***Miller v MacDonald* [2006] ACTSC 76 (30 June 2006) – Australian Capital Territory Supreme Court**

'Conditions of orders' – 'Conflict between orders' – 'Contravention of a protection order' – 'Explaining the orders' – 'Family court orders' – 'Mistake of law' – 'Protection order' – 'Recklessness' – 'Repeated breaches'

Charge/s: Contravention of a domestic violence order x 2.

Appeal type: Appeal against conviction and appeal against sentence.

Facts: The appellant's former wife, with whom he had a daughter, obtained a domestic violence protection order against him, prohibiting contact. Shortly before the appellant left for an extended visit to the United States, the Family Court made an order which vacated this contact order. It stated that while the appellant was out of the country, he could send gifts and correspondence or postcards to his daughter provided that the contact was directed to the child and that he could send a photograph from time to time. When he was back in Australia, the appellant sent his daughter a package containing photographs, gifts and a letter. Additionally, the appellant mistakenly sent his former wife an email when he sent a group message to his siblings. He had previously been interviewed by police for a similar mistake. The appellant had spent 42 days in custody on remand. The magistrate imposed a six month term of imprisonment from the date he was taken into custody and directed he be released after serving 42 days, effectively that he be released the day following the hearing. He also imposed an 18 month good behaviour bond, subject to some conditions (see[22]).

Issue/s:

1. The appellant made an honest and reasonable mistake of law by sending his daughter a package.
2. The email to his wife was sent in error.
3. The sentence was manifestly excessive.

Decision and reasoning: The appeal was dismissed. First, His Honour held that: '[I]t is certainly fair to say that if a person seeks to rely on a Family Court order that varies what is otherwise a clear domestic violence order, it is incumbent upon that person to take steps to understand what the Family Court order says. And it seems to me that the Magistrate was perfectly entitled to find that Mr Miller was at least reckless in assuming that that order, which on its face only covers the time that he was out of the country, continued to apply after he had returned to Australia' at [5].

Second, on its own, the email sent in error to his former wife would have been unlikely to meet the requisite standard of intent or recklessness. However, given that the appellant had made the same mistake before and had been interviewed by police for this, there was at least recklessness in relation to the sending of that message.

Third, the sentence could not be said to be manifestly excessive. His Honour noted that these were low level breaches of a domestic violence order, they involved recklessness rather than intent, and the nature of the correspondence in both the letter and the email was non-violent and non-threatening. However, the appellant had three prior appearances relating to seven convictions for breaches of a protection order. Connolly J stated:

'It seems to me that even though these were lower level, indeed very low level breaches in the sense that there was no actual or apprehended or threatened violence, repeated breaches however low level, do inevitably meet with an increase in sentence on the basic premise that when low level sentences do not stop the offending behaviour a court has little option but to continue a pattern of steadily ramping up the sentence' at [20].