

Domestic Violence Defendants' Jury Trial Rights in GPS Monitoring

*Fred Medick**

Recently, a number of states passed laws permitting Global Positioning System (GPS) monitoring of domestic violence defendants.¹ These laws usually permit GPS monitoring only after the defendant has violated a protective order.² Activists explain that the safety these laws afford can come too late because many victims are in danger when they first decide to leave their abusers.³

In Massachusetts, new legislation expands courts' powers so that a court may order a defendant to wear a GPS monitoring device after the court signs the initial protective order.⁴ By advancing the option of GPS monitoring from the criminal stage to the civil stage, the Massachusetts legislation raises the question of whether there is a violation of the defendant's jury trial right under the Seventh Amendment of the U.S. Constitution or Article XV of the Massachusetts constitution.

The U.S. Constitution provides a right to a jury trial in civil matters. The Seventh Amendment states, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"⁵ While the Supreme Court incorporated the Sixth Amendment against the states, it has never reached the same conclusion regarding the Seventh Amendment.⁶ The Massachusetts legislation does not violate the Seventh Amendment.

The Massachusetts Constitution also provides a jury trial right in civil matters. It says, "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised [sic], the parties have a right to a trial by jury"⁷ Like the federal right, the Massachusetts civil jury trial right is not absolute. Article XV preserves the jury trial right only for "actions for

* J.D. Candidate, Harvard Law School, 2008; B.A., Stanford University, 1996. The author wishes to thank Sandra Pullman for her help in the production of this article.

¹ Maura Kelly, *Tracking Device: How About Using GPS Monitoring to Stop Batterers?*, SLATE, May 4, 2007, <http://www.slate.com/id/2165568> [hereinafter *Tracking Device*].

² See Leah Satine, Comment, *Maximal Safety, Minimal Intrusion: Monitoring Civil Protective Orders Without Implicating Privacy*, 43 HARV. C.R.-C.L. L. REV. 271, 272 (2008).

³ See *id.*

⁴ S. 1351, 185th Leg. (Mass. 2007).

⁵ U.S. CONST. amend. VII.

⁶ See, e.g., *Freeman v. Wood*, 401 N.E.2d 108, 112 (Mass. 1980) (stating that the Supreme Court has never found that the Seventh Amendment applies to the states). See also *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877) ("We have held over and over again that art. 7 of the amendments to the Constitution of the United States relating to trials by jury applies only to the courts of the United States").

⁷ MASS. CONST. pt. 1, art. XV.

which a right to trial by jury was recognized at the time the Constitution of the Commonwealth was adopted in 1780.”⁸ In other words, the jury trial right “does not apply to cases which traditionally would have fallen within the jurisdiction of a court of equity.”⁹ To determine whether a case traditionally would have been equitable or legal, a court may look at the nature of the remedy sought.¹⁰ Also, although the Seventh Amendment does not apply, Massachusetts courts look to the Supreme Court’s interpretation for guidance.¹¹

Protective orders are a type of injunction,¹² and Seventh Amendment jurisprudence indicates that injunctions are equitable rather than legal.¹³ Therefore, it is unlikely that a court would find that Article XV provides a jury trial right to defendants who are ordered to wear GPS monitoring after a domestic violence civil proceeding. A defendant could argue that GPS monitoring falls under the Sixth Amendment rather than the Seventh Amendment. To do so, the defendant would have to argue GPS monitoring is actually a criminal penalty rather than a civil penalty.

When determining whether a penalty is civil or criminal, the court must first look at legislative intent.¹⁴ However, legislative intent is not dispositive.¹⁵ Even in cases where the legislature clearly intended a penalty to be civil, a court must ask “whether the statutory scheme was so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty.”¹⁶ To make this determination, a court considers the following factors:

- (1) whether the sanction involves an affirmative disability or restraint;
- (2) whether it has historically been regarded as a punishment;
- (3) whether it comes into play only on a finding of *scienter*;
- (4) whether its operation will promote the traditional aims of punishment - retribution and deterrence;
- (5) whether the behavior to which it applies is already a crime;
- (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and
- (7) whether it appears excessive in relation to the alternative purpose assigned.¹⁷

⁸ *New Bedford Hous. Auth. v. Olan*, 758 N.E.2d 1039, 1045 (Mass. 2001).

⁹ *Doherty v. Ret. Bd. of Medford*, 680 N.E.2d 45, 50 (Mass. 1997).

¹⁰ *Id.* (“As the remedy of restitution under [the relevant statute] is equitable in nature, art. 15 does not require a jury trial here.”).

¹¹ *Id.* (“[A]lthough the Seventh Amendment does not apply to State civil proceedings, its jurisprudence is instructive as we have granted a similar interpretation to art. 15.”).

¹² *See, e.g., Foreman v. Dallas County*, 193 F.3d 314, 323 (5th Cir. 1999) (“A temporary restraining order is a ‘stay put,’ equitable remedy that has as its essential purpose the preservation of the status quo while the merits of the cause are explored through litigation.”).

¹³ DANIEL R. COUILLETTE ET AL., 8 MOORE’S FEDERAL PRACTICE — CIVIL § 38.10[3][a][3] (3d ed. 2007) [hereinafter MOORE’S].

¹⁴ *Hudson v. United States*, 522 U.S. 93, 99 (1997).

¹⁵ *Id.*

¹⁶ *Id.* (internal citations omitted).

¹⁷ *Id.* at 99-100.

Only after weighing all of these factors can a court determine the true nature of the penalty.

It is unlikely that a court, after determining legislative intent and weighing the transformative factors, would conclude that civil GPS monitoring, as permitted in Massachusetts, is a criminal sanction. First, the legislature clearly intended GPS monitoring to be civil rather than criminal because the statute uses the language of civil litigation rather than that of criminal prosecution.¹⁸ Second, where the transformative factors are relevant, they weigh against finding that GPS monitoring is a criminal sanction. GPS monitoring is a relatively unobtrusive mechanism that does not involve an affirmative disability or restraint. Finally, historically, injunctions have not been regarded as punishment.¹⁹ Although a judge likely considers the issue of willfulness when deciding whether to sign a protective order, strictly speaking, a finding of willfulness is not a prerequisite to GPS monitoring.²⁰ GPS monitoring does not promote the aims of retribution and deterrence because it is only a minor inconvenience to the defendant, especially when compared to incarceration. Therefore, a court likely would find GPS monitoring to be a civil penalty.

Even if a court determines that GPS monitoring is criminal rather than civil, the defendant would still have to prove that the Sixth Amendment jury trial right applies. The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed”²¹ The Supreme Court held this right to be qualified. The Court has determined that no jury trial right exists when an offense is “petty.”²² To determine whether an offense is petty, courts look first to the length of the sentence.²³ If the sentence involves six months or fewer of incarceration, then the offense is presumed to be petty.²⁴ However, if additional penalties are severe enough, this presumption can be overcome.²⁵ Therefore, if the legislature “packs an offense it deems ‘serious’ with onerous penalties that nonetheless ‘do not puncture the 6-month incarceration line,’” the right to a jury trial might still attach.²⁶

GPS monitoring involves no prison sentence at all, so it is presumed to be petty. A defendant would have to persuade a court that the onus of GPS monitoring is heavy enough to overcome this presumption. A defendant’s

¹⁸ See S. 1351, 185th Leg. (Mass. 2007) (referring to a “defendant” and a “plaintiff” rather than a “defendant” and a “prosecutor”).

¹⁹ MOORE’S, *supra* note 13.

²⁰ *Id.*

²¹ U.S. CONST. amend. VI.

²² *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (“[S]o-called ‘petty offenses’ may be tried without a jury.”).

²³ *Id.* at 69.

²⁴ *Blanton v. N. Las Vegas*, 489 U.S. 538, 543 (1989).

²⁵ *Id.*

²⁶ *Id.*

strongest argument might be that the Massachusetts legislation contains no apparent limit on the length of time GPS monitoring would last.

Under Massachusetts law, a judge may issue a permanent restraining order.²⁷ Thus, for example, a twenty-year-old defendant could be subjected to a lifetime of GPS monitoring. He could spend the next sixty years wearing a GPS ankle bracelet based on the decision of a single judge, without ever having his case heard by a jury of his peers.²⁸ Still, it is unlikely that this single hypothetical result, extreme as it is, would be enough to overcome the presumption that a penalty involving no prison sentence would nonetheless be criminal rather than civil.

The fact that a jury trial right apparently does not attach in the context of civil-stage protective orders does not mean that we must feel comfortable with the balance current constitutional jurisprudence strikes between the plaintiff's civil rights and the defendant's civil liberties. On the one hand, we applaud technology that protects battered women from continued violence and even death. On the other hand, we are unsettled by the specter of a defendant ordered by a judge—not a jury—to wear a GPS anklet for the rest of his life. Perhaps the conflict derives from the fact that jurisprudence in this area tends to determine the existence of a jury trial right based on the crime committed or the remedy sought, rather than the means by which the remedy is implemented. Traditionally, protective orders were relatively noninvasive—a party was told not to go near another party's home or work for a certain period of time. With the introduction of GPS monitoring, however, the landscape of protective orders is dramatically changing, and this change will likely continue. But the relevant jurisprudence might not be equipped to address these changes effectively. If the Court took into account the means of implementation as well as the crime and the remedy, the jury trial right analysis might be more holistic and individualized.

A second solution would be to restructure domestic violence proceedings so that the first stage is considered criminal rather than civil. Although this would hardly guarantee a domestic violence defendant a jury trial, it would at least give the defendant an opportunity to prove that his claim met the established jury trial test. A drawback to this solution is that it would upset the structure and might have unforeseen and undesirable consequences, such as making it more difficult for plaintiffs to get protective orders in the first place, or making plaintiffs less willing to come forward because of the increased scrutiny inherent in a criminal proceeding.

²⁷ See MASS. GEN. LAWS ANN. ch. 209A, § 3 (West 2007). *But see* MassLegalHelp, 209A Protective Orders, <http://www.masslegalhelp.org/domestic-violence/chapter5-209a-protective-orders> (last visited Oct. 31, 2007) (noting that permanent restraining orders are uncommon).

²⁸ In addition, the Massachusetts law requires defendants to pay for their own monitoring. GPS monitoring is expensive, costing about \$10 per day, or \$3650 per year. *Tracking Device*, *supra* note 1. For our hypothetical twenty-year-old defendant ordered to sixty years of GPS monitoring, assuming the cost of monitoring stayed constant relative to inflation, the total bill would be \$73,000 in today's dollars.