

City of Newark v. Borrero, Unpublished Docket No. A-1416-08T2
(2009)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1416-08T2

CITY OF NEWARK,

Plaintiff-Appellant,

v.

ARNOLD BORRERO,

Defendant-Respondent.

Submitted October 20, 2009 - Decided November 12, 2009

Before Judges Skillman and Gilroy.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No.
L-3667-08.

Julien X. Neals, Corporation Counsel,
attorney for appellant (Steven F. Olivo,
Assistant Corporation Counsel, on the
brief).

Respondent Arnold Borrero has not filed a
brief.

PER CURIAM

On October 18, 2004, defendant Arnold Borrero, then a Newark Police Officer, was involved in an altercation with a motorist while in the course of issuing her a summons for obstructing traffic. As a result, defendant was charged with various offenses, including simple assault, in violation of N.J.S.A. 2C:12-1(a)(1). Defendant was found guilty of this charge in the Newark Municipal Court in the fall of 2006. The municipal court judge imposed a non-custodial, non-probationary sentence that included a \$250 fine and certain fees, assessments and costs.

The issue of the possible forfeiture of defendant's employment as a Newark Police Officer under N.J.S.A. 2C:51-2 was first raised at the conclusion of sentencing. The Assistant Essex County Prosecutor representing the State indicated that he would have to confer with his superiors to determine whether his office would apply for a waiver of such forfeiture. The municipal court judge continued the matter to another date to afford the Prosecutor's Office an opportunity to make this determination.

On that date, October 18, 2006, the Assistant Prosecutor advised the court that the Prosecutor's Office would not move for forfeiture of defendant's employment based on his conviction

for simple assault.¹ In explaining the position of his office, the Assistant Prosecutor stated:

It was my position that this action would be too severe especially taking into account the fact that Officer Barrero's pension -- be at risk. (Phonetic)

It's the [S]tate's position that the fact that the Officer has been found guilty of the offense is sufficient to deter any future conduct of a similar nature.

We do also take into account his history as a police officer and, obviously, most importantly, the fact as -- the finding that this Court has placed on the record by Your Honor on Friday.

Although it may have been unclear from the Assistant Prosecutor's statement of position whether the Prosecutor's Office was affirmatively seeking a waiver of the forfeiture of defendant's employment or only declining to seek a forfeiture at that time, the municipal court judge construed the Assistant Prosecutor's statement as an application for waiver, and granted the application:

Pursuant to New Jersey statute 2C:51-2, subsection . . . E. Any forfeiture or disqualification may be waived by the court

¹ The transcripts of defendant's sentencing in municipal court were not included in the record on this appeal. However, the court obtained those transcripts, which were part of the record on defendant's appeal from his conviction for simple assault, from the clerk's office. We take judicial notice of those transcripts, see N.J.R.E. 201(b)(4), which apparently were not submitted to the trial court.

upon application by the county prosecutor and for good cause shown.

I'm satisfied that the provisions of that statute have been met. I will waive forfeiture or disqualification -- I'm satisfied upon application of the county prosecutor and I'm satisfied that good cause has been shown in this instance. Waived on good cause upon application of the prosecutor.

The Assistant Prosecutor did not indicate any disagreement with the municipal court judge's view of the position of his office.

The municipal court's disposition of the waiver of forfeiture issue was reflected in a January 25, 2007 letter to a municipal court administrator, which stated: "Pursuant to 2C:51-2 the State is not asking for forfeiture per Vito DiBuono, A.P. Supervisor."

On November 29, 2006, the City of Newark served defendant with a preliminary notice of disciplinary action seeking his removal as a police officer based on the October 18, 2004 incident and defendant's conviction. After a departmental hearing, defendant was removed from his position, effective February 5, 2007. Defendant has not served as a police officer since that date.

Defendant appealed to the Merit System Board (now the Civil Service Commission) from the final notice of disciplinary action removing him from his position as a police officer, which the Board transmitted to the Office of Administrative Law (OAL). In

addition, defendant appealed to the Law Division from his municipal court conviction for simple assault.

On June 22, 2007, after a de novo review of the municipal court record, the Law Division entered an order, based on a letter opinion of that same date, finding defendant guilty of simple assault and reimposing the same sentence imposed by the municipal court. Neither the order nor the opinion included any reference to the waiver of the forfeiture of employment.

Defendant appealed his conviction in the Law Division to this court. Defendant and Newark initially agreed to hold defendant's appeal to the Board from the disciplinary action resulting in his removal in abeyance pending his appeal to this court from his conviction for simple assault. However, as a result of a change in counsel, defendant notified Newark and the OAL in the spring of 2008 that he wished to proceed with his administrative appeal notwithstanding the pendency of the appeal from his conviction.

That notification led Newark to file this action on June 23, 2008, seeking the forfeiture of defendant's employment based on his October 13, 2006 conviction in municipal court and June 22, 2007 conviction in the Law Division. The matter was brought before the court by order to show cause.

On the return date, which was August 26, 2008, defendant's counsel failed to appear. The trial court characterized this

failure to appear as a "default" and entered judgment on August 26, 2008 for a forfeiture of defendant's public employment "as unopposed."

Defendant filed a motion to vacate this judgment. In support of the motion, defendant's counsel submitted a certification that alleged Newark had failed to serve a copy of the complaint and certain other documents upon defendant. Defendant's counsel also presented various excuses for appearing in court late on the return date of the order to show cause.

After hearing argument, the trial court concluded in an oral opinion, based on the previously quoted January 25, 2007 letter of the municipal court judge, that the prosecutor had waived forfeiture of defendant's employment under N.J.S.A. 2C:51-2. Accordingly, the court entered an order on September 26, 2008, vacating the August 26, 2008 order and denying Newark's application for a forfeiture of defendant's employment based on his conviction for simple assault. Newark appeals from this order.²

During the pendency of this appeal, we affirmed defendant's convictions for simple assault in an unreported opinion. State

² Although the court did not characterize this order as a final judgment, Newark's complaint did not assert any claim other than its application for the forfeiture of defendant's employment under N.J.S.A. 2C:51-2. Therefore, this order is a final judgment that is appealable as of right.

v. Borrero, No. A-5784-06T4 (Dec. 5, 2008). In addition, on June 11, 2009, the Civil Service Commission issued a final decision affirming Newark's removal of defendant from his employment as a police officer. That final administrative decision is now on appeal. In re Borrero, A-6291-08.

On its appeal from the September 26, 2008 order denying Newark's application for a forfeiture of defendant's employment based on his conviction for simple assault, Newark argues that defendant's counsel did not show excusable neglect in her failure to file timely opposition to Newark's order to show cause and in appearing late on the return date and that the trial court therefore erred in vacating the judgment of forfeiture under Rule 4:50-1(a). In view of the colorable reasons presented by defendant's counsel for her failure to attend to this matter in a timely manner, and the shortness of time between entry of the order of forfeiture and defendant's motion, we would be inclined to conclude, if it were necessary to reach this issue, that defendant made a sufficient showing of "excusable neglect" to warrant vacating the order. In any event, we do not need to decide that issue because the record now before us demonstrates that the forfeiture of defendant's employment as a police officer was waived by the municipal court judge upon application of the Essex County Prosecutor at the time of sentencing. Therefore, the forfeiture of defendant's

employment by the trial court on August 26, 2008, was based on a "mistake" as to the effect of the prior criminal proceeding against defendant and must be vacated for that reason. See R. 4:50-1(a).

N.J.S.A. 2C:51-2(e) provides:

Any forfeiture or disqualification under subsection a., b. or d. which is based upon a conviction of a disorderly persons or petty disorderly persons offense may be waived by the court upon application of the county prosecutor or the Attorney General and for good cause shown.

N.J.S.A. 2C:51-2(g) provides in pertinent part:

In any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilt, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a court of this State upon application of the county prosecutor or the Attorney General or upon application of the public officer or public entity having authority to remove the person convicted from his public office, position or employment.

Under N.J.S.A. 2C:51-2(g), "the term 'raised' means more than a discussion of the issue of forfeiture at the time of verdict, plea or conviction." State v. Och, 371 N.J. Super. 274, 284 (App. Div. 2004). Rather, it "mean[s] that an order of forfeiture or an order approving a waiver has been entered." Ibid. Therefore, upon application by the employer in accordance with N.J.S.A. 2C:51-2(g), a judge must determine whether "an

order of forfeiture or waiver of forfeiture has been entered." Och, supra, 371 N.J. Super. at 284. We would add that a judge has the obligation to undertake this inquiry even if the employee fails to file an answer to a complaint seeking a forfeiture of his or her employment.

In this case, it is clear from the previously quoted portions of the transcript of defendant's sentencing that the municipal court judge did grant a waiver of a forfeiture of public employment in accordance with N.J.S.A. 2C:51-2(e). By the plain terms of N.J.S.A. 2C:51-2(g), as interpreted in Och, Newark may not collaterally attack that waiver in this kind of action. Therefore, the court's entry of an order of forfeiture on August 26, 2008 was a "mistake" within the intent of Rule 4:50-1(a), which the court properly vacated by its order of September 26, 2008.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION