RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2012-15T3

E.M.,

Plaintiff-Respondent,

v.

F.M.,

Defendant-Appellant.

Argued January 31, 2017 – Decided March 2, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FV-14-0505-89.

Ali Y. Ozbek argued the cause for appellant (Rutgers Law Associates, attorneys; John M. Boehler, on the briefs).

John M. Mills III, argued the cause for respondent (Mills & Mills, P.C., attorneys; Mr. Mills, on the brief).

PER CURIAM

Defendant appeals from an order entered by the Family Part on November 30, 2015, which denied without prejudice his motion

to dissolve a domestic violence final restraining order (FRO). For the reasons that follow, we reverse and remand the matter to the trial court for further proceedings.

I.

Plaintiff and defendant were married and they had three children. On November 15, 1988, plaintiff filed a domestic violence complaint in the trial court. The complaint was filed under the Prevention of Domestic Violence Act (PDVA), which was enacted in 1981 and codified at N.J.S.A. 2C:25-1 to -16, but later repealed and replaced by N.J.S.A. 2C:25-17 to -35. L. 1991, c. 261, § 20. In her complaint, plaintiff alleged that on November 9, 1988, defendant had been "physically and verbally abusive" to her. Apparently, at that time, the parties were residing in New York State.

Plaintiff asserted that she obtained a restraining order from a court in New York, but defendant violated the order and spent a night in jail. Plaintiff then fled to her sister's home in New Jersey with two of the children, who were minors at that time. She alleged that defendant called her there and threatened to take the children from her.

A judge issued a temporary restraining order (TRO) dated November 15, 1988. The TRO enjoined defendant from having any contact with plaintiff or harassing plaintiff or her relatives.

The TRO granted plaintiff temporary custody of the two minor children, and stated that the issue of defendant's visitation rights would not be considered until the hearing on the FRO, which was scheduled for November 23, 1988. On December 1, 1988, the court entered an order stating that the hearing on the FRO was re-scheduled for December 8, 1988, "with the consent of the attorneys."

It appears that the trial court considered plaintiff's application for a FRO on December 8, 1988. The court entered an order on that date, which prohibited defendant from having any contact with plaintiff or harassing plaintiff or her relatives. The December 8, 1988 order awarded plaintiff temporary custody of the minor children, but granted defendant supervised visitation in New Jersey.

The order precluded the parties from removing the children from New Jersey without the court's permission, and stated that plaintiff would have custody of the children until the court makes a decision on the custody issue. The order stated that it had been served upon defendant's attorney.

The trial court also entered orders on December 22, 1988, February 9, 1989, March 3, 1989, and March 9, 1989, which amended the FRO. Among other things, the orders addressed defendant's visitation with the children. The orders of December 22, 1988, and

March 9, 1989, noted that they had been served upon defendant's attorney.

On April 13, 2015, defendant filed a motion in the trial court to vacate the FRO. In support of his motion, defendant submitted a certification in which he stated that on November 1, 1994, a New York court had dissolved his marriage to plaintiff. Defendant asserted that he had attempted to obtain from the court transcripts of all proceedings relating to the FRO that were held in 1988 and 1989, but he was informed that the record of those proceedings was no longer available.

Defendant also stated that he had hired a private investigator to locate his children, and the investigator gave him addresses for all three children. He asserted that in March 2006, he went to a residence in Budd Lake, believing it was his son's home, and a woman answered the door. Defendant claimed he was not aware that the woman with whom he was speaking was his former wife. He stated that with the exception of that encounter, he did not have any contact with plaintiff since 1989 and that he had never violated the FRO.

In addition, defendant asserted that he was then seventy years old, and had many health problems, including congestive heart failure, and diabetes, which has caused a partial paralysis of the sciatic nerves in both legs. Defendant said he does not use

drugs or alcohol, and he has not been convicted of any crimes since the FRO was entered.

Defendant further claimed that when he and his current wife return to the United States from traveling abroad, they are taken into custody because of the FRO. He asserted that he is detained for long periods of time and "treated like a criminal." Defendant said he travels each year to Taiwan, and claimed that the treatment he faces when returning to the United States makes him reluctant to leave the country. On occasion, he also travels internationally on work-related business.

Plaintiff opposed defendant's application and submitted a certification to the trial court. In her certification, plaintiff stated that her entire marriage to defendant was "laced with violence and threats directed to [her]." She claimed defendant called her "brain dead" and a "stupid moron."

Plaintiff said the incident that led to the issuance of the FRO was a dispute over money that defendant allegedly spent on prostitutes. She stated that defendant began to threaten her and her son tried to protect her. According to plaintiff, defendant "smashed" her son into the wall of their home, and when her son ran upstairs, defendant screamed at him. Plaintiff said her son "ended up running away and our two young daughters were completely traumatized."

Plaintiff stated that defendant directed many acts of violence at her. She said defendant had thrown her against the stove and attempted to strangle her. She claimed his conduct "has been so evil" that none of the children want anything to do with him.

Plaintiff also stated that although the conduct that resulted in the FRO occurred many years ago, she still required the FRO. She said defendant had conducted himself in a "most awful and hideous manner." According to plaintiff, defendant paid little or no child support and defied the New York court's order on equitable distribution. Plaintiff stated that generally, defendant did as he pleased "and got away with it."

Plaintiff noted that about five years before, defendant had appeared at her home in Budd Lake. She was inside, attending to household work, when she heard a loud pounding on the front door. Plaintiff stated that she answered the door and was shocked to see defendant. He identified himself and said he wanted to see his son. Plaintiff asserted that she "was scared to death." She stated that she was in shock and told defendant the person he was looking for did not live there.

Plaintiff said that, in view of the history of violence that defendant had directed at her, "coupled with his relatively recent and aggressive unannounced and uninvited appearance at [her]

home," she has "an objective fear" of defendant. She stated that the court should continue the protection provided to her in the FRO.

One of plaintiff's daughters also submitted a certification to the court. She stated that said defendant "verbally and physically" abused plaintiff almost every day she was married to defendant. She claimed that her first memory as a child was of defendant strangling her mother. She said that after she fled with her mother, defendant had "haunted" them.

Plaintiff's daughter also asserted that even after her parents divorced, defendant remained "a threat." She stated that in the previous ten years, defendant hired private investigators to find her and her siblings. She asserted that on more than one occasion, defendant "would just show up at our residences or places of employment." She said defendant is dangerous, unpredictable, and remains a threat to her mother.

II.

On April 13, 2015, the Family Part judge heard oral argument on defendant's motion. The motion judge was not the judge who entered the original FRO. Plaintiff's attorney advised the motion judge that plaintiff did not consent to dissolution of the FRO. The judge entered an order denying the motion without prejudice.

In a statement of reasons attached to the court's order, the motion judge noted that N.J.S.A. 2C:25-29(d) allows the court to dissolve or modify a FRO, "but only if the [j]udge who dissolves or modifies the order is the same [j]udge who entered the order, or has available a complete record of the hearing or hearing on which the order was based." The motion judge also noted that in Kanaszka v. Kunen, 313 N.J. Super. 600, 606-07 (App. Div. 1998), we held that the term "complete record" in N.J.S.A. 2C:25-29(d) includes, among other things, a complete transcript of the hearing on the FRO.

The judge observed that the court's file on the FRO contained little documentation, and the FRO did not identify the predicate act or acts upon which the order was based. The judge also observed that defendant could not provide a complete transcript of the FRO hearing because the county had purged the records related to the FRO.

The judge determined that without the ability to review the transcript of the FRO hearing, the court was not authorized to provide relief under N.J.S.A. 2C:25-29(d). The judge rejected defendant's contention that he had substantially complied with the statute. The judge also rejected defendant's contention that the court should conduct a plenary hearing on the motion, in the exercise of its equitable powers.

On appeal, defendant argues that: (1) the court's application of the "complete record" standard in N.J.S.A. 2C:25-29(d) violates the prohibition on ex post facto legislation; (2) the trial court failed to consider that the Legislature's intent was to provide individuals the opportunity to be relieved of the restraints in a FRO; (3) the court's ruling violated his due process rights; (4) the court's decision should be reversed because he substantially complied with the "complete record" requirement of N.J.S.A. 2C:25-29(d); and (5) the procedural requirements in N.J.S.A. 2C:25-29(d) should not have been applied because only the Supreme Court has the authority to prescribe the procedures for the New Jersey courts.

III.

As the motion judge noted, N.J.S.A. 2C:25-29(d) provides that:

> Upon good cause shown, any final order may be dissolved or modified upon application to the Family Part of the Chancery Division of the Superior Court, but only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based.

In Kanaszka, we held that in determining whether a party has shown good cause to dissolve or modify a FRO, the court must consider the factors identified in Carfagno v. Carfagno, 288 N.J. Super.

424 (Ch. Div. 1995). Kanaszka, supra, 313 N.J. Super. at 607. The Carfagno factors are:

> (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant; (9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.
>
> [Carfagno, supra, 288 N.J. Super. at 434-35.]

Here, the motion judge also noted that in Kanaszka, we held the "complete record" requirement in N.J.S.A. 2C:25-29(d) includes, at a minimum, "all pleadings and orders, the court file, and a complete transcript of the [FRO] hearing." Kanaszka, supra, 313 N.J. Super. at 606.

In Kanaszka, we stated that unless the motion judge has the ability to review the transcript, the judge would not be able "to properly evaluate" a motion to dissolve or modify the FRO. Ibid. We held that the trial court may deny a motion to dissolve or

modify a FRO if the movant fails to provide the court with the transcript of the FRO hearing. Id. at 607.

We pointed out that in order to properly consider the Carfagno factors, the judge who did not issue the initial FRO must thoroughly review the parties' previous history of domestic violence in order "to fully evaluate the reasonableness of the victim's continued fear of the perpetrator." Ibid. (citations omitted). The court also may consider any incidents of domestic violence that were the subject of testimony at the final FRO hearing. Ibid. We noted that such evidence could be significant if the defendant had consented to the allegations in the domestic violence complaint, or did not contest the application. Ibid.

In this matter, plaintiff obtained a domestic violence FRO in 1988, pursuant to the terms of the PDVA then in effect. The PDVA then provided in pertinent part that the Family Part could dissolve or modify a FRO upon a showing of good cause. N.J.S.A. 2C:25-14(h) (repealed by L. 1991, c. 261, § 20). See L. 1987, c. 356, § 5.

Here, the judge applied the requirements of N.J.S.A. 2C:25-29(d), because the provisions of the PDVA in effect when the FRO was issued were thereafter repealed and replaced by the provisions of the PDVA presently in effect. Consequently, N.J.S.A. 2C:25-

29(d) now provides the only statutory authority for dissolving or modifying a domestic violence FRO.

As we have noted, the motion judge denied defendant's motion to dissolve the FRO because defendant had not provided the court with the "complete record," including the full transcript of the FRO hearing. In reaching this decision, the judge relied upon our decision in Kanaszka. However, Kanaszka does not address the situation presented in this case.

In Kanaszka, the transcript of the FRO hearing was available, while in this case, defendant is not able to provide the transcript because the county had discarded the record of the FRO proceedings. It is unclear whether defendant contested the order when it was entered. Furthermore, it is not clear whether defendant appeared at the hearing on the FRO, although the record indicates that he was represented in that proceeding by an attorney. It also is unclear whether the court heard any testimony before entering the FRO.

We conclude that under these circumstances, the motion judge should not have denied defendant's motion because he failed to provide the court with the transcript of the FRO hearing. If no testimony was taken when the court entered the FRO, or if plaintiff cannot recall the testimony she provided, the judge should then

consider the motion based on the "complete record" that presently exists.

If, however, plaintiff provides a certification stating that testimony was, in fact, taken in support of her application for a FRO, and she recalls her testimony, the judge should endeavor to reconstruct the record, using a process similar to that described in Rule 2:5-3. The rule applies to appeals where "a verbatim record made of the proceedings has been lost, destroyed or is otherwise unavailable[.]" Ibid.

We emphasize that the purpose of any reconstruction of the record would be to determine the testimony that plaintiff presented in that proceeding. Reconstruction of the record is not an opportunity for defendant to litigate the issuance of the FRO, particularly if he did not contest the entry of that order or testify at that proceeding.

We also emphasize that the burden of showing good cause to dissolve the FRO remains with defendant. It is his burden to establish that, upon consideration of the Carfagno factors, the FRO should be dissolved. If the record that presently exists does not provide a basis for vacating the FRO, the motion must be denied.

We therefore reverse the order denying defendant's motion, and remand the matter to the trial court for further proceedings on the motion.

IV.

Defendant also argues that the application of the "complete record" standard in N.J.S.A. 2C:25-29(d), with the requirement that he submit a complete transcript of the final FRO hearing, violates the prohibition on ex post facto legislation. The contention is without sufficient merit to warrant extended comment. R. 2:11-3(e)(1)(E). However, we add the following brief comments.

As we stated previously, the PDVA in effect when the FRO was entered authorized the trial court to dissolve or modify a FRO, but it did not specifically require the movant to provide the court with a "complete record" of the FRO proceedings if the judge hearing the motion was not the judge who entered the initial order. Nevertheless, a court could have required the movant to provide a full record, so that it could properly assess whether the FRO should be dissolved or modified.

As noted, N.J.S.A. 2C:25-29(d) was part of the changes to the PDVA which were enacted in 1991, and the statute added the provision that, in certain circumstances, the movant must provide the court with a "complete record" on a motion to dissolve or

modify a FRO. This was not, however, a substantive change in the requirements for obtaining dissolution or modification of a FRO. The PDVA as amended in 1991 only made specific what was implicit in the PDVA before the 1991 amendments. As we stated previously, the court had the authority to compel the movant to provide the full record of the FRO proceedings. Indeed, it may fairly be said that the court was always required to make its decision on a "complete record."

Furthermore, a domestic violence FRO is essentially civil in nature. J.D. v. M.D.F., 207 N.J. 458, 474 (2011) (citing Crespo v. Crespo, 408 N.J. Super. 25, 32-34 (App. Div. 2009), aff'd o.b., 201 N.J. 207 (2010)). More important, the "complete record" requirement in N.J.S.A. 2C:25-29(d) is not punitive in purpose of effect, when applied to a FRO issued before that statute was enacted. See Riley v. N.J. State Parole Bd., 219 N.J. 270, 285-86 (2014) (noting that the constitutional bar against ex post facto punishments may be applied to a civil measure if the purpose or effect of the measure is punitive in nature) (citation omitted)).

We therefore conclude that the application of the "complete record" requirement in N.J.S.A. 2C:25-29(d) to a FRO entered pursuant to the PDVA before the statute was enacted is not a violation of the constitutional proscription on ex post facto legislation.

Defendant further argues that the "complete record" requirement in N.J.S.A. 2C:25-29(d) is a matter of procedure that impermissibly infringes upon the Supreme Court's plenary authority under the New Jersey Constitution to make rules governing practice and procedure in the State's courts. N.J. Const., Art. VI, § II, ¶ 3; Winberry v. Salisbury, 5 N.J. 240, 247 (1950), cert. denied, 340 U.S. 877, 71 S. Ct. 123, 95 L. Ed. 838 (1950). We disagree.

The requirement that a movant submit a "complete record" on a motion to dissolve or modify a FRO is a matter of substance, not procedure. As we explained in Kanaszka, when the judge hearing a motion to dissolve or modify a FRO is not the judge who entered the initial order, the "complete record" is required of the proceedings that led to the issuance of the FRO so that the court can properly evaluate the merits of the application. Kanaszka, supra, 313 N.J. Super. at 606.

In view of our decision, we need not consider defendant's other arguments: that the trial court erred by failing to consider the Legislature's intent in providing parties an opportunity to seek relief from a FRO; that he substantially complied with the statute; and that denial of his motion on procedural grounds deprived him of due process.

Reversed and remanded to the trial court for further proceedings in conformity with this opinion. We do not retain jurisdiction.