

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3848-10T2

IN RE APPLICATION OF
JUSTIN BLASKO FOR THE
RETURN OF FIREARMS,
AMMUNITION, AND OTHER
PROPERTY.

Submitted April 18, 2012 - Decided June 22, 2012

Before Judges Lihotz and St. John.

On appeal from the Superior Court of New Jersey, Law Division-Criminal Part, Passaic County, Docket No. 09-2276.

Evan F. Nappen, attorney for appellant Justin Blasko (Louis P. Nappen, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent State of New Jersey (Marc A. Festa, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Appellant Justin Blasko appeals from a March 18, 2011 Superior Court order denying his application for the return of seized firearms, ordering the surrender of his Firearms Purchaser Identification Card (FPIC), and permitting the State to dispose of the seized firearms and ammunition. The judge found Blasko failed to safely store his weapons, by leaving them

in plain view, accessible to a third party. From these facts, he concluded Blasko's conduct was contrary to the public health, safety or welfare.

On appeal Blasko argues:

POINT 1.

THE COURT BELOW CREATED AN UNCONSTITUTIONAL REQUIREMENT AS A BASIS FOR DENIAL THAT DIRECTLY CONTROVERTS THE U.S. SUPREME COURT.

POINT 2.

JUSTIN BLASKO PRESENTS NO DISQUALIFIER TO FIREARM POSSESSION.

POINT 3.

THE COURT BELOW ERRED BY MAKING AN UNFOUNDED DETERMINATION THAT APPELLANT POSSESSED AN UNLAWFUL FIREARM.

A. THE COURT BELOW ERRED BY MAKING AN UNFOUNDED DETERMINATION THAT JUSTIN POSSESSED AN "ASSAULT RIFLE."

B. EVEN IF TRUE, MERE PAST POSSESSION OF AN "ASSAULT FIREARM" DOES NOT CONSTITUTE A PER SE REASON TO DENY PRESENT FIREARM POSSESSION, PARTICULARLY AFTER THE RIGHT TO KEEP ARMS HAS BEEN INCORPORATED AS A FUNDAMENTAL, INDIVIDUAL RIGHT.

POINT 4.

APPELLANT MAY NOT BE DENIED A FUNDAMENTAL, INDIVIDUAL, CONSTITUTIONAL RIGHT UNDER THESE CIRCUMSTANCES.

POINT 5.

THE COURT BELOW ERRED BY PROVIDING NO FORM OF REDRESS.

We reverse and remand.

These facts are gleaned from the trial court record.¹ Blasko resides in a third-floor studio apartment, located in a building that employs round-the-clock security and requires permission for visitors' entry. Blasko's lease contained a clause allowing the landlord to enter the apartment to perform routine maintenance or address emergencies.

On May 6, 2009, Sam Mendes, the building superintendent, entered Blasko's apartment to repair air conditioning vents. After entering Blasko's unit, he called police when he saw a four foot alligator and weapons strewn throughout the apartment. Specifically, Mendes informed police he saw, "assault rifles," one of which had a silencer, a handgun, and ammunition laying around the rooms. Clifton Police Officers effectuated a search warrant and searched Blasko's apartment.

In addition to removing the alligator, a boa constrictor, a steel jaw leg hold trap, a bow and arrow, knives, a flak jacket, certain books, liquid steroids, drug paraphernalia, and a Passaic Housing Inspection Badge, the following weaponry was seized:

¹ The record on appeal does not contain Blasko's motion but includes the State's responsive pleadings, with attachments. Several facts were asserted during oral argument and apparently accepted by the parties and relied upon by the trial judge. However, we cannot determine the basis for these facts on the limited appellate record.

a handgun and shotgun on [appellant's] bed; four rifles in plain view leaning against the wall . . . ; a fifth rifle laying next to the other rifles; one handgun in the base of his nightstand; [five] handguns hanging on the wall; eight rifles and ammunition in a closet; assorted boxes of ammunition on the bed; one leaded magazine on top of a night stand; and four boxes of ammunition on the left side of a stereo.

None of the guns had locks or safety mechanisms.

Blasko was issued a summons for unlawful possession of the steel jaw leg hold trap, the snake, and the alligator, and, also issued a complaint for the unlawful possession of an assault rifle, in violation of N.J.S.A. 2C:39-5(f). Blasko was admitted to the county's pre-trial intervention (PTI) program without a plea. Following his successful completion of PTI, all charges were dismissed.

Thereafter, Blasko petitioned for the return of his property. The State opposed the return of the weapons, maintaining Blasko's conduct made him unfit to possess firearms. Specifically, the State argued Blasko was drug dependent, relying on his admission of past marijuana use and the seizure of straws laced with cocaine residue, liquid steroids and hypodermic needles. The State also argued permitting Blasko to possess weapons was contrary to the public health, safety, and welfare based on the careless manner in which he stored the weapons.

Following oral argument, without the benefit of testimony, the motion judge rendered a written opinion denying Blasko's motion to return the seized firearms and ammunition, and ordered him to surrender his FPIC. Relying on the police report, which stated Blasko possessed an illegal assault firearm, the judge found:

[I]t would violate the public health, safety and welfare if Blasko possessed firearms because [he] was charged with possession of at least one illegal assault rifle and he stored his firearms in a negligent manner. Just like in [In re] Osworth, [365 N.J. Super. 72 (App. Div. 2003), certif. denied, 179 N.J. 310 (2004)], Blasko demonstrated his unwillingness to respect New Jersey's gun laws by possessing illegal assault firearms such as an AK-47.

The judge also found:

[T]he police report shows that Blasko kept his firearms in an extremely negligent and unsafe manner because he kept dozens of unsecured firearms and abundant ammunition in plain view in his apartment. . . . [He] chose to store these items in this manner knowing that his apartment was never truly "locked" since the building superintendent had a master key that he was permitted to use (or give to a maintenance worker to use) at any time even if [he] was not home. [He] in fact signed an agreement which permitted such access. . . . The Court finds that this is exactly the type of unsafe situation contemplated by the Supreme Court in Burton v. Sills[, 53 N.J. 86, 91 (1968), appeal dismissed, 394 U.S. 812, 89 S. Ct. 1486, 22 L. Ed. 2d 748 (1969),] that would invoke the public health, safety and welfare disability.

. . . .

As such, this [c]ourt finds that the State has established by a preponderance of the evidence that because of the careless manner in which Blasko stored his firearms and ammunition, that he is not fit under N.J.S.A. 2C:58-3(c)(5) to possess those items.

This appeal followed.

In our review of a trial court's factfinding, we defer to those findings that are "supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (citing N.J. Tpk. Auth. v. Sisselman, 106 N.J. Super. 358 (App. Div.), certif. den. 54 N.J. 565 (1969)). In matters such as this one, "a judicial declaration that a defendant poses a threat to the public health, safety or welfare involves, by necessity, a fact-sensitive analysis." State v. Cordoma, 372 N.J. Super. 524, 535 (App. Div. 2004). Accordingly, this court may only "set aside a trial court's forfeiture ruling when it was not supported by sufficient competent evidence." Ibid.

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). Our review of a trial court's statutory interpretation is de novo. Toll

Bros. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002) (citing Balsamides v. Protameen Chems., Inc., 160 N.J. 352 (1999)).

The State regulates firearm licensing under the New Jersey Gun Control Law, N.J.S.A. 2C:58-1 to -19, which embodies the "conscientious legislative efforts aimed at keeping firearms out of the hands of all dangerously unfit persons, noncriminal as well as criminal." Burton, supra, 53 N.J. at 94. Accord In re Dubov, 410 N.J. Super. 190, 198 (App. Div. 2009). An individual's firearm purchase or request for a FPIC must be preceded by a determination that the applicant is "of good character and good repute in the community in which he [or she], lives, and . . . is not subject to any of the disabilities" described in N.J.S.A. 2C:58-3c.

Denial of an application must be based on one of the following provisions:

No handgun purchase permit or firearms purchaser identification card shall be issued:

(1) To any person who has been convicted of any crime, or a disorderly persons offense involving an act of domestic violence . . . ;

(2) To any drug dependent person as defined in section [N.J.S.A. 24:21-2], to any person who is confined for a mental disorder to a hospital, mental institution or sanitarium, or to any person who is presently an habitual drunkard;

(3) To any person who suffers from a physical defect or disease which would make it unsafe for him to handle firearms, to any person who has ever been confined for a mental disorder, or to any alcoholic . . . ; to any person who knowingly falsifies any information on the application form for a handgun purchase permit or firearms purchaser identification card;

(4) To any person under the age of 18 years for a firearms purchaser identification card and to any person under the age of 21 years for a permit to purchase a handgun;

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

(6) To any person who is subject to a restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," . . . ;

(7) To any person who as a juvenile was adjudicated delinquent . . . ; or

(8) To any person whose firearm is seized pursuant to the "Prevention of Domestic Violence Act of 1991[.]"

[N.J.S.A. 2C:58-3c.]

A request for the return of seized weapons is subject to the same standard. State v. Cunningham, 186 N.J. Super. 502, 511 (App. Div. 1982). In that regard, confiscated weapons should not be returned to defendants who are threats to the "public health, safety or welfare." In re Return of Weapons to J.W.D., 149 N.J. 108, 116 (1997) (concluding the Legislature intended to authorize courts to retain the weapons of defendants

who pose a threat to the public health, safety or welfare). Accord State v. Freysinger, 311 N.J. Super. 509, 515 (App. Div. 1998).

Turning to the facts in this matter, we first note the State now concedes "[n]o assault rifles were identified among Blasko's possessions." This obviates the need for review of the arguments raised in Blasko's Point Three. We do note the trial court's finding that Blasko possessed "at least one illegal assault rifle," was the basis of the determination Blasko "demonstrated an unwillingness to respect New Jersey's gun laws by possessing illegal assault firearms." The absence of an assault firearm among Blasko's arsenal requires the rejection of this finding as unsupported.²

Therefore, we review whether Blasko's acts of keeping "his weapons and ammunition in a manner that would enable a third party to gain access to them and use them[,]" precludes the return of the weapons because of conduct contrary to the public health, safety and welfare. See N.J.S.A. 2C:58-3c(5). We note, although N.J.S.A. 2C:58-3c(5) contains "broadly worded disqualification criterion [which] eludes precise definition[,]" Cordoma, supra, 372 N.J. Super. at 534, courts have upheld

² An assault firearm is defined at N.J.S.A. 2C:39-1w.

firearm forfeiture under N.J.S.A. 2C:58-3c(5) based on an applicant's negligent conduct.

In Cunningham, supra, 186 N.J. Super. at 507, we explored the meaning of "public health, safety or welfare," as used in N.J.S.A. 2C:58-3c(5), observing intentional wrongdoing or negligence in the handling of a weapon could support denial of a permit. The police seized the defendant's .38-caliber handgun and Winchester rifle following a shooting for which the defendant was arrested and charged with assault with an offensive weapon. Id. at 504. The charges were dismissed when the victim, the defendant's wife, declined to testify. Ibid. The defendant moved for return of his weapons, which the State opposed, arguing "the issuance [of the FPIC] would not be in the interest of the public health, safety and welfare." Id. at 504-05. The trial judge ordered return of the weapons because the evidence did not clearly show whether the gun had been intentionally fired or accidentally discharged. Id. at 506-07. We reversed the trial judge's determination, concluding the return of a firearm was prohibited when the owner is "likely to pose a danger to the public[,]" even though charges against the defendant were dismissed. Id. at 511.

In In re Sbitani, we relied on N.J.S.A. 2C:58-3c(5), as a basis for denial of a permit where the defendant had been

convicted of a disorderly persons offense, that is, possession of a controlled dangerous substance. We held:

It would obviously not be "in the interest of the public health, safety or welfare" under N.J.S.A. 2C:58-3c(5) to issue a firearms purchaser identification card to a person who would be committing a crime under N.J.S.A. 2C:39-7 were he to use the card to purchase a rifle or a shotgun. It therefore follows that a person may not obtain a purchaser identification card if he "has been convicted for the unlawful . . . possession" of marijuana.

[216 N.J. Super. 75, 78 (App. Div. 1987).]

Also, in Freysinger, supra, we upheld forfeiture, concluding proof of the defendant's habitual drunkenness and other behaviors were threats to the public health, safety or welfare. 311 N.J. Super. at 516-17. The evidence showed the defendant was convicted twice for driving under the influence and refusing to submit to a breath test. Id. at 516. Moreover, he admitted he struck a pedestrian while driving but did not stop. Id. at 516-17. In a separate matter, the defendant, while drinking, hit his girlfriend after the two argued and later stated he did not know the woman he struck was his girlfriend. Id. at 517. Based on these facts, we concluded the defendant's actions demonstrated "a complete disregard for the stranger[s] he struck and left unattended in the roadway." Ibid.

In Osworth, supra, 365 N.J. Super. at 81, we upheld denial of the defendant's application for a FPIC because the record adequately disclosed he willingly ignored state gun laws. We concluded "it does not serve public safety to issue a [FPIC] to someone who has demonstrated his willingness to disregard the gun laws of this State." Ibid.

Our review of these authorities, results in the conclusion that negligent conduct may satisfy the statutory standard allowing the denial of an application for return of weapons and a FPIC because the conduct poses a threat to the public health, safety and welfare. However, the facts of each case must be carefully analyzed to determine whether an individual's demonstrated negligence results in an unfitness, harmful to the public interest. Cordoma, supra, 372 N.J. Super. at 535.

The facts at hand present none of the circumstances found in the prior authorities to result in disqualification under N.J.S.A. 2C:58-3c(5). No weapon was discharged as found in Cunningham; no possession of narcotics occurred as cited in Sbitani; no domestic violence, drunkenness, or criminal conduct while intoxicated (assault, hit and run, and DWI) existed as relied upon in Freysinger, or a disregard of the gun laws as found in Osworth. Here, after eliminating the erroneous finding that Blasko possessed an assault rifle, the remaining facts

underpinning the trial judge's conclusion Blasko was disqualified under N.J.S.A. 2C:58-3c(5) were that he owned a significant arsenal of weapons, which were strewn haphazardly in his small studio apartment.

Blasko asserts he is permitted to have his weapons readily accessible within the confines of his home, and argues the trial judge erroneously ordered forfeiture solely because his weapons were not stored and locked. He maintains the trial decision wrongly limits his Second Amendment rights by creating a de facto rule, in the name of public safety, which requires a private citizen lawfully possessing firearms to store the weapons in a specific manner. Relying on the United States Supreme Court's interpretation of the Second Amendment in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), Blasko emphasizes the State may not dictate the storage of firearms. In Heller, following an exhaustive analysis of the history of the Second Amendment and the rights regarding firearms, the United State Supreme Court held "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." Id. at 635, 128 S. Ct. at 2821-22, 171 L. Ed. 2d at 683.

Two years later in McDonald v. City of Chicago, 561 U.S. ___, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), the Court ended all doubt by declaring "the Second Amendment right is fully applicable to the States." Id. at ___, 130 S. Ct. at 3026, 177 L. Ed. 2d at 903. Concluding "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty," id. at ___, 130 S. Ct. at 3042, 177 L. Ed. 2d at 921, the Court held "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller." Id. at ___, 130 S. Ct. at 3050, 177 L. Ed. 2d at 929.

We note New Jersey's statutes make it a criminal offense when "[a] person who knows or reasonably should know that a minor is likely to gain access to a loaded firearm at a premises[.]" N.J.S.A. 2C:58-15a.³ Also, N.J.A.C. 13:54-6.1 to - 6.7 sets forth alarm and security systems requirements for

³ The State does "encourage all firearms owners to practice safe storage" by "waiv[ing] all sales taxes on trigger locks, firearms lock-boxes and vaults and, under the 'KeepSafe' program, offer[ing] an instant \$5 rebate to all retail firearms purchasers who buy a compatible trigger locking device along with their firearm[.]" N.J.S.A. 2C:58-2.2. Additionally, "New Jersey was the first state to require retail dealers to include, as part of every handgun sale, either a State Police approved trigger lock or a locked case, gun box, container or other secure facility[.]" Ibid. However, trigger locks are not statutorily mandated.

commercial firearm retailers. See e.g., N.J.A.C. 13:54-6.5(b) (requiring commercial firearm retailers to provide "internal security methods for the safeguarding of firearms and ammunition during nonbusiness hours"). However, these provisions have no applicability to this matter.

The State agrees it presented no evidence proving Blasko suffered any disability delineated in N.J.S.A. 2C:58-3c(1) to (4) or (6) to (8). Blasko, who was twenty-seven at the time of seizure, had no criminal record. Charges for the illegal possession of the exotic animals and illicit leg trap were dismissed upon his successful completion of PTI. He had never been accused of misusing a weapon or otherwise disregarding the State's requirements for obtaining or owning guns. He has no mental illness, alcoholism, or domestic violence history.

The State's argument, therefore, is limited to whether leaving weapons in the open confines of a locked apartment, where the owner lives alone, and where the apartment is within a secured building where visitors were denied access absent permission but where a maintenance supervisor may enter, triggers disqualification under N.J.S.A. 2C:58-3c(5). We conclude it does not.

N.J.S.A. 2C:58-3c(5) "is 'intended to relate to cases of individual unfitness, where, though not dealt with in the

specific statutory enumerations, the issuance of the permit or [FPIC] card would nonetheless be contrary to the public interest.'" Osworth, supra, 365 N.J. Super. at 79 (quoting Burton, supra, 53 N.J. at 91). In this matter, the only individual who had access to Blasko's apartment was the building superintendent, who typically did not enter without giving prior notice. No evidence suggests such limited third-party access would result in a public safety issue. Despite a preference for the safe storage of weapons with safety locks, we conclude a law abiding adult, living alone without children, who openly leaves weapons in a locked apartment, insufficiently supports a finding of conduct contrary to the interest of the public health, safety or welfare pursuant to N.J.S.A. 2C:58-3c(5). See Heller, supra, 554 U.S. at 635, 128 S. Ct. at 2822, 171 L. Ed. 2d at 683 (holding "the District's ban on handgun possession in the home violates the Second Amendment").

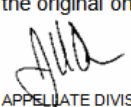
On this record, we conclude the trial judge erred as a matter of law in concluding "it would violate public health, safety and welfare if Blasko possessed firearms because . . . he stored his fire arms in a negligent manner." The State has failed to carry its burden to establish necessary facts to conclude the return of Blasko's firearms and FPIC would be contrary to the interest of the public health, safety or

welfare. See Weston v. State, 60 N.J. 36, 46 (1972)⁴; Cordoma, supra, 372 N.J. Super. at 533; Osworth, supra, 365 N.J. Super. at 77.

We reverse the March 18, 2011 order and remand the matter to the trial court for further review of Blasko's current factual circumstances to assure no disqualification has developed in the fifteen months since the matter was last heard. Absent proof he is disqualified or that any weapon may not be legally possessed in New Jersey, Blasko's weapons and FPIC must be returned.

Reversed and remanded. We do not retain jurisdiction.

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


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⁴ Weston concerned a similarly worded antecedent statute, which analysis applies to N.J.S.A. 2C:58-3. Osworth, supra, 365 N.J. Super. at 77.