

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3289-22

IN THE MATTER OF A.J.D.

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Submitted May 28, 2024 – Decided June 17, 2024

Before Judges DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. 1506 XTR 2023 000007.

Law Offices of Francis R. Hodgson LLC, attorneys for appellant A.J.D. (Francis R. Hodgson III, on the brief).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent State of New Jersey (Samuel Marzarella, Chief Appellate Attorney, of counsel; Cheryl L. Hammel, Assistant Prosecutor, on the brief).

PER CURIAM

Appellant A.J.D. appeals from the June 2, 2023 final extreme risk protective order (FERPO) entered against him in the Law Division pursuant to

the Extreme Risk Protective Order Act of 2018 (Act), N.J.S.A. 2C:58-20 to -32.<sup>1</sup> We affirm.

I.

On March 22, 2023, Officer Scott Smith of the Brick Township Police Department was dispatched to a residence on the report of a missing or endangered person. Upon arrival, he spoke to A.J.D.'s spouse who reported that she returned home shortly before 3:00 p.m. and discovered A.J.D. heavily intoxicated. She requested that he leave the residence because their seven-year-old son was expected to arrive soon and she did not want him to see A.J.D. in that condition. The spouse told Smith that A.J.D., who had been depressed over the recent deaths of friends and family members, left the house on foot after she confiscated his car keys.

She also told Smith that A.J.D. had been diagnosed with depression, but was not taking his medications as prescribed, choosing instead to deal with his condition by drinking alcohol. The spouse stated that A.J.D. had a history of suicidal ideation and had made statements in the past that he "should just die" or wanted to die, but that he had not made a comment to that effect on that day.

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<sup>1</sup> We refer to appellant by his initials in compliance with Administrative Directive #19-9, "Guidelines for Extreme Risk Protective Orders" (Aug. 12, 2019) (Guidelines), Guideline 8(a).

She told Smith that on one occasion in the past A.J.D. had slapped her lightly in the face, but did not cause physical injury. She had not reported that act of domestic violence to police.

The spouse told Smith that A.J.D., who owned five firearms, including a .357 and two nine-millimeter handguns, was awaiting approval for another permit to purchase firearms. A.J.D.'s spouse directed the officer to the firearms, which were not stored in a safe, but on the top shelf in a spare bedroom closet together with approximately 1,850 rounds of ammunition. The spouse told Smith that because A.J.D. would sometimes get a blank dissociative look on his face, she was afraid he might harm himself or another with one of his firearms.

While Smith spoke with A.J.D.'s spouse, other officers searched for A.J.D. The search led officers to find A.J.D. at a bar in Brick. In order to get there from his home, A.J.D. walked more than two miles across and along several busy highways while highly intoxicated.

Smith responded to the bar, where he encountered A.J.D. Smith observed that A.J.D. was highly intoxicated, although polite and cooperative. Smith, who is certified for the crisis intervention task force and is a member of the crisis negotiating team, spoke with A.J.D. Based on A.J.D.'s condition and reported history, including going into a dissociative state, Smith was concerned that

A.J.D. had a mental health issue that was not being properly medicated. Smith was not comfortable leaving A.J.D. with no assistance. In light of his concerns, Smith arranged for A.J.D. to be transported by other officers to a local hospital for a psychiatric emergency screening services (PESS) evaluation. Smith subsequently determined that A.J.D. did not have a criminal record.

Smith thereafter submitted a petition for a temporary extreme risk protective order (TERPO) and a FERPO. A municipal court judge granted the TERPO on March 23, 2023.

On May 24, 2023, a hearing was held in the Law Division on whether issuance of a FERPO was warranted. Two witnesses testified: Smith and A.J.D., who was represented by counsel.

Smith recounted his conversation with A.J.D.'s spouse on March 22, 2023 as detailed above, his observation of A.J.D.'s condition when he encountered him at the bar later that afternoon, and his opinion as a police officer trained in psychiatric and crisis management that A.J.D. was in need of a PESS evaluation.

At the close of the State's case, A.J.D. moved to dismiss the petition. He argued that the petition could not be granted because the State's evidence consisted entirely of hearsay. Without the testimony of A.J.D.'s spouse, he argued, none of Smith's testimony, apart from his personal observation of A.J.D.

at the bar, could be corroborated. The trial court denied the motion, concluding that hearsay evidence is permissible in a FERPO hearing.

A.J.D. then testified. He stated that he was diagnosed with stress and anxiety, not depression, after undergoing treatment for three months. He testified that he takes prescribed medications, Zoloft and Clonazepan, for his condition as directed by his physician. A.J.D. denied having assaulted his spouse in the past and stated that he slapped her inadvertently "in defense" when she tackled him. A.J.D. denied having a drinking problem or handling his firearms while drinking. He testified that he was trained in the safe operation of his firearms and had never mishandled them. A.J.D. denied having expressed suicidal ideation or having unexpressed thoughts of suicide. He testified that when he is engaged in a conversation with someone who talks for long periods he sometimes stares blankly at that person, which explains his spouse's observation about dissociative stares.

A.J.D. admitted that he had been drinking alcohol on March 22, 2023 when his spouse returned to the house. He testified that he decided to leave on foot rather than engage in an argument with his spouse, who was upset that he had been drinking. He described his interaction with the officers at the bar as cordial and admitted that he was transported to the hospital for an evaluation.

A.J.D. testified that he was released from the hospital the following morning without a follow-up appointment or instructions.

The court admitted into evidence a report from a counseling center that evaluated A.J.D. in April 2023. The report contained the opinion that A.J.D. did not exhibit sufficient symptoms of substance abuse to meet the diagnostic criteria for initiating formal substance abuse treatment. A.J.D. conceded that the report does not address his mental health.

In an oral opinion issued shortly after the close of the hearing, the court granted the State's application for a FERPO. The court found Smith had expertise in psychological and crisis management and provided credible testimony. The court also found A.J.D. to have been credible, but to have downplayed his mental health condition. In addition, the court found that A.J.D. confirmed "the most important factors that his wife mentioned which are set forth in the police report." The court then considered the eight behavioral factors set forth in N.J.S.A. 2C:58-23(f) and the three additional behavioral factors set forth in the Guidelines.

The court found that A.J.D. and his spouse gave conflicting accounts of the prior incident of domestic violence. The court found that the incident took place and considered it to satisfy factors (1) and (2) as a history of acts of

violence and use of violence against another person. The court found that factors (3) and (4) were not present because A.J.D. had never been the subject of a domestic violence restraining order or sexual assault survivor restraining order. Factors (5) and (6) were not present, the court found, because A.J.D. had no criminal history or animal abuse charges.

With respect to factor (7), A.J.D.'s history of drug or alcohol abuse and recovery from such abuse, the court accepted as credible the statements A.J.D.'s spouse made to Smith. Thus, the court found a history of alcohol abuse based on A.J.D.'s spouse having reported that he does not take his mental health medications as prescribed, and instead deals with his emotions over the recent deaths of friends and family members by becoming intoxicated. The court found this statement was corroborated by the fact that the spouse and Smith observed A.J.D. in a highly intoxicated state on March 22, 2023.

The court also found that factor (8) was present because A.J.D. had purchased firearms in 2020, 2021 and 2022 and had an application pending for a firearm purchase permit. The court found that factor (9) was not present because no evidence had been produced that A.J.D. recklessly used, displayed or brandished a firearm. The court found that factors (10) and (11) also were not present because A.J.D. did not have a previous FERPO entered against him.

Having determined that several of the statutory behavioral factors were present, the court considered the additional four mental health factors set forth in the Guidelines. The court found no evidence had been admitted establishing that A.J.D. had been committed to the hospital on the day in question or at any other time. Thus, the court concluded, factor (12) was not present. The court found that factor (13) was present, as defendant admitted that he has received or is receiving mental health treatment. The court accepted as credible the statement of A.J.D.'s spouse that he does not take his medications as prescribed. Thus, the court concluded, factor (14) was present. Finally, the court found that factor (15) was present based on defendant's admission that he was treated for stress and his spouse's characterization of his diagnosis as depression.

After weighing these factors, the court concluded that A.J.D. poses a significant danger of bodily injury to himself or others by owning, possessing, purchasing, or receiving a firearm. The court based its decision on what it determined to be the credible statement of A.J.D.'s spouse that he does not take his prescribed medications as directed, drinks excessive amounts of alcohol to cope with his emotions, and has expressed suicidal ideation on occasion. The court also found that A.J.D.'s explanation for his periodic blank stares lacked credibility. Instead, the court found, A.J.D.'s staring behavior was concerning



enough to his spouse that she mentioned it to Smith when he responded to her call for assistance. The court found that these concerns were exacerbated by the fact that A.J.D.'s weapons were found unsecured in a bedroom closet, along with a large amount of ammunition.

On June 2, 2023, the court entered a FERPO against A.J.D.

This appeal followed. Defendant raises the following argument.

RESPONDENT'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED, AS PETITIONER DID NOT PRESENT A RESIDUUM OF COMPETENT EVIDENCE ON WHICH THE COURT COULD RELY UPON IN ISSUING A FERPO.

## 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 "Victim's Assistance and 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)."

"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 412. 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. 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).

A.J.D. argues that the trial court erred when it did not dismiss the petition at the close of the State's case-in-chief because all of the evidence produced by the State was hearsay. We have carefully reviewed the record and find no merit in A.J.D.'s argument. Smith's testimony was not limited to hearsay statements

made by A.J.D.'s spouse. The officer's testimony included his personal observations of A.J.D.'s state of extreme intoxication when he encountered him at the bar. In addition, Smith, who was trained in psychiatric and crisis management, testified as to his opinion that A.J.D. needed an emergent psychiatric evaluation at a hospital.

Because the State's case-in-chief was not limited to hearsay evidence, we need not determine whether a FERPO may be issued solely on the basis of hearsay evidence. We note, however, that "[t]he rules governing admissibility of evidence at trial shall not apply to the presentation and consideration of information at the hearing." In re D.L.B., 468 N.J. Super. at 406 (quoting Guideline 5(c)).


We also note that after the court denied A.J.D.'s motion, he elected to testify. The trial court found that A.J.D.'s testimony corroborated many of his spouse's statements to Smith. A.J.D. admitted he had been treated for mental health issues, that he had been prescribed medications for anxiety, that he failed to secure his firearms in the home where his minor child lived, and that he had numerous cocktails on the afternoon in question. A.J.D. also admitted to having slapped his spouse on a prior occasion, although claimed to have done so in self-defense. The trial court found A.J.D. to have downplayed his mental health

issues. To the extent that the trial court relied on hearsay statements of A.J.D.'s spouse, the court's finding that significant elements of her statements were corroborated by A.J.D.'s testimony is well-supported by the record.

Our review of the record reveals sufficient support for the trial court's findings of fact with respect to each of the factors applicable to the State's petition. The trial court carefully considered the evidence and concluded the State had established by a preponderance of the evidence that issuance of a FERPO was warranted. We see no error in the trial court's decision.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION