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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0243-21

IN THE MATTER OF
F.H.

Submitted April 5, 2022 – Decided February 15, 2023

Before Judges DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Petition Nos. 0315XTR2020000002 and 0315XTR2020000003.

Scott A. Coffina, Burlington County Prosecutor, attorney for appellant State of New Jersey (Jennifer B. Paszkiewicz, Assistant Prosecutor, of counsel and on the brief).

Attorneys Hartman, Chartered, attorneys for respondent F.H. (Katherine D. Hartman and Mark A. Gulbranson, Jr., on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

The State appeals from the August 12, 2021 order of the Law Division terminating a final extreme risk protective order (FERPO) previously entered against respondent F.H.¹ We reverse.

I.

On October 13, 2020, S.P., with the assistance of a police detective, filed a petition for a FERPO with respect to F.H. S.P. certified that one day earlier, F.H. confronted four juveniles, one of whom was her child, in a field he did not own, and while he pointed a loaded crossbow at them, ordered the juveniles to get on their knees, empty their pockets, and put their hands behind their backs as he detained and interrogated them with respect to alleged trespassing. She certified that, as a result of his actions, F.H. was charged with third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), third-degree criminal restraint, N.J.S.A. 2C:13-2(a), and third-degree terroristic threats, N.J.S.A. 2C:12-3(b).²

¹ We use initials because "[a]ll records related to proceedings for [FERPOs] are confidential and may not be disclosed to anyone other than the respondent . . . , except if good cause is found by the court to release such records." Admin. Off. of the Cts., Administrative Directive #19-19, Guidelines for Extreme Risk Protective Orders (Aug. 12, 2019) (the Guidelines).

² A grand jury later indicted F.H., charging him with four counts of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2), four counts of third-

S.P. also certified that F.H.: (1) has a history of violence, including tackling and fighting a man in 2015 who was fishing on allegedly private property;³ (2) was previously charged with shoplifting, N.J.S.A. 2C:20-11(b)(3), which was conditionally dismissed;⁴ and (3) "has had multiple encounters with individuals . . . while hunting [after which] both he and the other party have filed complaints for harassment which have all been dismissed." S.P. alleged that F.H., who was in possession of several firearms, displayed "erratic behavior" that was "extremely alarming and cause for concern." A municipal court judge issued a temporary extreme risk protective order (TERPO) against F.H. that day.

On February 1, 2021, after a two-day hearing at which two police officers, S.P., the four juveniles, and F.H.'s spouse, daughter, and hunting partner testified, the trial court issued a written opinion granting the petition. The court

degree terroristic threats, N.J.S.A. 2C:12-3(b), four counts of third-degree criminal restraint, N.J.S.A. 2C:13-2(a), third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d). Those charges are not before us.

³ Although not alleged in the petition, the record suggests F.H. was convicted of simple assault, N.J.S.A. 2C:12-1(a), in 2017. It is not clear if the conviction is related to the incident described in the petition.

⁴ The record suggests F.H. was convicted of shoplifting, N.J.S.A. 2C:20-11, in 2020, and charged with unlawful taking, N.J.S.A. 2C:20-3, which was conditionally discharged in 2019.

found that the four victims gave credible and largely consistent testimony establishing the following facts. They entered an agricultural field near their homes in the early evening of October 12, 2020, to take photographs. They did not see "No Trespassing" signs posted at the perimeter of the property. The four walked along a path at the edge of the crops growing in the field. As they walked, they saw F.H., who did not own the property but had permission to hunt there, in the distance. There is no dispute that F.H. was armed with a crossbow, which the court found to be a deadly weapon.

The juveniles continued on the path until they entered a wooded area of the property. F.H., who had crossed the field, confronted the teenagers. With his loaded crossbow pointed in their direction, an irate F.H. ordered the juveniles to get on their knees, empty their pockets, and put their hands behind their backs or head. Some of the juveniles heard F.H. say the crossbow was loaded; some saw that it was loaded. All were scared they would be shot or killed and did not feel they were free to leave. One victim was preparing herself mentally to either die or watch one of her friends die. Another thought he and his friends were being robbed and were going to die. After the teenagers complied with F.H.'s orders, he accused them of trespassing on what he falsely claimed to be his property.

F.H. told one of the juveniles they "only had one chance to tell him why [they] were on the property and that he would determine how this plays out." F.H. did not believe the juveniles' explanation that they were there to take photographs, but refused the offer of one victim to show him the camera under his jacket. Several photographs taken by the juveniles in the field prior to their encounter with F.H. were admitted as evidence.

F.H. told the juveniles they would be fined \$4,000 for trespassing and instructed them to call one of their parents. One of the juveniles called her mother, S.P. With the cellphone on speaker, the juvenile told her mother that a man was accusing the group of trespassing and wanted to speak with her. S.P. initially told F.H. that she was sure the children did not intend to trespass or harm the property and that they would pay whatever fines might result from trespassing. When she instructed F.H. to let the children leave the property, he refused. In an increasingly nasty tone, he demanded the addresses of each of the juveniles, which she refused to give. S.P.'s reaction caused F.H. to say that if she did not "calm down" things would "get much worse" for the children and that he would decide how things "played out."

S.P. instructed her daughter to leave. Her daughter said that she could not. Alarmed, S.P. repeatedly asked the children where they were. F.H. either

instructed them not to answer or spoke loudly to prevent S.P. from hearing their responses. A quick thinking S.P. activated an application on her cellphone that showed the location of her daughter's phone. As she spoke to the children and F.H., she drove to a cul-de-sac in her neighborhood adjacent to the field. When she told F.H. where she was, which happened to be near F.H.'s parked truck, he let the child get off their knees, gather their possessions, and flee. He told S.P. she was not allowed to come onto the property to retrieve the children.

F.H. later went to S.P.'s home. When her spouse asked F.H. if he had "pulled a crossbow" on the children, he said, "yeah, that's what happened" and left. F.H. later went to the local police department where he encountered the juvenile victims and their parents in the lobby. F.H. became angry and told the group that they were a "bunch of fucking liars."

Although F.H. did not testify, his attorney acknowledged he was armed with a crossbow when he encountered the juveniles because he was hunting deer. The attorney suggested F.H. was an experienced hunter who would not point a loaded crossbow at children. She argued that F.H. had the permission of the owner of the property to confront trespassers to prevent damage to the property and for their safety because the field was actively used for hunting. The record establishes that prior complaints of trespassing by F.H. were not resolved to his

satisfaction by police. The court found that F.H.'s "response to a legitimate concern about trespassing was beyond the pale. Whether or not [F.H.] purposefully, recklessly, negligently or even inadvertently menaced these children with a deadly weapon is unconscionable under any of those states of mind." The court concluded that F.H.'s "frustration with trespassing caused him to react in a way that caused grave harm to these children."

The court found that "[w]hether or not [F.H.] poses a significant danger of bodily injury to self or others by owning, possessing, purchasing, or receiving a firearm . . . is a thornier issue." While noting its "serious concerns" with F.H.'s conduct, the court found that

the question of whether or not this was an aberrational act or something indicative of a heretofore undiagnosed mental health issue is a conundrum in the court's mind. It is a question that the court feels requires further evaluation; and therefore, for the aforementioned reasons, the court finds by a preponderance of the evidence that [F.H.] does pose a significant danger as specified in the statute.

The court, however, stated that it "remains open to revisiting the matter if [F.H.] furnishes the court with a psychological/psychiatric evaluation that would elucidate the court as to whether or not it is safe for [F.H.] to have weapons." The court suggested such a report could support a motion for reconsideration.

On February 3, 2021, the trial court entered a FERPO against F.H. F.H. did not file an appeal.

On March 16, 2021, F.H. moved to terminate the FERPO. At a hearing on the motion, he presented the testimony of an expert in clinical forensic psychology. The expert opined that F.H. was not a danger to himself or others. His opinion was based on the results of psychological tests he administered to F.H. and two interviews with him shortly after entry of the FERPO. According to the expert, F.H.'s scores were not indicative of depression, hopelessness, psychosis, antisocial tendencies, or thought disorder, and suggested F.H. had a low risk for future violence. The expert noted, however, that F.H. feels "picked on or mistreated" as a result of the consequences he faces from his encounter with the juveniles and is "upset about that."

On cross-examination, the expert acknowledged that his opinion was based in part on his belief, as expressed in his report, that F.H. had "no history of any type of violent or inappropriate behavior with weapons for over [forty] years." He conceded, however, that he did not read the transcript of the hearing that resulted in issuance of the FERPO, having read only the police reports and the trial court's written opinion, so he was not aware of the details of the victims' testimony. The expert also did not consider the criminal charges arising from

the encounter that were then pending against F.H. He, therefore, provided no explanation for how the allegations supporting the pending criminal charges, which the trial court found credible, squared with his opinion that F.H. has no history of violent behavior with a weapon and is not a threat to himself or others.

In addition, the expert admitted that during his interviews, F.H. did not reveal to the expert that he had been convicted of simple assault in 2015. The expert was also not aware of F.H.'s shoplifting conviction or the unlawful taking charge. Moreover, although the expert's opinion was based in part on his belief that F.H. had a long history as a safe hunter, he admitted F.H. did not inform him of three safety-related hunting citations he received: twice for hunting without required orange safety clothing, and once for possession of a loaded weapon within 450 feet of an occupied building. He testified that neither the concealed information nor the fact that F.H. withheld it from him, changed his opinion F.H. is not a danger to himself or others when armed. The expert offered no opinion with respect to whether F.H. had undergone any therapy since entry of the FERPO or whether his mental condition had changed since that time.

On August 6, 2021, at the conclusion of the hearing, the trial court issued an oral opinion granting F.H.'s application. The court found that the expert's opinion was credible, despite the fact that F.H. did not reveal his complete

criminal history and past hunting violations during his evaluations. The court found the facts withheld by F.H. are "not necessarily insignificant facts if you will, but whether they detract from [the expert's] opinion regarding [F.H.] and whether or not he's a safety risk, I don't know that they challenge that perspective too much." The court continued,

The [c]ourt still stands by its findings that it did happen as indicated by the juveniles, and at the time the [c]ourt had very serious concerns about [F.H.], and on some level, if I'm being candid, I think maybe still a little bit, but I think some of the testing that's been done that is considered to be pretty objective by most standards that – that concerns somewhat ameliorated by how [F.H.] performed on these sort of psychological risk assessment tools, if you will.

So, I do find, at least, at this point, based on everything that's been testified to in my assessment of things, that [F.H.], by a preponderance of the evidence at this point, may not pose the same risk of harm to others that caused the [c]ourt to impose the [FERPO] in the first place. I do think there's been some time that has gone by, and [the expert's] assessment, at least provides the [c]ourt with some comfort level or assurances that there may not be any further reason for the order to remain in effect.

Although the expert did not offer an opinion explaining F.H.'s behavior when he confronted the juveniles, the court found that F.H.'s decision to detain the children with a loaded weapon "very well could be an aberrant act"

attributable to his frustration with the failure of local police to address his prior trespassing complaints to his satisfaction. Addressing F.H., the court stated

[b]ut, [F.H.], I do want to say this, and I try to be as – as candid and forthright as I can, I do think that there was something that can probably - - the fact that you've become frustrated with the trespassing issues, and that the town, or the law enforcement officials weren't doing something about it, and it may have just caused you to kind of like, you know what, then I'm just going to have to deal with this the way I want to deal with it, and, you know, they shouldn't be here, and whatever the case may be, and this is the way it's going to be handled.

....

But, again, that being said, I hope, [F.H.], that I'm not making a mistake.

....

But I will say that the [c]ourt is satisfied for the reasons indicated that the [FERPO] can be rescinded at this point.

On August 12, 2021, the trial court entered an order terminating the FERPO.

This appeal followed. The State makes the following argument.

THE TRIAL COURT ERRED IN FINDING RESPONDENT'S WITNESS AT THE FINAL EXTREME RISK PROTECTIVE ORDER TERMINATION HEARING CREDIBLE AND IN RESCINDING THE FERPO, AS RESPONDENT DID NOT PROVE, BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE, THAT HIS POSSESSION OF WEAPONS NO LONGER POSES A

SIGNIFICANT DANGER OF BODILY INJURY TO
HIMSELF OR OTHERS.

The trial court subsequently granted the State's motion for a stay of the August 12, 2021 order.

II.

The Extreme Risk Protective Order Act of 2018 (the ERPO Act), N.J.S.A. 2C:58-20 to -32, also known as the "red flag law," "permits the emergent removal of weapons from any person who poses a danger to self or others." In re D.L.B., 468 N.J. Super. 397, 400-01 (App. Div. 2021). Pursuant to N.J.S.A. 2C:58-31, the Supreme Court promulgated the Guidelines to effectuate the purposes of the ERPO Act. In addition, pursuant to N.J.S.A. 2C:58-32, the Attorney General adopted Attorney General Law Enforcement Directive No. 2019-2 to implement the law. See Attorney General, Law Enforcement Directive No. 2019-2 (Aug. 15, 2019) (the AG Directive).

New Jersey's law creates a two-stage process for issuing temporary and final orders to remove a person's firearms and ammunition, firearms purchaser identification card, handgun purchase permit, and handgun carry permit. N.J.S.A. 2C:58-23 (authorizing TERPO); N.J.S.A. 2C:58-24 (authorizing FERPO). The court first decides, based on an ex parte documentary record, if it will issue a temporary order to remove firearms. See N.J.S.A. 2C:58-23. Then, after a plenary hearing, the court decides if it will issue a final order to remove firearms indefinitely. See

N.J.S.A. 2C:58-24. The [ERPO] Act is loosely modeled on the process for obtaining temporary and final domestic violence restraining orders. See [the Guidelines].

[The Guidelines and the AG Directive] discuss the [ERPO] Act and its background at length. [The Guidelines] . . . prescribe the process for obtaining orders under the [ERPO] Act Because the [Guidelines] implement[] the Court's constitutional power to promulgate rules governing practice and procedure and administration of the courts, the . . . Guidelines have "the force of law." See State v. Morales, 390 N.J. Super. 470, 472 (App. Div. 2007) (discussing court directives generally). As such, a trial court is required to comply with the requirements of [the AG Directive and the Guidelines].

[D.L.B., 468 N.J. Super. at 401-02.]

In determining whether to issue a TERPO, a court must consider eight factors as to whether the respondent:

- (1) has any history of threats or acts of violence by respondent directed toward self or others;
- (2) has any history of use, attempted use, or threatened use of physical force by the respondent against another person;
- (3) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," . . . ;
- (4) is the subject of a temporary or final protective order or has violated a temporary or final protective

order issued pursuant to the "Sexual Assault Survivor Protection Act of 2015," . . . ;

(5) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to section 1 of [L. 1992, c. 209 (N.J.S.A. 2C:12-10)], or domestic violence offense enumerated in section 3 of [L. 1991, c. 261 (N.J.S.A. 2C:25-19)];

(6) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals;

(7) has any history of drug or alcohol abuse and recovery from this abuse; or

(8) has recently acquired a firearm, ammunition, or other deadly weapon.

[N.J.S.A. 2C:58-23(f).]

Guideline 3(d) requires the court to consider three additional factors as to whether the respondent:

(9) has recklessly used, displayed, or brandished a firearm;

(10) has an existing or previous extreme risk protective order issued against him or her; and

(11) has previously violated an extreme risk protective order issued against him or her.

[Guideline 3(d).]

If a court finds at least one of the eleven "behavioral" factors, it may then consider four mental health factors as to whether the respondent:

(12) has any prior involuntary commitment in a hospital or treatment facility for persons with psychiatric disabilities;

(13) has received or is receiving mental health treatment;

(14) has complied or has failed to comply with any mental health treatment; and

(15) has received a diagnosis of a mental health disorder.

[Ibid.]

Furthermore,

[a] finding of one or more of the factors may not be enough to support the issuance of a TERPO. The judge "shall issue" the TERPO only "if the court finds good cause to believe that the respondent poses an immediate and present danger of causing bodily injury to the respondent or others by" possessing a firearm.

[D.L.B., 468 N.J. Super. at 405 (quoting N.J.S.A. 2C:58-23(e)).]

When determining whether to grant a FERPO, the court must consider the N.J.S.A. 2C:58-23(f) factors "as well as any other relevant evidence." N.J.S.A. 2C:58-24. Guideline 5(d) requires the court to "consider all relevant evidence, including the factors referenced in Guideline 3(d)(1) to (11). If the court finds

one or more of those factors, then the court may consider the factor referenced in Guideline 3(d)(12) to (15)."

A respondent may apply for termination of a FERPO at any time following issuance of the order. N.J.S.A. 2C:58-25(c). The trial court must hold a hearing, at which it shall consider the N.J.S.A. 2C:58-23(f) factors, "as well as any other evidence including, but not limited to, whether the respondent has received, or is receiving, mental health treatment." Ibid.

If the respondent petitioned for termination, the respondent shall bear the burden at the hearing of proving by a preponderance of the evidence that the respondent no longer poses a significant danger of causing bodily injury to the respondent's self or to other persons by having custody or control of, owning, possessing, purchasing, or receiving a firearm.

[Ibid.]

"The scope of appellate review of a trial court's fact-finding function is limited." Cesare v. Cesare, 154 N.J. 394, 411 (1998). We are bound by the trial court's findings "when supported by adequate, substantial, credible evidence." Id. at 411-12. When evidence is testimonial and involves credibility questions, deference is "especially appropriate" because the trial judge is the one who has observed the witnesses first-hand. Id. at 412. We will not disturb a trial court's

findings unless they "went so wide of the mark that the judge was clearly mistaken." N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007).

We have carefully reviewed the record and conclude that the trial court departed from the applicable statutory standard when it determined that F.H. should no longer be subject to a FERPO. According to N.J.S.A. 2C:58-25(c), a FERPO may be terminated where the person subject to the order establishes that they "no longer pose[] a significant danger of causing bodily injury to [him]self or to other persons by having custody or control of, owning, possessing, purchasing, or receiving a firearm." (emphasis added). The plain language of the statute requires a finding by the court that there has been a change of circumstances since entry of the FERPO that eliminates the danger to self and others previously found by the court to exist if the respondent is in possession of a firearm. This is underscored by the statutory directive that the court shall consider "whether the respondent has received, or is receiving, mental health treatment." N.J.S.A. 2C:58-25(c).

No evidence was introduced at the termination hearing that F.H.'s mental state, circumstances, or acceptance and understanding of his behavior with the juveniles had changed in the time between entry of the FERPO and the hearing. The expert did not offer an opinion that F.H. had taken any steps, such as

undergoing therapy, to eliminate the threat of harm that supported entry of the FERPO a few months earlier. The expert instead, in effect, offered the opinion that entry of the FERPO was error in the first instance. A motion to terminate a FERPO, however, is not the equivalent of a motion for reconsideration or a substitute for an appeal. The statutory authority to terminate a FERPO is predicated on a finding that the threat of harm to self and others, previously found to exist, "no longer" is posed by the respondent's possession of a firearm. An expert's opinion based on results of psychological tests applied after entry of a FERPO, absent an opinion explaining why those results are convincing evidence of a change in circumstances eliminating the threat of harm to self and other supporting entry of the FERPO, is insufficient to satisfy N.J.S.A. 2C:58-25(c).

In addition, we find an absence of evidence in the record supporting the trial court's conclusion that termination of the FERPO is warranted because F.H.'s conduct with the juveniles was, in effect, an "aberration." The court found that F.H. detained the children at crossbow point because he was frustrated that police had not responded to his prior trespassing complaints to his satisfaction. Yet, the expert did not offer an opinion supporting this finding. The expert, who considered F.H. to have a violence-free history despite the trial court's finding

that the juveniles gave credible accounts of being detained by him through use of a loaded deadly weapon, did not opine that F.H.'s encounter with the children was an aberration. As noted above, the expert did not explain how F.H.'s encounter with the children could be squared with his opinion that F.H.'s possession of weapons did not pose a threat to himself or others.

Nor did the expert opine that, if faced with similar frustrations in the future, F.H. was unlikely again to use a loaded weapon to obtain the results he desired. Given that it is undisputed that F.H. frequently confronted and complained about alleged trespassers on his property and property he does not own, the potential for a future confrontation of this nature, and F.H.'s likely response, would be critical components of the analysis of whether termination of the FERPO is warranted. There is no evidence in the record establishing that F.H. has gained an understanding of the cause of his threatening and dangerous behavior with the juveniles or how to avoid engaging in such behavior when he finds himself frustrated with alleged trespassers or in other frustrating situations in the future. There is, therefore, insufficient support in the record for the trial court's decision to terminate the FERPO.

The August 12, 2021 order is reversed. The February 3, 2021 FERPO is reinstated.

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



CLERK OF THE APPELLATE DIVISION