

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3089-20**

**IN THE MATTER OF
K.M.D.**

Submitted November 7, 2022 – Decided November 23, 2022

Before Judges Whipple, Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Petition No. 1103-XTR-2020-3.

Evan F. Nappen, Attorney at Law, PC, attorneys for appellant K.M.D. (Ali Homayouni, of counsel and on the briefs).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent State of New Jersey (Taylor S. Hicks, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Appellant K.M.D.¹ appeals from a May 24, 2021 Final Extreme Risk Protective Order (FERPO) entered against him pursuant to the Extreme Risk Protective Order Act of 2018 (the Act), N.J.S.A. 2C:58-20 to -32. We affirm.

The facts were developed during a four-day trial at which the State presented testimony from Hamilton Township Police Officer Christopher Vitoritt, and appellant adduced testimony from his wife D.D., himself, and his treating psychiatrist. In August 2020, Hamilton Police responded to a crisis call from D.D. expressing concern appellant was going to harm himself. Appellant called D.D. and stated he was "staring at [a] bullet for the last two weeks and wanted her on the phone when he pull[ed] the trigger."

Officer Vitoritt testified police responded to appellant's home with a crisis screener from Capital Health Hospital and saw appellant was bleeding from a gash in his head and "was very tensed up, physically" Appellant's son told police appellant was "drinking heavily for the last couple [of] weeks," and "purposely took too much prescription medication." When Officer Vitoritt interviewed appellant, he "appeared mentally unstable" Appellant told the officer he overused his prescription for ketamine and "was having a very bad

¹ We use appellant's initials pursuant to Rule 1:38-3(a).

day." He said he regularly attended psychiatry visits to treat depression and anxiety, but "was having these thoughts."

Officer Vitoritt testified D.D. said there were weapons in the home and there was a concern appellant would take his own life. Police found a nine-millimeter round inscribed with "peace" and a nine-millimeter Glock handgun, among several other guns in a shed. Appellant was admitted to the hospital crisis center for three days.

Officer Vitoritt explained the facts gathered concerned police that appellant might use the guns to take his own life. He applied for a Temporary Extreme Risk Protective Order (TERPO), which was granted later that day.

D.D. testified she was aware appellant took more medicine than was prescribed because appellant told her so. She called police because she was concerned he would hurt himself based on his reaction to the medication. Although D.D. reported appellant had been staring at a bullet, she later denied the claim at trial.

Appellant testified he was having a "bad day[,] " and was concerned about COVID-19 because his three teenage children were "go[ing] out in the world and having to live their li[ves]" He admitted to overmedicating himself on the day of the incident, but also shared he "dumped out the rest of the ketamine

in the toilet, and . . . ha[s] been going through withdrawal and [was] clean ever since." He claimed he felt "clear minded[,] " had spoken to his psychiatrist on several occasions, and his relationship with D.D. had improved.

The psychiatrist testified she had been treating appellant since she initially evaluated him in November 2017. At the time, appellant "had [been having] chronic suicidal thoughts for . . . years." He had been diagnosed with bipolar disorder, a diagnosis with which she concurred. However, over time she dropped the bipolar diagnosis and diagnosed him with depression, anxiety, and attention deficit disorder (ADD). She testified appellant was "very depressed for much of the time [she] was treating him[,] " but "is not currently depressed." "[H]e was very anxious[,] " and was now "much, much less anxious." As a result of the changed diagnosis, she removed appellant from the lithium previously prescribed for him and treated his depression by prescribing intranasal ketamine. She conceded "[d]epression can certainly lead to suicidal thoughts or actions[,] " "but [appellant] never said he was going to take his own life." She claimed the lengthy duration in which appellant had suicidal thoughts reassured her he would not act on his thoughts.

The doctor testified appellant also suffered from cystic fibrosis. She also provided marriage therapy and noted "there was a lot of marital conflict"

between appellant and D.D. She claimed he was improving on both fronts in addition to his mental health. Although her report opined appellant had taken an entire day's dose of ketamine all at once, at trial she claimed appellant had not overdosed, but rather taken his doses close in time. She explained appellant was no longer taking ketamine and she prescribed Klonopin, a psychiatric anti-anxiety drug. Appellant also had a prescription for medical marijuana for nightmares. She concluded appellant was at low risk for self-harm.

The trial judge found Officer Vitoritt credible, noting his testimony was "straightforward and direct . . . and [the officer] did not embellish his testimony." He found D.D.'s testimony to be reasonable in that she cared for appellant, which was why she was concerned for him the day of the incident. However, her testimony was confusing, because she recalled various details of the incident, but lacked detail regarding the days preceding the incident. The judge reached a similar conclusion regarding appellant's testimony.

The judge found the psychiatrist's testimony "did not add much firsthand knowledge concerning the underlying incident, but it did put it into some context." He found her testimony credible about the common nature of misdiagnoses and that appellant had suicidal ideation for years with no intention

to act. However, there was some inconsistency in her testimony regarding appellant's use of prescriptions drugs.

Applying the statutory factors, the judge found by a preponderance of the evidence that appellant "poses a significant danger of bodily injury to [him]self" N.J.S.A. 2C:58-23(f)(1). He found the evidence of appellant "purportedly staring at [a] bullet for two weeks, that he was going to harm himself on the day in question[; h]e was admittedly overmedicated on prescription drugs[; the] . . . nine[-]millimeter bullet with the word 'peace' written on it[; and] . . . a corresponding nine[-]millimeter firearm located among other weapons[,]" weighed strongly in favor of a FERPO. Further, "all the testimony was clear that [appellant] made [a] statement of threatened self[-]harm and that he wanted another witness." The judge found Officer Vitoritt's "credible description of . . . [appellant]'s demeanor at the time the police responded [was] consistent with the finding. For example, that [appellant] . . . was . . . injured with a gash on his head, . . . and was non-cooperative, and ultimately . . . evaluated and . . . admitted into crisis in [the] hospital for three days"

The judge concluded the evidence regarding appellant's mental health, namely, his treatment, diagnosis, and prognosis "cumulatively weigh in favor of the [FERPO] based upon the history, statements and the behavior in conjunction

with the [facts of the underlying incident.]" The doctor's testimony did not outweigh "the history of suicidal ideations, the events, comments and actions by [appellant] culminating with the police response and admission to the hospital, [and] more likely than not suggest[] . . . [appellant] poses a significant danger of bodily injury to [him]self by owning, possessing, purchasing, or receiving a firearm."

Appellant raises the following arguments on appeal:

I. THE TRIAL COURT UNDULY UNDERVALUED THE EXPERT TESTIMONY PROVIDED BY [THE DOCTOR] BY FAILING TO CONSIDER ALL RELEVANT FACTORS IN HER TESTIMONY AS TO WHY [APPELLANT] IS NOT A SIGNIFICANT DANGER TO HIMSELF OR OTHERS WITH FIREARMS.

II. THE TRIAL COURT GAVE LITTLE TO NO WEIGHT TO [APPELLANT]'S CURRENT MENTAL STATE AND TREATMENT BY SPECULATING ABOUT HIS FUTURE CONDUCT IN DETERMINING WHETHER HE POSES A SIGNIFICANT DANGER TO HIMSELF OR OTHERS WITH FIREARMS.

III. THE TRIAL COURT'S REASONING CLEARLY INDICATES THAT IT DID NOT STRICTLY CONSTRUE THE MEANING OF "SIGNIFICANT" DANGER UNDER THE FERPO STATUTE.

IV. THIS COURT SHOULD TAKE THIS OPPORTUNITY TO ESTABLISH A LIST OF

MITIGATING FACTORS AS TO WHY A [FERPO]
SHOULD NOT [BE] ISSUE[D].

I.

"The scope of appellate review of a trial court's fact-finding function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). We do "not disturb the 'factual findings and legal conclusions of the trial judge unless [we are] convinced . . . they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Id. at 412 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)).

The law framing our discussion is outlined at length in In re D.L.B., 468 N.J. Super. 397, 400-07 (App. Div. 2021). We explained the Act is modeled on the process for obtaining a domestic violence restraining order. Id. at 402. The Act contains eight statutory factors under N.J.S.A. 2C:58-23(f), and seven additional factors were promulgated in Administrative Directive #19-19: Guidelines for Extreme Risk Protective Orders (August 12, 2019) (AOC Directive), which courts must consider before entering a FERPO. Id. at 402-04. We also described the applicable evidentiary standards, including that the Act provides "[t]he court shall issue the FERPO . . . if it finds 'by a preponderance

of the evidence at the hearing that the respondent poses a significant danger of bodily injury to the respondent's self or others' by possessing a firearm." Id. at 406-07 (quoting N.J.S.A. 2C:58-24(b)).

A.

In Points I, II, and III appellant attacks the trial judge's application of the facts to the statutory and guidelines factors. These arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). The trial judge's findings are supported by substantial credible evidence in the record. We discern no abuse of discretion and affirm for the reasons expressed by the judge.

B.

In Point IV, appellant argues the statutory and AOC Directive factors are "aggravating factors" and we should create a list of "mitigating factors" for courts to use when deciding to issue a FERPO. We decline appellant's invitation.

Our function is to enforce statutes in accordance with their terms. Phillips v. Curiale, 128 N.J. 608, 618 (1992). A "court has no power to substitute its own idea of what a statute should provide in the face of clear and unambiguous statutory requirements." Comm. to Recall Casagrande from Off. of Spring Lake

Heights Sch. Bd. Member v. Casagrande, 304 N.J. Super. 496, 510 (Law Div. 1997), aff'd, 304 N.J. Super. 421 (App. Div. 1997).

The Act and AOC Directive are unambiguous, and we discern no intent in them to promulgate aggravating or mitigating factors. The N.J.S.A. 2C:58-23(f) statutory factors are not aggravating factors because they "comprise a non-exclusive list, and the requirement that [a] court[] consider 'any other relevant evidence' in deciding if it will issue a FERPO, N.J.S.A. 2C:58-24." D.L.B., 468 N.J. Super. at 404 (internal citation omitted). Regardless, the AOC directive contains four additional factors pertaining to a respondent's mental health, which permits a court to consider whether a respondent receives mental health treatment and is compliant with the treatment. Finally, we note the domestic violence restraining order process, upon which the Act is modeled, lacks aggravating and mitigating factors, which further supports the conclusion such considerations do not apply here.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION