeen Ally, respondent.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen and Peter D. Coddington of counsel), for Darcel D. Clark, respondent.

Lambda Legal Defense and Education Fund Inc., New York (Richard Saenz and Ethan Rice of counsel), for Lambda Legal Defense and Education Fund, Inc., New York City Gay and Lesbian Anti–Violence Project, The Sylvia Rivera Law Project, Transgender Law Center, amici curiae.

Brooklyn Defender Services, Brooklyn (S. Lucas Marquez, Jessica Nitsche, Matthew Robinson and Jeffrey Blank of counsel), The Legal Aid Society, New York (Justine Luongo and Corey Stoughton of counsel), and Neighborhood Defender Service of Harlem, New York (Meghna Philip and Avinash Samarth of counsel), for Brooklyn Defender Services, The Legal Aid Society and Neighborhood Defender Service of Harlem, amici curiae.

Dianne T. Renwick, J.P., Troy K. Webber, Lizbeth González, Saliann Scarpulla, JJ.

Opinion

WEBBER, J.

***1** We are asked to decide whether Supreme Court properly denied as moot the petition for a writ of mandamus to compel respondent Criminal Court Judge to hold an evidentiary hearing concerning the appropriateness and scope of a temporary order of protection (TOP) and dismissed the proceeding as moot. The parties agree that this proceeding is moot, since the TOP in the underlying criminal proceeding was renewed without the condition that petitioner stay away from the complainant's home, as petitioner had sought, and the charges against petitioner were dismissed while the proceeding was pending in Supreme Court. They disagree as to whether the proceeding presents an exception to the mootness doctrine which would allow us nevertheless to rule on the petition. We find that the mootness exception applies here and accordingly, we reverse to the extent of declaring that the court should have held an evidentiary hearing.

On November 3, 2019, petitioner was arrested on a criminal complaint charging her with third-degree assault, petit larceny, obstruction of breathing or blood circulation, and second-degree harassment, based on sworn allegations by her partner, nonparty Keivian Mayers (Mayers), that she and two men assaulted him. This incident allegedly occurred inside 1232 Clay Avenue, Apt. 4B, Bronx, New York.

At petitioner's arraignment in Criminal Court, the People consented to petitioner's release but requested a TOP. The court issued a TOP prohibiting petitioner from contacting

Mayers and granted petitioner's request that it be "subject to [F]amily [C]ourt modification," but denied her request to issue a "limited" TOP. The TOP itself, effective until November 8, 2019, prohibited petitioner from entering Mayers's home, listed as the address where the alleged incident occurred, except to retrieve personal items the following day.

During argument, petitioner's counsel stated that the address listed on the TOP was petitioner's apartment, that she was the lessee of the residence, and that she resided there with her young children, for whom she was the primary caregiver. Counsel argued that barring her from the residence would result in barring the children as well. The People stated that there was no indication in their file that a limited TOP was "necessary or appropriate." The court declined to issue a limited TOP "without the People's consent," but stated that it would adjourn the case for an earlier date, "for that issue to be investigated." The case was adjourned to November 8, 2019.

On November 8, 2019, petitioner appeared in Criminal Court. The People asked that the TOP "remain full, considering the nature of the charges" and Mayers's visible physical injuries when he was interviewed on the date of petitioner's arrest. The Assistant District Attorney stated that it was his understanding that both petitioner and Mayers resided in the apartment. Apparently, this was based upon the information listed on approximately 17 prior domestic incident reports (DIRs) filed by petitioner against Mayers. There was no further inquiry as to the DIRs.

*2 Petitioner renewed her request for a limited TOP, noting that Mayers was residing in petitioner's home and that the effect of the order was to separate her from her two children. Counsel asserted that the lease allowed only petitioner, her brother, and her two children to live in the apartment. Counsel stated that Mayers refused to leave the residence and that the TOP created the risk of petitioner's losing the apartment.

The court denied petitioner's request for a modification to a limited TOP, noting that there was still a "remedy to see the children" and as to "gaining access to the home." Counsel then requested a short date in order to conduct a due process hearing to require the People to show that the TOP was actually needed, based on what counsel referred to as the property interest and family interest at stake. In reply, the court stated that it was "hearing ... the issues [now]." The court further stated that unless petitioner was prepared to present additional information as to the issuance of the TOP,

it would remain in effect. The case was then adjourned to December 20, 2019 with the full TOP in effect until that date.

On November 20, 2019, petitioner again moved the Criminal Court for a modification of the TOP. Petitioner attached a lease addendum and family composition, listing only herself, her brother, and her two children as authorized occupants of her New York City Housing Authority (N.Y.CHA) unit. The People opposed the motion, arguing that the issue had already been litigated, that petitioner already had an opportunity to make her arguments sufficient to satisfy due process, and, finally, that the Criminal Court was the least appropriate forum for resolving claims to a particular residence, since Mayers was not a party and as such did not have a meaningful opportunity to respond. The court denied the motion, finding there was "no change of circumstances." A new TOP was issued effective until January 30, 2020.

On January 22, 2020, petitioner sought "a writ of mandamus directing the Bronx Criminal Court to hold an evidentiary hearing concerning the appropriateness and scope of the [TOP]" issued in her criminal case.

At a proceeding on January 30, 2020, another Criminal Court judge presiding over the case modified the TOP. In doing so, the court reviewed the evidence presented, including the fact that while no prior order of protection had been issued against petitioner, there had been many prior incidents of abuse against petitioner by Mayers. The court also apparently reviewed the photographs of Mayers's injuries and noted that while they depicted injuries, there was "nothing of any specificity indicating that [petitioner] was in fact responsible for those injuries."

The court further stated that the record made that day indicated that Mayers had previously threatened petitioner and that he had an alcohol intoxication issue. The court concluded by stating that under  CPL 530.12(1)(a), "it would not be appropriate to require [petitioner] to stay away from the home, school, business, or place of employment of the individual whom she has children in common with." However, the court found it appropriate to issue an order of protection requiring petitioner to "refrain from any act that would create an unreasonable risk to the health, safety, and welfare of any family member and in particular, that she is not to engage[] in any family offences [sic] against the complainant."

*3 The case was then adjourned to March 5, 2020. On that date, upon the application of the People, the case was dismissed. Based upon that dismissal, Supreme Court dismissed the petition for a writ of mandamus as moot.

We find that the Criminal Court's initial failure to hold an evidentiary hearing in accordance with petitioner's due process rights after being informed that petitioner might suffer the deprivation of a significant liberty or property interest upon issuance of the TOP falls within the exception to the mootness doctrine: "(1)[there is] a likelihood of repetition, either between the parties or among other members of the public; (2) [it involves] a phenomenon typically evading review; and (3) [there is] a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714–715 [1980]).

Although the issue is not likely to recur with respect to petitioner, the parties are in agreement that the issue is likely to recur "among other members of the public." As was stated by the Criminal Court judge who ultimately issued the limited TOP, "it is [the Bronx Criminal] [C]ourt's practice not to conduct a hearing" when a defendant challenges the prosecution's application for a TOP. The District Attorney's Office conceded that temporary orders of protection are "regularly" issued in domestic abuse cases in the Bronx, and Supreme Court in its decision stated that "similar circumstances may arise in another proceeding by someone else in the general public." The correct standard is whether the issue "typically"—not "necessarily"—evades review (*see Hearst Corp.*, 50 N.Y.2d at 715).

As to the second prong, pretrial temporary orders of protection typically last for only a short duration between court appearances, often for one or two months. This short duration between appearances results in little or "no opportunity to litigate a challenge to any one such order while it is still in effect" (*People v. Forman*, 145 Misc.2d 115, 122 [Crim Ct, N.Y. County 1989]). Thus, the temporary nature of short-term orders of protection serves in many ways to insulate them from legal challenge.

As to a showing of substantial and novel issues, the Court of Appeals has indicated that, if the issue is substantial, novelty is not a requirement of the mootness exception (*see People ex rel. McManus v. Horn*, 18 NY3d 660, 663–664 [2012]; *City of New York v. Maul*, 14 NY3d 499, 507 [2010]). The

impact of being barred from one's home, even temporarily, can be far-reaching; notably, petitioner faces the potential loss of specialized public housing. Depriving a person of her valuable property right in a lease or tenancy interest by issuing a Criminal Court order of protection triggers the due

process requirement (*see People v. Forman*, 145 Misc.2d at 125–130). Moreover, in addition to the potential loss of her NYCHA apartment, petitioner was barred from access to her children for nearly three months.

The present circumstances are similar to those in *Matter of F.W. (Monroe W.)* (183 AD3d 276 [1st Dept 2020]), where a father appealed, on due process grounds, the Bronx Family Court's delay in holding an evidentiary hearing regarding the removal of his children from his care based on alleged parental neglect, and before the appeal was decided, the father prevailed at the evidentiary hearing, and the Family Court completed the neglect proceeding in its entirety, mooted the appeal. This Court found that the mootness exception applied, and reached the merits of the appeal. We held that the Family Court's delay in holding an expedited evidentiary hearing interfered with the father's fundamental liberty interest in the care, custody, and control of his children and violated due process in protecting that interest (183 AD3d at 281).

*4 In sum, while this proceeding is moot as to petitioner, it falls within the exception to the mootness doctrine because it implicates substantial issues that will likely recur elsewhere and that typically evade review, and we hold that the Criminal Court should have held a hearing.

In order to issue a TOP, and thereby deprive a defendant of significant liberty and property interests, there must be an articulated reasonable basis for its issuance. While consideration of whether the defendant poses a "danger of intimidation or injury" to the complainant (*see People v. Forman*, 145 Misc.2d at 125) is one factor, there are other factors that should be considered as well. The Criminal Procedure Law enumerates a non-exhaustive list of factors that a court "shall consider" when determining whether to order the defendant in a family offense case "to stay away from the home, school, business or place of employment of the family or household member or of any designated witness" (CPL 530.12[1][a]). Under this statute, the court must consider "whether the temporary order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or

alcohol abuse, and access to weapons.” Indeed, in the instant case, in the January 2020 proceeding, after being apprised of all of the relevant information, including the filing of 17 prior DIRs that alleged domestic violence against petitioner by Mayers, the Criminal Court articulated a reasoned basis for issuing a “limited” TOP, based in part on  CPL 530.12.

This Court need not articulate the precise form of the evidentiary hearing required. At a minimum, however, when the defendant presents the court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP, the Criminal Court should conduct a prompt evidentiary hearing on notice to all parties and in a manner that enables the judge to ascertain the facts necessary to decide whether or not the TOP should be issued (*see Matter of Lopez v. Fischer*, 2009 N.Y. Slip Op. 32859(U), *4 [Sup Ct, Nassau County 2009]; *cf.*  *Krimstock v. Kelly*, 306 F3d 40, 69 [2d Cir2002]).

Accordingly, the order and judgment (one paper), of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 16, 2020, which denied

as moot the petition seeking a writ of mandamus to compel respondent Criminal Court Judge to hold an evidentiary hearing concerning the appropriateness and scope of a temporary order of protection, and dismissed as moot this proceeding brought pursuant to CPLR article 78, should be reversed, on the law, without costs, to the extent of declaring that the petition should have been granted.

All concur.

*5 Order and judgment (one paper), Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 16, 2020, reversed, on the law, without costs, to the extent of declaring that the petition should have been granted.

Motions to file amicus curiae briefs granted, and the briefs deemed filed.

All Citations

--- N.Y.S.3d ----, 2021 WL 2582799, 2021 N.Y. Slip Op. 04082

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