

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2813-21

IN THE MATTER OF P.L.¹

Argued June 6, 2023 – Decided June 20, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Petition No. 0234-XTR-2021-000001.

Joseph L. Nackson argued the cause for appellant P.L. (Joseph L. Nackson and Jeffrey Zajac, on the briefs).

K. Charles Deutsch, Assistant Prosecutor, argued the cause for respondent State of New Jersey (Mark Musella, Bergen County Prosecutor, attorney; K. Charles Deutsch, of counsel and on the briefs).

PER CURIAM

The Extreme Risk Protective Order Act of 2018 (ERPO or the statute), N.J.S.A. 2C:58-20 to -32, New Jersey's "'red flag law,' empowers a court," upon

¹ We identify appellant P.L. and his wife by initials as records relating to temporary extreme risk protective order proceedings are confidential. See N.J.S.A. 2C:58-30.

proof by a preponderance of the evidence, to order the removal of "firearms from a person who 'poses a significant danger of bodily injury to . . . self or others' by possessing them." In re D.L.B., 468 N.J. Super. 397, 400 (App. Div. 2021) (omission in original) (quoting N.J.S.A. 2C:58-24(b)). Following a plenary hearing, the Law Division judge granted a law enforcement officer's petition for a final extreme risk protective order (FERPO) against P.L., who appeals from that order. Based upon our review of the record, the parties' arguments, and the applicable legal principles, we affirm.

We take the following facts from the record. On August 17, 2021, the Maywood Police Department filed a petition for a temporary extreme risk protective order (TERPO), which was granted by a municipal court judge after finding that P.L. "pose[d] an immediate and present danger of causing bodily injury to himself/herself or others by owning, possessing, purchasing or receiving firearms and/or ammunition." The TERPO provided:

1. [P.L.] is prohibited from owning, purchasing, possessing, or receiving firearms and/or ammunition, and from securing or holding a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.A. 2C:58-3, or a permit to carry a handgun pursuant to N.J.S.A. 2C:58-4;
2. [P.L.] shall surrender to law enforcement any firearms and ammunition in the Respondent's custody or control, or which the Respondent possesses or owns;

3. [P.L.] shall surrender to law enforcement any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by [him];
4. Any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by [P.L.] is hereby immediately revoked; [and]
5. The County Prosecutor is to immediately notify the New Jersey State Police that [P.L.] is disqualified from owning, purchasing, possessing, or receiving firearms and/or ammunition pursuant to N.J.S.A. 2C:58-3(c)(10).

The Law Division judge conducted a two-day plenary hearing on April 1 and 7, 2022. Detective Shawn Patten of the Maywood Police Department testified for petitioner. Dr. Diana Riccioli, P.L., and his wife, G.L. testified for P.L. The judge issued a FERPO and oral decision following closing arguments. On May 23, 2022, the judge issued a comprehensive written statement of reasons amplifying her oral decision pursuant to Rule 2:5-1(b).

The judge made the following factual findings. On July 28, 2021, Maywood Police responded to a report of an unresponsive person at P.L.'s residence. Upon arrival, police found P.L. lying in bed with a weak, slow pulse and agonal respirations. P.L.'s hands were blue/grey and cool to the touch. The bedsheets were wet and there was vomit next to his head.

G.L. told police that P.L. was taking Xanax, Percocet, and other medications. G.L. led police to three empty pill bottles on a desk in the home office area. Next to the prescription bottles police found a note stating: "Sorry I gotta go," P.L.'s wallet, cell phone, and birth certificate.

G.L. told police that she and P.L. had an argument the night before, during which she told him that she believed their marriage was ending. Police also responded to that incident. G.L. informed police that she was concerned for P.L.'s mental health. P.L. later spoke to police upon recovery and declined to speak to a mental health professional.

P.L. was hospitalized for a Xanax overdose. While he claimed the overdose was accidental, police and medical professionals at Hackensack University Medical Center (HUMC) considered the overdose to be a suicide attempt. At one point, P.L. told hospital staff he attempted suicide by overdosing on Xanax because he desired to be with his parents who had died several years earlier. P.L. told police he filled his mouth with water and dumped pills into his mouth. Medical records show that over fifty 1 mg. pills were found in his system. P.L. remained hospitalized at HUMC for seven days and was diagnosed with depression and unspecified mood disorder status post-suicide attempt. At the time, P.L. was prescribed Xanax, Percocet, Flexeril, and Zoloft.

P.L. testified that he had discontinued taking Xanax and was currently prescribed Olanzapine, a mood stabilizer.

The judge noted P.L. denied the handwritten note he left was a suicide note, and "[t]he text of the note, on first blush, would appear to be innocuous, but when considered with the attendant facts, that consideration leads [the] court to the reasonable inference that the note was an expression [of P.L.'s] intent to commit suicide."

Due to the apparent suicide attempt and the large number of firearms and amount of ammunition found in P.L.'s residence, police seized his firearm's and filed a TERPO petition.

As to credibility, the judge found Detective Patton, who had testified as to the underlying facts, to be credible. She found P.L.'s testimony was not credible. The judge found P.L. continued to deny the suicide attempt, maintained the Xanax overdose was accidental, and repeatedly minimized his psychiatric symptoms during his testimony. The judge also found G.L.'s testimony was not credible, noting G.L. minimized respondent's psychiatric symptoms.

P.L.'s expert, Dr. Diana Riccioli, interviewed P.L. and G.L. and administered an MMPI-2 psychological test of P.L. Dr. Riccioli diagnosed P.L.

with adjustment disorder – anxious. She testified that she based her opinion in part on the fact that P.L. was not recommended to be involuntarily committed following his hospital stay. The judge noted that HUMC medical professionals recommended that he engage in outpatient mental health treatment, which he did not do. The judge further noted that P.L. was prescribed Zoloft, a psychotropic medication, by a pain specialist and he did not follow prescription instructions. Dr. Riccioli acknowledged that P.L. was sad, did not engage in mental health treatment, and minimized his psychiatric symptoms.

Dr. Riccioli opined that P.L. was "not be likely to act in a dangerous manner to public safety. and granting relief will not be contrary to the public interest as he is conscientious in his handling and storing of firearms." The judge did not find Dr. Riccioli's opinion to be credible and discounted her testimony.

As we explain infra, the ERPO requires the court to consider eight factors before deciding whether to issue a TERPO or FERPO (factors one through eight). N.J.S.A. 2C:58-23(f). Administrative Directive #19-19: Guidelines for Extreme Risk Protective Orders (August 12, 2019) requires the court to consider seven additional factors in certain circumstances (factors nine through fifteen).

The judge considered each of the fifteen factors. She found the following seven factors supported the entry of a FERPO: one (history of threats or acts of violence against self or others); two (history of use, attempted use, or threatened use of physical force against another); seven (history of drug or alcohol abuse); twelve (prior involuntary commitment), thirteen (received mental health treatment); fourteen (complied with or failed to comply with mental health treatment); and fifteen (diagnosed with a mental health disorder). During oral argument before this court, the State acknowledged that factor twelve did not apply.

Based on those findings, the judge found the State "sustained its burden of showing "by a preponderance of the evidence that [P.L.] poses a significant danger of bodily injury to self by owning or possessing a firearm," and entered the FERPO against P.L. The FERPO imposed the same operative restrictions and prohibitions against P.L. as the TERPO. This appeal followed.

Defendant raises the following points for our consideration:

**I. THE ENTRY OF A [FERPO] BY THE LAW
DIVISION REPRESENTS PLAIN AND
REVERSIBLE ERROR.**

**A. The State Failed to Satisfy Its Burden of Proof
Under N.J.S.A. 2C:58-23(f).**

B. The Reasoning of the Law Division Does Not Support the Entry of a FERPO Under N.J.S.A. 2C:58-23(f).

II. THE DECISIONS IN HELLER,² McDONALD,³ AND THE RECENT 2022 DECISION IN NEW YORK STATE RIFLE & PISTOL ASS'N, INC. V. BRUEN⁴ BY THE UNITED STATES SUPREME COURT REQUIRE AN ENHANCED BURDEN OF PROOF UNDER N.J.S.A. 2C:58-23(c).

A.

Like many other states, New Jersey "adopted a 'red flag law' to permit family members and others to seek emergent orders to remove firearms from a person who poses a danger to self or others because of a mental health crisis or instability." D.L.B., 468 N.J. Super. at 400-01. "The Act supplements other statutory mechanisms for removing firearms from persons who legally possess them." Id. at 401 (citing N.J.S.A. 2C:58-3(f) (providing for revocation of firearm purchaser identification card if person no longer qualifies)).

ERPO created "a two-stage process for issuing [TERPOs and FERPOs] to remove a person's firearms and ammunition, firearms purchaser identification

² Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

³ McDonald v. City of Chicago, 561 U.S. 742 (2010).

⁴ New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. ___, 142 S. Ct. 2111 (2022).

card, handgun purchase permit, and handgun carry permit." Ibid. (citing N.J.S.A. 2C:58-23 (authorizing TERPOs); N.J.S.A. 2C:58-24 (authoring FERPOs)). The court initially decides, based on an ex parte documentary record, whether to issue a TERPO. Id. at 401-02 (citing N.J.S.A. 2C:58-23). Then, after conducting a plenary hearing, the court decides whether to issue a FERPO to remove firearms indefinitely. Id. at 402 (citing N.J.S.A. 2C:58-24). "The Act is loosely modeled on the process for obtaining temporary and final domestic violence restraining orders. Ibid. (citing Administrative Directive #19-19: Guidelines for Extreme Risk Protective Orders (August 12, 2019) (AOC Directive)).

The AOC Directive summarizes the statute and promulgates Guidelines (AOC Guidelines or Guideline) "that prescribe the process for obtaining orders" under the statute. Ibid. "Because the AOC Directive implements the [Supreme] Court's constitutional power to promulgate rules governing practice and procedure and the administration of the courts, the AOC Guidelines have 'the force of law.'" Ibid. (citing 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 [AOC Directive] and the AOC guidelines." Ibid.

The Attorney General also issued a directive regarding the statute. See Attorney General, Law Enforcement Directive No. 2019-2 (Aug. 15, 2019) (AG Directive). "Attorney General directives relating to the administration of law enforcement have the 'force of law.'" D.L.B., 468 N.J. Super. at 402 (quoting In re Att'y Gen. L. Enf't Directive Nos. 2020-5 and 2020-6, 246 N.J. 462, 487-88 (2021)).

"A family or household member or a law enforcement officer may petition the court for an order by 'alleging that the respondent poses a significant danger of bodily injury to self or others by having custody or control of, owning, possessing, purchasing or receiving a firearm.'" Ibid. (quoting N.J.S.A. 2C:58-23(a)). A law enforcement officer "'shall file a petition for a TERPO' if the non-family or non-household member provides information that gives the officer 'probable cause to believe that the respondent poses an immediate and present danger of causing bodily injury to self or others' by possessing a firearm." Id. at 403 (quoting AG Directive § 3.5). Alternatively, "[i]f an officer only has 'good cause,' then that officer may still choose to file for a TERPO." Ibid. (quoting AG Directive § 3.5). "The petition shall include an affidavit presenting the factual grounds for the relief and shall provide available information about

the respondent's firearms and ammunition." Ibid. (citing N.J.S.A. 2C:58-23(b));
see also AOC Guideline 2(e).

As we explained in D.L.B.:

Before deciding to issue a TERPO or FERPO, the statute requires a court to consider eight factors – whether the respondent:

- (1) has any history of threats or acts of violence by the 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 . . . (C.2C:12-10), or domestic violence offense enumerated in section 3 of . . . (C.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 a court to consider three additional factors, based on the Act's statement that the eight factors comprise a non-exclusive list, N.J.S.A. 2C:58-23(f), and the requirement that courts consider "any other relevant evidence" in deciding if it will issue a FERPO, N.J.S.A. 2C:58-24. See AOC Directive at 4-5 (discussing additional factors incorporated in AOC Guidelines). Those three factors pertain 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).]

Only if a court finds at least one of the eleven "behavioral" factors, then it "may consider," Guideline

3(d) (regarding TERPO), Guideline 5(d) (regarding FERPO), four additional factors pertaining to a person's mental health – 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.

[Guideline 3(d).]

[Id. at 404.]

"A finding of one or more 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." Id. at 405 (quoting N.J.S.A. 2C:58-23(e)); see also AOC Guideline 4(a). A TERPO may be granted ex parte based on the petitioner's affidavit. Ibid. (citing N.J.S.A. 2C:58-23(d); AOC Guideline 3(c)). The court shall also issue a search warrant for firearms and ammunition in the possession, custody, or control of a

respondent or which the respondent could access, upon a showing of probable cause. Ibid. (citing AG Directive § 6.4).

The court must then conduct a plenary hearing to determine if a FERPO will be issued. N.J.S.A. 2C:58-24; AOC Guideline 5(a). "Importantly, '[t]he rules governing admissibility of evidence at trial shall not apply to the presentation and consideration of information at the [FERPO] hearing.'" D.L.B., 468 N.J. Super. at 406 (quoting AOC Guideline 5(c)). Thus, the court "may consider an affidavit and documents submitted in support of the petition, and may consider any information provided by the county prosecutor or designee." AOC Guideline 5(c). Presumably, an order cannot be based solely on hearsay; there must be a residuum of competent evidence in the record to support the issuance of a FERPO. D.L.B., 468 N.J. Super. at 406.

"The court shall issue the FERPO order 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)). "The FERPO bars the respondent from possessing, and requires the respondent to surrender, any firearms, ammunition, firearm purchaser identification card, handgun purchase permit, and handgun carry permit." Id. at 407 (citing AOC Guideline 6(b)); see also N.J.S.A. 2C:58-

24(d). "A respondent may ask the court at any time to terminate the order" but "[u]ntil the court issues a further order, the FERPO remains in effect." Ibid. (citing AOC Guideline 6(c)).

B.

Applying these principles, we affirm the issuance of the FERPO against P.L. substantially for the reasons expressed in the judge's statement of reasons with one exception. We add the following comments.

Our review of the trial court's findings of fact and credibility determinations is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). "We are generally bound by trial court findings 'when supported by adequate, substantial, credible evidence.'" D.L.B., 468 N.J. Super. at 416 (quoting Cesare, 154 N.J. 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." Ibid. (quoting Cesare, 154 N.J. at 412). "An appellate court will not disturb a trial court's findings unless they 'went so wide of the mark that the judge was clearly mistaken.'" Ibid. (quoting N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007)). However, the trial court must "find the facts" in its decision, R. 1:7-4(a), and state "the reasons supporting its decision to grant or deny" the FERPO, AOC Guidelines 6(a).

P.L. contends the judge incorrectly found factor one (history of threats or acts of violence against self or others). He argues that the marital discord did not rise above a single episode of domestic contretemps. We are unpersuaded. The day before the suicide attempt, in the midst of a marital incident, the police were summoned to his residence. G.L. told police the marriage may be ending, and she was concerned that defendant may harm himself. While the verbal argument between P.L. and his wife may not have risen to the level of supporting the entry of a domestic violence restraining order, factor one is not limited to a history of threats or acts of violence by the respondent directed toward others. N.J.S.A. 2C:58-23(f)(1). It also applies to threats or acts of violence directed toward self. Ibid. The record supports the conclusion that apparent marital difficulties and unhappiness with retirement contributed to P.L.'s attempted suicide at his residence, which constituted a nearly successful act to end his life but for medical intervention, including intubation.

P.L. also contends he did not attempt suicide, the overdose was accidental, and he was hospitalized due to pneumonia. The record indicates otherwise. P.L. took fifty Xanax pills by dumping the entire contents of the prescription bottle in his mouth. His contention this was accidental is implausible and rejected by the judge, who did not find P.L.'s testimony to be credible. Moreover, the

hospital reported that P.L. told staff that he wanted to commit suicide to be with his parents. The hospital discharge summary indicated P.L. "presented with drug overdose found to have toxic metabolic encephalopathy from drug overdose and aspiration pneumonia. He was intubated for respiratory failure."

P.L. argues the evidence did not support the entry of the FERPO because the State did not "produce any informed medical or expert opinion addressing . . . the incident represented a suicide attempt." We are unpersuaded. The rules of evidence do not apply in ERPO hearings. D.L.B., 468 N.J. Super. at 406 (quoting Guideline 5(c)). Hearsay may be considered by the court. Ibid. The judge relied, in part, on medical records. We discern no abuse of discretion in doing so. The State was not required to present expert testimony. Moreover, the court, sitting as the factfinder, may determine that P.L.'s expert's opinions were not persuasive even though the State did not present opposing expert testimony. See In re Civil Commitment of R.F., 217 N.J. 152, 174 (2014) ("A trial judge is 'not required to accept all or any part of [an] expert's opinion[.]'" (alterations in original) (quoting In re D.C., 146 N.J. 31, 61 (1996))); Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 2 on N.J.R.E. 703 (2022-2023) ("Certainly, a factfinder is never bound to accept the testimony of

expert witnesses, even if unrebutted by any other evidence."). We defer to such findings.

Our careful review of the record convinces us that except for finding factor twelve, the judge's findings of fact and credibility determinations are amply supported by the record. Except as to factor twelve, her application of the factors and guidelines was correct, and the weight she gave the applicable factors was supported by the evidence. Even removing factor twelve, so too was her finding that petitioner met the burden of proof by a preponderance of the evidence. We discern no basis to disturb her ruling.

C.

P.L. contends that the trilogy of United States Supreme Court opinions in Heller, McDonald, and Bruen requires an enhanced burden of proof by clear and convincing evidence. We disagree. P.L. cites no published precedent in support of that argument. Notably, P.L. does not argue that ERPO is unconstitutional.

The State contends that Heller, McDonald, and Bruen only pertain to regulating gun ownership and possession by law abiding, mentally healthy people. The State notes that the preponderance of the evidence standard has been held to be constitutional for the issuance of final restraining orders in domestic violence cases, and the same reasoning should apply here. We agree.

Heller, McDonald, and Bruen each approved of state-imposed limitations on the right of mentally ill people to possess firearms. Heller, 554 U. S. at 626-27 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill"); McDonald, 561 U. S. at 786 (same); Bruen, 142 S. Ct. at 2162 (Kavanaugh, J. concurring). Each of these cases involved challenges to regulations of the right of law-abiding, mentally healthy individuals to possess firearms. Bruen, 142 S. Ct. at 2122 (holding that "ordinary that "ordinary, law abiding citizens" have the right to carry a handgun for self-defense outside the home"); *Id.* at 2162 (Kavanaugh, J. concurring). Each of these cases involved challenges to restrictions of the right of law-abiding, mentally healthy individuals to possess firearms. Bruen, 142 S. Ct. at 2122.

None of these cases discuss much less rule on the standard of proof needed in a judicial proceeding to temporarily dispossess a person of firearms during a period of crisis or extreme risk. Nor does P.L. cite any case that has interpreted Heller, McDonald, or Bruen to require a clear-and-convincing standard of proof in any such judicial proceeding.

In Crespo v. Crespo, we held the preponderance of the evidence standard was appropriate for issuing final restraining orders and firearms forfeitures in

domestic violence cases, and concluded it provided sufficient due process protection for defendants. 408 N.J. Super. 25, 37 (App. Div. 2009), aff'd o.b., 201 N.J. 207 (2010). The same reasoning applies here since ERPO "is loosely modeled on the process for obtaining temporary and final domestic violence restraining orders." D.L.B., 468 N.J. Super. at 402. We decline to depart from our analysis and holding in Crespo, which applies with equal force to ERPO.

The government has a strong interest in preventing gun violence. States may regulate the purchase and possession of firearms by persons who have mental health issues. See Heller, 554 U. S. at 626-27 (stating that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill"); McDonald, 561 U. S. at 786 (stating that "[w]e made it clear in Heller that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill'"); Bruen, 142 S. Ct. at 2162 (Kavanaugh, J. concurring) (same). We discern no violation of P.L.'s Second Amendment or due process rights in applying the preponderance of the evidence standard.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION