CASE ALERT: WASHINGTON

The Sexual Assault Protection Order Law Does Not Allow Respondents to Defend Against Nonconsensual Sex by Saying They Believed an Incapacitated Victim Was Able to Consent

DeSean v. Sanger, 2 Wn.3d 329, 536 P.3d 191 (2023)

How Could This Case Help? Someone who has a Sexual Assault Protection Order (SAPO) filed against them is **not** allowed to bring up criminal "affirmative defenses," like that they reasonably believed the victim had the ability to consent to sex when the victim is incapacitated such as by alcohol or other substances. The Sexual Assault Protection Order Act is a civil type of protection. It is different from the criminal law where these defenses are allowed. The other party is not allowed to present any criminal "affirmative defense" in a civil sexual assault protection order hearing.

Summary of the Case DeSean filed a petition for a sexual assault protection order (SAPO) in Washington following a trip to Nevada, where she met Sanger, became heavily intoxicated, and was sexually assaulted by him. DeSean said Sanger engaged in "non-consensual sexual penetration." The trial court found that DeSean could not consent because she was too intoxicated and issued a one-year protection order against Sanger. Sanger appealed, arguing that the trial court should have considered whether from his perspective he reasonably believed DeSean was not incapacitated and could consent (this defense is available in *criminal* prosecutions). The Court of Appeals agreed with Sanger, that the trial court was wrong in refusing to consider Sanger's defense and reversed the protection order. DeSean appealed to the Supreme Court.

The Washington Supreme Court agreed with DeSean. First, the Court said that the civil protection order law does not include defenses like reasonably believing that someone could consent even if they are intoxicated. Second, the Court said the civil law is separate from criminal proceedings, by focusing on helping victims, rather than punishing perpetrators. The new protection order law explicitly defines consent – "Consent cannot be freely given when a person does not have capacity due to . . . intoxication,"– meaning it does not matter whether Sanger believed DeSean was not intoxicated. Because Desean was intoxicated, she could not consent. Finally, if there has been proven "nonconsensual sexual penetration," a petitioner like DeSean does not have to prove the respondent's intent. The respondent is automatically responsible.

PRACTICE TIPS

1. If the **respondent argues they believed the petitioner consented to sex when the victim was intoxicated**, show the court this case and RCW 7.105.010(5).
2. If the **respondent relies on criminal law to argue defenses that are used in sex offense prosecutions** during a SAPO hearing, show the court this case.
3. **You do NOT have to prove the respondent's intent** when the respondent engaged in nonconsensual sexual penetration; show the court this case.

For questions or clarifications, contact Family Violence Appellate Project at infoWA@fvaplaw.org or (360) 680-1030. Thank you!