

## **RECORD IMPOUNDED**

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0820-21

IN THE MATTER OF  
THE REVOCATION OF  
E.B.'S FIREARMS PURCHASER  
IDENTIFICATION CARD  
AND COMPELLING THE  
SALE OF HIS FIREARMS.

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Submitted March 13, 2023 – Decided August 4, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Law  
Division, Morris County, Docket No. GPA-016-21.

Evan F. Nappen Attorney at Law, PC, attorneys for  
appellant (Louis P. Nappen, on the briefs).

Robert J. Carroll, Morris County Prosecutor, attorney  
for respondent (Paula Jordao, Assistant Prosecutor, on  
the brief).

PER CURIAM

Petitioner E.B. appeals from a trial court's order revoking his firearms purchaser identification card (FPIC) and compelling the sale of his firearms. Petitioner's FPIC and firearms had been surrendered as a condition of bail in

connection with a 2013 sexual assault investigation. Petitioner and two others were indicted for sexual assault, but the matter was dismissed when the complaining witness died. Petitioner then moved for the return of his FPIC and weapons. The court denied the application, finding that returning petitioner's card and weapons were not in the interest of the public health, safety, and welfare pursuant to N.J.S.A. 2C:58-3(c)(5).

Among other things, petitioner argues on appeal that N.J.S.A. 2C:58-3(c)(5) is unconstitutional. In the alternative, he argues the trial court abused its discretion in its analysis of the facts, erring in its findings. For the reasons that follow, we affirm.

## I.

### A.

On June 9, 2013, Detective Sergeant Brett Rothenburger of the Bergen County Prosecutor's Office (BCPO) received a call at 4:00 a.m. reporting a sexual assault. The victim, N.R., was taken to Hackensack University Medical Center, and the sergeant met her there to take her statement. N.R. told Sergeant Rothenburger she went to a bar in Teaneck to celebrate her twenty-fourth birthday with some friends, where they socialized and drank alcohol. N.R. and her friends met some individuals in the bar, who introduced themselves as NFL football players.

N.R. decided to stay with the alleged players after her friends went home. The three men identified were petitioner, Frank Simmons, and Muron Damus. N.R. left the bar with the three men in a "white or silver sedan[.]" who offered to give her a ride back home. N.R. was in the backseat with petitioner, while Simmons and Damus occupied the front of the vehicle. She told the sergeant petitioner "tried to kiss her at one time and she pushed him away and said she was in a relationship." She then reported petitioner and the man in the front passenger seat "pinned her down in the backseat where she was sexually assaulted by [petitioner] putting his penis in her vagina."

The car then pulled into a driveway, and N.R. "was pushed out onto the roadway . . . [and t]he driver . . . exited [and] inserted his penis in her mouth while [another] held her arms." N.R. "recalled being pushed to the ground where she was knocked out . . . [and] when she regained her consciousness, she heard [someone say] '[w]as she alive? Was she alive?'" She heard someone else say they were going to call the police. The three men got back in the vehicle and drove off. N.R. ran home and told her mother, who called the police.

N.R.'s forensic exam yielded 150 photographs depicting "several abrasions, cuts, bruises, [and] contusions on . . . [her] body . . . head to toe . . . ." Later, N.R. and her mother gave statements to the police, which Sergeant Rothenburger described as "very similar to the account from the first time . . . ."

N.R.'s phone contained a picture of her with a man from the bar taken that night. The man was described as an "African American male with [a] buzz cut, black t-shirt, white insignia." The picture was sent to a phone number believed to belong the man in the photograph, and the number corresponded to petitioner's address.

Petitioner voluntarily reported to the prosecutor's office, where he was read his Miranda<sup>1</sup> rights. Petitioner then stated his recollection of the night's events. He said he was celebrating his birthday at a bar in Teaneck where he used to be a manager. He recalled interacting with N.R. and telling her friends he and the other two men "would take care of her and drive her home later that evening."

Petitioner told police he was in the backseat of the car with N.R. and "he had no contact at all physically with" her. He stated he may "have held her hand or touched her hand on the walk to the car . . . ." When their car arrived in petitioner's neighborhood, "Simmons . . . got out and hooked up with . . . [N.R.] and then they departed the area." Petitioner told Sergeant Rothenburger Simmons "was trying to have sex with . . . [N.R.]; [h]e was being rough and . . . there was some type of oral sex that took place" between her and Simmons

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

outside of the vehicle. He heard someone<sup>2</sup> say they were going to call the police, so the three men got back into the car and drove away.

Simmons and Damus were also interviewed by the BCPO. Simmons stated when the car reached the driveway "[h]e got out and . . . bent . . . [N.R.] over the vehicle and tried to have sexual intercourse with her and penetrate her." He told Sergeant Rothenburger he could not sexually perform because of his intoxication and "[a]t some point . . . [N.R.] was pushed to the ground." He told the officer that he "kind of pushed her away from him," and she fell, hitting her head.

Simmons returned to the BCPO to make an additional statement. In his second statement he told police he "was touching and kissing . . . [N.R.] in the back seat during the car ride." Simmons told Sergeant Rothenburger "[w]hen in the driveway . . . receiving oral sex, he stated that he waited for . . . [petitioner] to exit the vehicle and come . . . over to where he was to participate in the sex act . . . ." N.R. protested petitioner joining them and so petitioner went back into the vehicle, where he put the car "in reverse and backed it out of the driveway, causing [Simmons and N.R.] to fall . . . onto the ground . . . ."

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<sup>2</sup> The record shows that the neighbor who threatened to call the police was Patricia Magnero.

Sergeant Rothenburger then interviewed petitioner a second time. He admitted to kissing and touching N.R. in the backseat of the car before the group reached the driveway. When N.R. was outside with Simmons, he admitted that he got out of the "vehicle with his penis exposed as he walked over to [her and] she pushed him away . . . and he . . . put his penis back in his pants and returned to [the] vehicle." Petitioner told Sergeant Rothenburger "Simmons had gotten rough with [N.R.]." He said N.R. fell to the ground and had lost consciousness. Petitioner stated that shortly after she fell, he got into the driver's seat, backed the car out of the driveway, and left.

#### B.

In January 2020, Captain Stuart Greer of the Morristown Police Department received a request from the BCPO for information regarding a firearms investigation the Morristown Police Department conducted on petitioner. They sought this information because petitioner had applied to get his guns and FPIC back. Captain Greer learned there were two master index (MI) files for petitioner. According to Captain Greer, an MI file "is a master file for a single person so any documentation or applications [for firearms] . . . would go into one file." Noting the presence of two files for one applicant was unusual, Captain Greer concluded there had to be some sort of administrative mistake, which led to the creation of two MI files for petitioner.

Captain Greer reviewed the two MI files, which included petitioner's FPIC applications from 2007, 2009, and 2012. He learned that the Morristown Police Department received petitioner's first FPIC application on November 27, 2007. The Department denied the petition in 2008 because of concerns regarding missing equipment from petitioner's time working with the Morristown Ambulance Squad and petitioner lying about being related to a police officer in Morristown. In 2009, petitioner filed a second application. At that time, Captain Greer recommended denial of petitioner's second FPIC application because he learned there was missing equipment from petitioner's time working as a seasonal officer with another police department. The Morristown Police Department denied the second FPIC application on December 29, 2009.

Captain Greer also learned petitioner applied for employment as a police officer with the Morristown Police Department on July 2, 2012. Petitioner was not considered for employment at the time because he did not rank high enough on the list of eligible candidates.

Petitioner filed a third application for an FPIC on December 8, 2012, which the department inadvertently filed under a different MI file. On this application, petitioner answered "no" to the question: "have you ever had a[n FPIC], permit to purchase a handgun, permit to carry a handgun or any other firearms license or application refused or revoked . . . ?" Petitioner answered in

the negative despite his previous FPIC rejection by the very same police department.

Petitioner applied for employment a second time with the Morristown Police Department in June 2013. As part of his background questionnaire, petitioner answered he had not been denied "any license or permit, issued by any [s]tate or [f]ederal agency . . . ." The 2013 background check revealed petitioner owned a Glock handgun. Petitioner was ultimately recommended for employment on June 7, 2013, one day before the events of N.R.'s alleged sexual assault.

### C.

Petitioner, Simmons, and Damus were arrested on June 29, 2013, in connection with the alleged sexual assault of N.R. On October 25, 2013, the Bergen Vicinage Superior Court issued an order for the surrender of petitioner's passport, firearms, and FPIC as a condition of bail. In addition to the Glock, petitioner surrendered a Mossberg shotgun. Petitioner was indicted on June 27, 2014. The case was dismissed on June 27, 2019, because the complaining witness, N.R., had committed suicide.

Petitioner moved for return of his weapons and FPIC. The State opposed, citing the sexual assault allegations as well as petitioner's FPIC application



misrepresentations. The State cross-moved for an order revoking petitioner's FPIC and compelling petitioner to sell the firearms.

The trial court conducted five hearings between June 30, and September 20, 2021. Captain Greer and Sergeant Rothenburger testified. The court found petitioner had not engaged in a knowing falsification of his FPIC application, rejecting the State's automatic disqualifier argument under N.J.S.A. 2C:58-3(c)(3). The trial court then turned to the June 8, 2013 incident, and whether petitioner's role in it merited discretionary disqualification under N.J.S.A. 2C:58-3(c)(5). Calling the criminal investigation "well documented," and its written reports "comprehensive," the trial court found, "there were sexual activities going on," and that "[petitioner] in his second statement acknowledged that he had at some point exposed his private parts to the complaining witness . . . ." The court further found N.R. suffered "non-trivial injuries" as a result of her encounter with the three men, an encounter the court described as "unwanted sexual misconduct." Finding the State had met its burden under N.J.S.A. 2C:58-3(c)(5) by a preponderance of the credible evidence, the court concluded:

My assessment is that the allegations of misconduct in the sexual assault case were serious enough and corroborated enough by physical evidence and observations of the victim to lead me to the conclusion by a preponderance of the evidence that it would be inappropriate to authorize possession of a weapon.

Petitioner raises numerous points on appeal, some of which are repetitive, and many which overlap. We summarize them as follows:

I. N.J.S.A. 2C:58-3 Is Unconstitutional Under the United States Supreme Court Decision in New York State Rifle And Pistol Assn v. Bruen, 142 S.Ct. 2111 (2022).

II. The Trial Court Had No Authority to Compel the Forfeiture of Petitioner's Firearms.

III. The Trial Court Abused Its Discretion in Denying the Return of Petitioner's Weapons Pursuant to N.J.S.A. 2C:58-3(c)(5).

IV. Petitioner Was Entitled to A Jury Trial on the Issue of Forfeiture under N.J.S.A. 2C:64-1, -13.

II.

A.

In the review of an order granting forfeiture, the court shall "accept a trial court's findings of fact that are supported by substantial credible evidence[.]" In re Forfeiture of Pers. Weapons & Firearms Identification Card belonging to F.M., 225 N.J. 487, 505 (2016) (quoting In re J.W.D., 149 N.J. 108, 116-17 (1997)), "[b]ecause 'a judicial declaration that [a person] poses a threat to the public health, safety or welfare involves, by necessity, a fact-sensitive analysis.'" Ibid. (quoting State v. Cordoma, 372 N.J. Super. 524, 535 (App. Div. 2004)). The findings of a trial judge are "binding on appeal when supported by

adequate, substantial and credible evidence." New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358, 373 (App. Div. 2018) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474 (1974)).

A reviewing court shall "'not disturb the factual findings and legal conclusions of the trial [court] unless' [it is] convinced [they were] 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" In re Twp. of Bordentown, 471 N.J. Super. 196, 217 (App. Div. 2022) (quoting Rova Farms Resort, 65 N.J. at 484.). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

## B.

The decision to grant an FPIC "is made by the chief of police of the municipality where the applicant resides." F.M., 225 N.J. at 508 (citing N.J.S.A. 2C:58-3(d)). An FPIC must be granted "unless good cause for the denial thereof appears." Ibid. (quoting N.J.S.A. 2C:58-3(f)). "Similarly, the procedure for revoking an [FPIC], which may be initiated upon application of the county prosecutor . . . is governed by N.J.S.A. 2C:58-3(f)." Ibid. "That statute provides that '[a]ny [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 such permit." Ibid. (first alteration in original) (quoting N.J.S.A. 2C:58-3(f)).

The State "has the burden of proving the existence of good cause for the denial by a preponderance of the evidence." In re Osworth, 365 N.J. Super. 72, 77 (App. Div. 2003) (citing Weston v. State, 60 N.J. 36, 51 (1972)). Hearsay evidence is admissible, but there must be sufficient legally competent evidence to support the court's findings. Weston, 60 N.J. at 45.

### III.

#### A.

Petitioner argues the trial court deprived him of his constitutional right to bear arms under the Second Amendment to the United States Constitution when it used N.J.S.A. 2C:58-3 as the statutory basis for its order compelling forfeiture of his weapons. Petitioner further contends the statute fails the test established by the United States Supreme Court in Bruen, that is, the statute "is not consistent with this nation's historical tradition of firearms regulation."

We have recently addressed the constitutionality of a weapons forfeiture grounded in N.J.S.A. 2C:58-3(c)(3) and N.J.S.A. 2C:58-3(c)(5) in light of Bruen. In re Appeal of the Denial of M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. 148 (App. Div. 2023).

M.U. appealed from a trial court order denying his application for a handgun purchasing permit (HPP), revoking his FPIC, and requiring him to sell his firearms. M.U., 475 N.J. Super at 162. M.U. argued N.J.S.A. 2C:58-3(c)(5) was unconstitutional under Bruen. Id. at 170. In the alternative, M.U. argued the trial court engaged in a mistaken exercise of discretion when it considered the evidence and concluded that M.U.'s acquisition of additional firearms would not be in the interest of the public health, safety, and welfare under subsection (c)(5). Ibid.

The facts bear some resemblance to the matter before us. M.U. obtained an FPIC in 2017 and subsequently applied for an HPP. Id. at 164. After an investigation by local police, the police chief denied the request, citing subsection (c)(5). Id. at 164-65. The chief referenced "[M.U.'s] 'multiple instances of negative police interactions, including the theft of a trailer and criminal mischief.'" Id. at 164. M.U. appealed to the trial court, which conducted a hearing. Ibid. Testimony at the hearing adduced evidence that M.U. was implicated in the crimes of criminal mischief and theft in four separate incidents between 2012<sup>3</sup> and 2017. Id. at 164-65. The testifying officer

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<sup>3</sup> The November 2012 incident was expunged. Id. at 165.

addressed each incident and "concluded they reflected a pattern of 'poor judgment,' which made [M.U.] 'unfit to possess a firearm.'" Id. at 165.

In weighing the witnesses' testimony, the trial court found M.U. not credible and noted he had lied to the police during their investigation of his crimes. Id. at 167. "The [trial] court found that granting the HPP permit and allowing appellant to continue to own firearms was not in the interest of public health, safety, and welfare." Id. at 167. Declining to consider the vandalism and drink-throwing incidents because M.U. was not charged, the court nonetheless found M.U. posed a risk that he would improperly cause harm to others with a firearm. Id. at 168.

The court issued an order which: denied M.U.'s HPP application; granted the State's motion to revoke M.U.'s FPIC; and required M.U. to sell his firearms. Ibid. While the matter was pending before us, the U.S. Supreme Court decided Bruen. Writing for the panel, Judge Richard J. Geiger undertook an exhaustive review of the historical record, as required by the Bruen Court. He concluded:

The historical record reveals three principles. First, legislatures traditionally imposed status-based restrictions that disqualified categories of persons from possessing firearms. Second, the status-based restrictions were not limited to individuals who demonstrated a propensity for violence—they also applied to entire categories of people due to the perceived threat they posed to an orderly society and compliance with legal norms. Third, legislatures had

broad discretion to determine when people's status or conduct indicated a sufficient threat to warrant disarmament.

[Id. at 189.]

Rejecting M.U.'s arguments that N.J.S.A. 2C:58-3(c)(5) was void for vagueness or unconstitutionally overbroad, Judge Geiger held that neither Bruen, nor its predecessors, Heller<sup>4</sup> and McDonald<sup>5</sup>, rendered the statute unconstitutional. Id. at 192-93. We see no reason to deviate from Judge Geiger's well-reasoned analysis and conclude N.J.S.A. 2C:58-3(c)(5) is constitutional for the same reasons.

## B.

We turn to petitioner's argument that the trial court, like in M.U., "erred in its assessment of the evidence and in its conclusion under N.J.S.A. 2C:58-3(c)(5) that it would not be in the interest of the 'public health, safety or welfare'" to return the FPIC and weapons he surrendered as a condition of bail. Id. at 163. The trial court denied petitioner's motion for return of his property, and it granted the State's request for revocation of petitioner's FPIC and to compel sale of his firearms on October 12, 2021. We note N.J.S.A. 2C:58-3(c)(5) was

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<sup>4</sup> District of Columbia v. Heller, 554 U.S. 570, 635 (2008)

<sup>5</sup> McDonald v. City of Chicago, 561 U.S. 742, 791 (2010)

amended effective December 22, 2022. The current version of the statute is not before us. The version of the statute we analyze reads as follows:

c. Who may obtain. No person of good character and good repute in the community in which he lives, and who is not subject to any of the disabilities set forth in this section or other sections of this chapter, shall be denied a permit to purchase a handgun or a [FPIC], except as hereinafter set forth. No [HPP] or [FPIC] shall be issued:

. . . .

(3) . . . to any person who knowingly falsifies any information on the application form for a [HPP] or [FPIC];

. . . .

(5) To any person where the issuance would not be in the interest of the public health, safety or welfare[.]

Our thorough review reveals a comprehensive record from which the trial court reached its findings of fact and conclusions of law. The court made detailed and nuanced credibility findings.

In its oral statement of reasons, the court rejected some aspects of the State's cross-motion, finding the State failed to demonstrate petitioner engaged in a knowing falsification of his FPIC application. However, the record supports the court's finding that N.R. was sexually assaulted inside and outside of the car she and petitioner were riding in, and then abandoned by the side of the road.



The record also amply supports the court's finding petitioner played a role in the incident. Noting petitioner admitted that he had exposed himself to N.R. while she was being sexually assaulted by the driver of their car, the court found the greater weight of the evidence led it to conclude "there was sexual misconduct against [N.R.] and that [petitioner] was part of it." To quote Judge Geiger:

The record supports the finding that appellant fits squarely within the category of individuals who would pose a risk to "public health, safety or welfare" if permitted to purchase handguns. We therefore conclude that appellant's history of misconduct placed him outside of "the people" protected by the Second Amendment. We discern no abuse of discretion.

[M.U., 475 N.J. Super. at 196.]

C.

Petitioner contends that N.J.S.A. 2C:58-3(c)(5) solely addresses HPP and FPIC licensing issues, and that it does not authorize the court to order forfeiture of his weapons. Petitioner contends that the State should have moved under the forfeiture statute, N.J.S.A. 2C:64-1, -13 to take his weapons. Proceeding under this statute, argues petitioner, would have entitled him to litigate the matter in civil court pursuant to N.J.S.A. 2C:64-3. Petitioner posits that the court's order compelling him to sell his weapons outside of the process established by the forfeiture statute is error. We are unpersuaded.

Petitioner's FPIC and firearms were turned over as a condition of petitioner's bail in 2013. When the first-degree and second-degree sexual assault charges against petitioner were dismissed after the complainant's death, the State moved, as it had statutory authority to do, for revocation of petitioner's FPIC. Making findings, the court granted the State's request. It follows that, once the court revoked petitioner's right to acquire firearms under N.J.S.A. 2C:58-3(c)(5), the State can proffer the same evidence of petitioner's conduct and seek an order compelling sale of the weapons petitioner had already surrendered. We find no forfeiture in this scenario because a compelled sale through an authorized firearms dealer results in petitioner receiving compensation for his property. A forfeiture under N.J.S.A. 2C:64-1, -13, the process recommended by petitioner, would result in petitioner receiving no compensation for the weapons retained by the State.

Petitioner's firearms were never "unlawfully possessed, carried, acquired or used" during his commission of the acts which led to revocation of his FPIC. See N.J.S.A. 2C:64-1(1). There is no evidence that petitioner's weapons were used or intended to be used in furtherance of an unlawful activity. See N.J.S.A. 2C:64-1(2). We discern no basis for the State to "seize" petitioner's weapons under the statute, especially where the State came into possession of those weapons by surrender as a condition of bail.

To the extent that we have not addressed any remaining arguments by petitioner, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION