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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2046-20

IN THE MATTER OF THE
SEIZURE OF WEAPONS
BELONGING TO A. K.

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Submitted January 31, 2022 – Decided April 18, 2022

Before Judges Rothstadt and Mayer.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FO-02-0126-21.

The Tormey Law Firm, attorneys for appellant A.K. (Brent DiMarco, on the brief).

Mark Musella, Bergen County Prosecutor, attorney for respondent State of New Jersey (William P. Miller, Assistant Prosecutor, of counsel; Catherine A. Foddai, Assistant Prosecutor, on the brief).

PER CURIAM

A.K.[1] appeals from a February 19, 2021 Family Part order granting the State's application for forfeiture of his firearm, ammunition, and Firearms Purchaser Identification Card (FPIC), that were seized by law enforcement under the Prevention of Domestic Violence Act of 1991 (PDVA), N.J.S.A. 2C:25-17 to -35. After their seizure and the subsequent resolution of the domestic violence action, the State applied for forfeiture of A.K.'s weapon and FPIC under N.J.S.A. 2C:58-3(c)(5). Judge Mark T. Janeczko conducted a three-day forfeiture hearing before concluding that it would not be in the interest of the public health, safety, or welfare to return the weapon and FPIC to A.K., especially since there continued to exist a domestic violence situation.

On appeal, A.K. argues that the State failed to satisfy its burden to prove by a preponderance of the evidence that he posed a danger to public health, safety, or welfare. In support, he argues that he does not have a criminal background; has never been the subject of a final restraining order; has never been civilly committed or hospitalized for mental health issues; has no history of substance abuse; there was no showing during the trial that he ever misused or accidentally discharged his weapon; the incident was an expression of

[1] We employ initials and pseudonyms for ease of reference and because the identities of alleged victims of domestic violence are excluded from public access and to protect private medical information. R. 1:38-3(d)(9) and (10).

frustration and his conduct was not as bad as in other cases where forfeiture was denied; and the local police chief did not object to the return of the seized weapon. We affirm.

The facts derived from the hearings held by the trial judge are summarized as follows. A.K. and D.S. were married in 2001. They have one son, born in 2007, who was diagnosed with autism at the age of two and is mostly nonverbal. Besides autism, the son suffers from behavioral conditions, such as Pica (ingestion of non-food items), self-harm behavior, and on occasion, has harmed others.

The couple began having marital issues beginning in 2018. There were a few domestic incidents before law enforcement became involved. Most, if not all, of the parties' disputes focused on their disagreement or lack of tolerance as to the other's care of their son. The incidents of unreported domestic violence included A.K allegedly being provoked by D.S.'s unsubstantiated periodic allegations of A.K.'s inappropriate behavior towards the son and challenges to his care of the boy, A.K. reacted by to D.S. by, among other things, raising his fist to her, punching a hole in a wall after a verbal altercation that followed an argument and, at another time, throwing a washcloth, soiled with their son's feces, at her face.

A.K. described their relationship as "toxic" and he felt that it was "dammed if you do, dammed if you don't" type of a relationship where D.S. was never satisfied with what he was doing, "[e]ven if [he] did it exactly the way she wanted [him] to do it." He explained that D.S. "berated" him by calling him "stupid, . . . moron, [and] a refugee," and also saying that "she can't believe she married [him]." However, A.K. admitted that he also engaged in the same type of behavior.

D.S. described their relationship as "non-amicable" and she predicted that their divorce will be "contentious . . . in the upcoming weeks or months." Indeed, A.K. testified that he asked through his attorney for an amicable divorce, but that D.S. refused.

The only reported incident of domestic violence occurred on June 20, 2020. On that day, the son was self-harming in D.S.'s presence while she was trying to put him to bed. A.K. came into the room, noticed that D.S. was not restraining the boy, so A.K. did so, purportedly as directed by his son's doctors in order to stop him from hurting himself. A.K. became "very frustrated" that D.S. was not helping and was instead using her phone to film the episode. In response, A.K. admitted that he grabbed the phone from her hands and broke it.

D.S. called the police to report the incident. According to D.S., her call to the police, prompted A.K. to say, "I hope you know what you're doing."

A local police officer responded and asked A.K. to leave, which he did. But, as A.K. was walking past D.S., she testified that he told her, "[B]e careful." D.S. testified that she believed that A.K. was trying to censor what she told officers.

Thereafter, both parties sought the entry of temporary restraining orders (TRO), but the only one entered was issued to D.S. As part of the TRO, local police were authorized to search and seize A.K.'s weapons. On the same day, an officer seized A.K.'s weapon and ammunition. According to the officer, the weapon and ammunition had been "secured" separately in a "locked toolbox" in the basement of the home with the keys hidden in a separate drawer.

On July 20, 2020, the parties consented to the voluntary dismissal of the TRO, which limited contact between A.K. and D.S. In addition, while custody issues were to be determined at a later date, the parties agreed to supervised visitations for A.K.

Thereafter, the Bergen County Prosecutor's Office petitioned the Family Part for forfeiture of A.K.'s weapon, ammunition, and FPIC. Judge Janeczko held hearings on November 20, 2020, January 27, 2021, and February 18, 2021,

where he heard testimony from A.K., D.S., and the responding officer. Also, during the first day's hearing, the parties stipulated that the local police chief did not object to the return of A.K.'s weapon or FPIC. The judge issued his oral opinion on February 18, 2021, granting the forfeiture. On the following day, February 19, 2021, the judge entered his order.

In his oral opinion, the judge granted the State's motion to forfeit A.K.'s weapons because he found it was clear that "a domestic violence situation between the [parties] still exists." The judge relied upon the "totality of the circumstances" and not simply the June 20, 2020 incident in a vacuum, but also the "build-up to that" incident, including the parties' "frustration leading to anger" over their son's self-injuring behavior, and the "disagree[ment] on the protocol that should be followed regarding [their] child."

The judge also found that "the parties [were] currently going through or in the middle of a rather contentious divorce." While he acknowledged that "not every party who is going through a difficult divorce . . . should lose their constitutional rights," he explained that his "concerns [were] based upon the familial relationship that currently exist[ed]" between the parties. He observed that "[t]he son seems to be a focal point, and rightly so, between these parties,

but it was a focal point to the extent that [A.K.] found his ownership of the gun to be a coping mechanism, to help keep his mind off his son's disability."

Although the judge found that D.S. "embellished some of her testimony," A.K.'s "honest" and credible testimony confirmed her testimony "on a number of very critical issues." For instance, A.K. confirmed that "he did, in fact, break her phone during a disagreement" and that the son's "self-injuring condition," contributed to "much [of the] frustration leading to anger in th[e] household and between [the] parties." The judge considered A.K.'s testimony that he also "asked for a restraining order because he felt he needed one for his safety [but] was denied" as well as D.S.'s call to "the mobile crisis unit on the night [of June 20, 2020]." In this regard, the judge noted his "great[] concern[]" with the June 2020 incident and observed that he "cannot help but think if there was easy access to a weapon at that point, what could have occurred."

The judge also observed that "to a degree, [A.K.] did control his anger but he did act out by breaking the phone" and "raising a fist towards [D.S.'s] face and making threatening statements." He was concerned about the continued exacerbation of events, and their interactions "getting worse." He also recognized, through A.K.'s testimony, that his inability to enjoy regular visitation with the son is an "added dose of frustration" because D.S. insisted on

supervised visitations and due to the pandemic, he has not been able to find a supervisor.

Considering the totality of the circumstances, the judge ultimately stated that he was "aware of [A.K.'s] constitutional rights, but [had] to weigh the [public] safety." He further reasoned that forfeiture was necessary because "inject[ing] weapons into this situation" is "gravely concern[ing]" in light of the continuing anger demonstrated and the continuing existence of a "domestic situation . . . between the parties." This appeal followed.

In our review of an order granting forfeiture, we "accept a trial court's findings of fact that are supported by substantial credible evidence," In re Return of Weapons to J.W.D., 149 N.J. 108, 116-17 (1997), "[b]ecause 'a judicial declaration that a defendant poses a threat to the public health, safety or welfare involves, by necessity, [is] a fact-sensitive analysis,'" In re Forfeiture of Pers. Weapons Belonging to F.M., 225 N.J. 487, 505 (2016) (first quoting State v. Cordoma, 372 N.J. Super. 524, 535 (App. Div. 2004); and then quoting J.W.D., 149 N.J. at 116-17). Family Part judges' findings are entitled to deference because "they are judges who have been specially trained" in family matters. J.D. v. M.D.F., 207 N.J. 458, 482 (2011). Therefore, "we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced

that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). However, we review a trial court's legal conclusions de novo. In re N.J. Firearms Purchaser Identification Card by Z.K., 440 N.J. Super. 394, 397 (App. Div. 2015).

As already noted, weapons and associated FPICs can be seized under the PDVA. The PDVA's purpose is "to assure the victims of domestic violence the maximum protection from abuse the law can provide." F.M., 225 N.J. at 509 (quoting N.J.S.A. 2C:25-18). "Because the presence of weapons can heighten the risk of harm in an incident of domestic violence, the [PDVA] contains detailed provisions with respect to weapons." State v. Harris, 211 N.J. 566, 579 (2012).

The PDVA provides an officer "who has probable cause to believe that an act of domestic violence has been committed," the authority to seize weapons "upon observing or learning that a weapon is present on the premises," and where "the officer reasonably believes [such weapon] would expose the victim to a risk of serious bodily injury." N.J.S.A. 2C:25-21(d)(1). In addition, if the

"officer seizes any firearm pursuant to [the statute], the officer shall also seize [the FPIC] issued to the person accused of the act of domestic violence." N.J.S.A. 2C:25-21(d)(1)(b).

Any firearm seized under the PDVA must be returned to the owner within forty-five days of seizure unless the prosecutor pursues a forfeiture action. N.J.S.A. 2C:25-21(d)(3). If forfeiture is pursued, after a hearing, the application must be denied unless the court determines that the weapon's owner suffers from a "disability," N.J.S.A. 2C:58-3(c), or that the domestic violence action has not been dismissed, N.J.S.A. 2C:25-21(d)(1)(3), or the court determines the domestic violence situation still exists, ibid. "The burden is on the State to prove 'by a preponderance of the evidence, that forfeiture is legally warranted.'" F.M., 225 N.J. at 508 (emphasis omitted) (quoting Cordoma, 372 N.J. Super. at 533).

Under N.J.S.A. 2C:58-3(c)(8), "[n]o handgun purchase permit or [FPIC] shall be issued . . . . [t]o any person whose firearm is seized pursuant to the [PDVA] and whose firearm has not been returned[.]" Ibid. While under our state law, any "person of good character and good repute in the community" may obtain a firearm, that right is limited where certain statutory "disabilities" under N.J.S.A. 2C:58-3(c) exist.

Accordingly, "[t]he [s]tate retains the statutory right to seek the forfeiture of any seized firearms provided it can show that defendant is afflicted with one of the legal 'disabilities' enumerated in under N.J.S.A. 2C:58-3(c)." Cordoma, 372 N.J. Super. at 533. Among those not entitled to the return of their weapon and FPIC is "any person where the issuance would not be in the interest of the public health, safety or welfare[.]" N.J.S.A. 2C:58-3(c)(5). In addition, a FPIC "may be revoked by the Superior Court of the county wherein the card was issued, after hearing upon notice, upon a finding that the holder thereof no longer qualifies for the issuance of the permit." N.J.S.A. 2C:58-3(f).

This "statutory design is to prevent firearms from coming into the hands of persons likely to pose a danger to the public." F.M., 225 N.J. at 507 (alteration in original) (quoting State v. Cunningham, 186 N.J. Super. 502, 511 (App. Div. 1982)). Further, "[b]ecause the presence of weapons can heighten the risk of harm in an incident of domestic violence," there is an interplay between the PDVA and N.J.S.A. 2C:58-3 to ensure that "victims of domestic violence [have] the maximum protection from abuse the law can provide." F.M., 225 N.J. at 509-10 (first quoting N.J.S.A. 2C:25-18; and then quoting Harris, 211 N.J. at 579).

With these guiding principles in mind, we turn to A.K.'s argument on appeal that this case is distinguishable from those where we have upheld a trial court's decision to seize weapons. He observes that unlike those cases, he no longer lives with his wife, has filed for divorce, and that the record does not show that he had any contact with D.S. after June 20. Further, he notes that even when they were living together, "police were not called to their home on multiple occasions."

Moreover, A.K. compares the facts of this case to other cases, to argue that the parties' situation is more akin to cases where the behavior was demonstrably worse but nevertheless in those cases the weapons were not forfeited. He concedes that he is in a "frustrating position" because of their child's issues, and D.S.'s uncooperativeness in "attempting to control their son's conduct." "Consequently, [he] vented his frustration" much like in the cases where there was no finding of threat to the public safety. Additionally, he argues that unlike other cases where the gunowner was accused of some form of physical altercation, but there was nonetheless no finding of threat to the public, he has "never engaged in any form of physical contact with [D.S.] and [even] her own attorney advised her that [the] chances of obtaining an order [of protection] are 'next to none.'"

Citing to a non-binding unpublished decision, A.K. contends that the judge "improperly speculated about future conduct" when he expressed "concerns regarding the future and inserting a weapon into the situation." A.K. asserts that the judge stated that "because of the potential for danger, there is in fact, danger that exist[s]." He observes that the judge's statement—"this Court cannot help but think if there was easy access to a weapon at that point, what could have occurred,"—ignored the fact that the "evidence presented at the hearing demonstrate[d] what would happen if a firearm was available." He notes that "[t]hroughout the marriage, there were firearms in the home" but that "[n]evertheless, [he] never used or even threatened to use a gun against his family." Last, he asserts that the local police chief did not object to the return of his weapon, ammunition, and FPIC.

We are unpersuaded by A.K.'s contentions. We conclude that Judge Janeczko correctly granted the application for forfeiture substantially for the reasons expressed by the judge in his cogent oral decision.

In this case, the parties' testimony indicated that they actively disparaged each other; that the discord has been escalating for some time; that A.K. had threatened D.S.; that he grabbed D.S.'s phone from her hand and destroyed it; and that the acrimony will continue. While it may be true that some of the

tension has been eased because the couple no longer live together, the source of tension—their son's care—has not been eased because they fiercely disagree over that topic.

Moreover, as the judge noted, there is a new source of frustration for A.K.: the inability to see his son, whom he has lived with throughout the child's life, because he has not been able to find someone to supervise his visitations. This inability to see his son, except through video chats, indicates that distance will not improve the familial discord. Moreover, A.K.'s testimony that discharging his weapon at the range is his "coping mechanism," supports the judge, who is best equipped to get a "feel of the case," D.C. v. F.R., 286 N.J. Super. 589, 601 (App. Div. 1996), finding under N.J.S.A 2C:25-21(d)(3) that domestic violence still exists. See also Z.K., 440 N.J. Super. at 359 ("We are aware that live testimony can convey nuances that a cold record cannot.").

In addition, A.K.'s assertion that the lack of a criminal record, continued employment, and his physical acts were not as severe as in other cases is unpersuasive because N.J.S.A. 2C:58-3(c)(5) does not require the existence of a criminal record, lack of employment, or a specific level of physical action. Here, forfeiture of the weapons was properly based on the current domestic violence situation which, over time, as conceded by A.K., has been escalating. Indeed, it

began with verbal threats, continued with punching a hole in the wall, escalated to throwing a washcloth with feces, and finally cumulated when A.K. physically took D.S.'s phone from her hand and destroyed it. While it is true an expression of "frustration" is insufficient to seize weapons, State v. One Marlin Rifle, 319 N.J. Super. 359, 372 (App. Div. 1999), violent behavior can satisfy the standard, see Hoffman v. Union Cnty. Prosecutor, 240 N.J. Super. 206, 213-14 (App. Div. 1990). See also Z.K. 440 N.J. Super. at 358-59 (agreeing with the trial court's assessment that "history of discord between the couple" suggested that a firearm did not belong in such an environment).

Further, A.K.'s argument that the judge ignored evidence demonstrating of "what would happen if a firearm was available" illustrates A.K.'s misunderstanding of the judge's concerns. The judge did not ignore the evidence that demonstrated that the weapon was found in a secure location. Instead, the judge found his concern was not alleviated by the weapon being stored in a secure location. In other words, the judge weighed the fact that the weapon was secured against the escalating discord between the parties and the continued pressures that they face regarding their son, and he appropriately gave more weight to the latter.

Moreover, A.K.'s conduct need not involve weapons to support the conclusion that he is unfit or poses a threat to a person in particular or the public in general. See Hoffman, 240 N.J. at 213-14. Indeed, "[t]he statute as written does not require [a] court to wait for an individual to use a weapon inappropriately before ordering forfeiture." F.M., 225 N.J. at 514. "Such a result would be contrary to the objective of the [PDVA] to provide maximum amount of protection to victims of violence, and the 'statutory design . . . to prevent firearms from coming into the hands of persons likely to pose a danger to the public.'" Id. at 514-15 (second alteration in original) (quoting Cunningham, 186 N.J. Super at 511).

Last, A.K.'s argument that the local chief of police provided a letter stating that he did not object to the return of A.K.'s weapons is also unpersuasive. The judge acknowledged that the parties stipulated to the existence of the letter but it was not admitted into evidence and is not part of the record on appeal. Thus, there is no indication or testimony in the record as to why the chief did not object to returning A.K.'s weapon, including the information he considered or whether it was based on an investigation. As such, the letter does not outweigh the judge's finding that domestic violence is still an existing issue that warranted the forfeiture that the judge ordered.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION