Matter of J.B. v K.S.G.

Supreme Court of New York, Cortland County

April 6, 2023, Decided

Index No. EF23-013

Reporter
2023 N.Y. Misc. LEXIS 1552 *; 2023 NY Slip Op 23099 **

[1]** Matter of J.B., Petitioner, against K.S.G., Respondent.

Core Terms

extreme risk, serious harm, mental illness, temporary, due process, firearms

Counsel: **[*1]** Attorneys for Petitioner: WEAVER MANCUSO BRIGHTMAN PLLC, By: Shannon T. O'Connor, Esq. Baldwinsville, New York.

Attorneys for Respondent: CARDINALE & DELVECCHIO LAW FIRM, PLLC, By: Michael R. Cardinale, Esq., Cicero, New York.

Judges: HON. MARK G. MASLER, Supreme Court Justice.

Opinion by: MARK G. MASLER

Opinion

Mark G. Masler, J.

The following documents filed with the Clerk of the County of Cortland via the New York State Courts Electronic Filing System were considered on this motion (see CPLR 2219 [a]): Document Numbers 24-30.

This proceeding was commenced and a temporary extreme risk protection order was **[**2]** issued on January 9, 2023. At the in-person hearing that was held four days later, respondent's counsel stated an intention to challenge the constitutionality of CPLR article 63-a, which governs the issuance of extreme risk protection orders. The court advised that a written motion would be required, made on notice to the Attorney General, as required by CPLR 1012 (b), and scheduled a return date of February 17, 2023. The motion was subsequently adjourned, at respondent's request, to March 24, 2023. Respondent timely filed a motion to dismiss and provided the required notice to the Attorney General, who responded by advising that she declined to intervene. **[*2]** [1] Petitioner opposed the motion and oral argument was heard via Microsoft Teams on the adjourned return date of March 24, 2023.

Respondent specifically contends that CPLR article 63-a (the extreme risk protection statute) is unconstitutional because it infringes upon the right to possess firearms granted by the Second and Fourteenth Amendments to the United States Constitution without affording proper due process safeguards and, in this regard, relies on *G.W. v C.N.* (78 Misc 3d 289 [Sup Ct, Monroe County 2022]). Notably, respondent made no argument that the extreme risk protection statute is unconstitutional for any reason beyond the failure to provide sufficient procedural due process, and the court will decide only the issue raised by respondent.

The court's decision in *G.W. v C.N.* that the extreme risk protection statute is unconstitutional was based on the most recent decision from the United States Supreme Court regarding the Second Amendment, *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 U.S. __, 142 S Ct 2111 [2022]), which was decided on June 23, 2022.[2] In *Bruen*, the United States Supreme Court

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[1] The Attorney General also demanded that she be provided with notice of any appeal from this decision and order, as required by Executive Law § 71 and CPLR 1012 (b).

[2] The Second Amendment recognizes the right to keep and

noted that it had previously held in *District of Columbia v Heller* (554 U.S. 570 [2008]) and *McDonald v City of Chicago, Ill*. (561 U.S. 742 [2010]) that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense, and that conduct covered by the Second Amendment can be regulated only when the government demonstrates that the regulation is consistent with our Nation's historical tradition of firearm regulation (*see Bruen*, 597 U.S. **[*3]** __ at __, 142 S Ct at 2122). The Court further noted that in the wake of *Heller* and *McDonald* the Circuit Courts of Appeals had developed a two-step test to assess Second Amendment challenges. The first step required a determination of whether the challenged law regulated activity falling outside the scope of the Second Amendment right as originally understood. If the first step resulted in a determination that the regulated activity was protected by the Second Amendment, the second step required a balancing of whether the regulation was justified under either strict or intermediate scrutiny (*see id.* at 2126-2127). The Court emphatically rejected the second step (*see id.* at 2127-2130), and emphasized that "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees'" (*id.* at 2156, quoting ***[**3]*** *McDonald*, 561 U.S. at 780).

In *G.W. v C.N.*, the court concluded that the extreme risk protection statute is unconstitutional because it effectively treats the Second Amendment as a second-class right by failing to provide the same procedural safeguards for the Second Amendment rights at issue as those provided for protection of the Fourth Amendment rights of respondents in proceedings under the Mental Hygiene Law for involuntary admission or medication over objection. Although this court **[*4]** agrees that Second Amendment rights must be afforded the same level of protection as all other constitutional rights, it does not find the comparison upon which the decision in *G.W. v C.N.* rests to be well founded.

A temporary extreme risk protection order may be entered only "upon a finding that there is probable cause to believe the respondent is likely to engage in conduct that would result in serious harm to himself, herself or others, as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law" (CPLR 6342). The court in *G.W. v C.N.* based its decision on the fact that Mental Hygiene Law § 9.39 requires that the determination of whether a patient presents a likelihood of serious harm must be made by a physician (*see G.W. v C.N.*, 78 Misc 3d at 293). The court then reasoned that because the extreme risk protection statute incorporates the definition of "likelihood to result in serious harm" found in Mental Hygiene Law § 9.39 (a), the determination of whether a respondent in a proceeding commenced under the extreme risk protection statute is likely to engage in conduct that would result in serious harm is a "medical determination" that must likewise be made by a physician, and concluded, therefore, that the extreme risk protection statute is unconstitutional because it does not require or provide that this **[*5]** determination be made by a physician (*see G.W. v C.N.*, 78 Misc 3d at 295).[3]

The decision in *G.W. v C.N.* overstated the role of the physician in proceedings under Mental Hygiene Law article 9 and misapprehended the extreme risk protection statute by concluding that it requires proof of mental illness—it does not. Mental Hygiene Law § 9.39 governs the admission and retention of persons alleged to have a mental illness to a hospital for in-patient care and treatment on an emergency basis. A person may be admitted under Mental Hygiene Law § 9.39 only if a staff physician of the hospital examines such person and finds that the "person qualifies under the requirements of this section," which are that the person "have a mental illness for which immediate observation, care, and treatment in a hospital is appropriate and which is likely to result in serious harm to [the person] or others" (Mental Hygiene Law § 9.39 [a]; *see Matter of Howard U.*, 147 AD3d 1284, 1284 [2017]; *New York City Health & Hosps. Corp. v Brian H.*, 51 AD3d 412, 415 [2008]).

The required determinations that a person has a mental illness for which in-patient treatment is appropriate, and that the mental illness is likely to result in serious harm, can be made only by a qualified medical expert (*see*

bear arms. Like all amendments comprising the Bill of Rights, it originally applied only to the federal government (*see McDonald v City of Chicago, Ill.*, 561 U.S. 742, 754 [2010]). However, it was made applicable to the states by incorporation in the Due Process Clause of the Fourteenth Amendment (*id.* at 791). For sake of simplicity, when addressing the substantive right to keep and bear arms, reference will be made only to the Second Amendment.

[3] The court also concluded, based on a comparison with the procedures applicable to proceedings under the Mental Hygiene Law, that the extreme risk protection statute was further deficient because it does not ensure that both parties are represented by attorneys and does not provide for appointment of an attorney or expert for respondents who are unable to afford them (*see id.* at 299-300).

Addington v Texas, 441 U.S. 418, 429-430 [1979] [noting that the determination of whether an individual is mentally ill turns on the meaning of facts that must be interpreted by expert psychiatrists and psychologists]). However, likelihood **[*6] [**4]** of serious harm is

> "1. substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or
> 2. a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm."

Thus, whether a person has engaged in the type of conduct that evinces a likelihood of serious harm is a fact-based determination that may be made without the need for an expert opinion (*see e.g. Addington v Texas*, 441 U.S. at 429 [whether a person committed an act is a straightforward factual question]; *New York City Health & Hosps. Corp. v Brian H.*, 51 AD3d at 416-417 [the likelihood that a patient posed a risk of serious harm to himself was affirmed based largely on the court's review of his prior conduct]).

Notably, however, the extreme risk protection statute does not require findings that respondent is mentally ill, or that the likelihood of serious harm result from mental illness, as conditions to entry of either a temporary or final extreme risk protection order; rather, it requires only a determination that the respondent is likely to engage in conduct that would result in serious harm to the **[*7]** respondent or others (*see* CPLR 6342 [1]; 6343 [2]). The extreme risk protection statute defines the "likelihood to engage in conduct that would result in serious harm to the respondent or others" by incorporating only the portion of Mental Hygiene Law § 9.39 (a) that defines "likelihood to result in serious harm"—it does not incorporate any provisions related to mental illness or the requirement that the likelihood of serious harm result from mental illness (*see* CPLR 6342 [1]). Thus, under the extreme risk protection statute, a respondent may be found likely to engage in conduct that would result in serious harm based solely upon conduct that evinces the likelihood of harm. As previously noted, the definition of "likelihood of serious harm" provides for a fact-based inquiry that does not require proof of mental illness or expert opinion; the definition can be satisfied by conduct alone. In other words, a person who has threatened or attempted suicide, engaged in other conduct that demonstrates a danger to self, or engaged in homicidal or other violent behavior placing others in reasonable fear of serious harm satisfies the definition without the need for expert opinion.

Moreover, in determining whether grounds exist for an extreme risk protection **[*8]** order, the court is required to consider any additional factors which may be relevant, including specific acts which may have been committed by the respondent that show a disposition to engage in the type of conduct that would constitute a risk of serious harm as defined by Mental Hygiene Law § 9.39 (a) (*see* CPLR 6342 [2]; 6343 [2]). These additional factors likewise involve fact-based conduct that may be directly considered by the court without the need for expert opinion testimony (*see e.g. Addington v Texas*, 441 U.S. at 429; *New York City Health & Hosps. Corp. v Brian H.*, 51 AD3d at 416-417). Accordingly, because the extreme risk protection statute does not require proof of mental illness, no expert opinion testimony is required in support of an application for an extreme risk protection order.

Having declined to follow *G.W. v C.N.*, the court must consider whether the extreme risk protection statute provides respondent with constitutionally sufficient due process. It does. "The core of due process is an 'opportunity to be heard at a meaningful time and in a meaningful manner'" (*Frein v Pennsylvania State Police*, 47 F4th 247, 257 [3d Cir 2022], quoting *Mathews* ***[**5]*** *v Eldridge*, 424 U.S. 319, 333 [1976]). As relevant here, it has been recognized that the government has a compelling and pressing interest in ensuring the safety of the general public by quickly removing firearms from individuals who may be unfit to possess them, and that in such cases the **[*9]** requirements of procedural due process may be satisfied through adequate post-deprivation procedures (*see id.* at 256-257; *Torcivia v Suffolk County, New York*, 409 F Supp 3d 19, 39-40 [ED NY 2019], *affd* 17 F4th 342 [2d Cir 2021], *cert denied* __ U.S. __, 143 S Ct 438 [2022] [no appeal was taken from that part of the judgment of the trial court regarding procedural due process]).

The extreme risk protection statute provides ample procedural safeguards against an improper deprivation of an individual's Second Amendment right to keep and bear arms. Initially, a temporary extreme risk protection order curtailing an individual's rights may only be granted following a preliminary finding by the court that there is probable cause to believe that the individual is likely to engage in conduct that would result in serious harm to the respondent or others, based consideration of standards specifically set forth in the statute (*see* CPLR 6342 [1], [2], [3]). The temporary extreme risk

protection order provides the respondent with notice of the grounds on which it was granted (*see* CPLR 6342 [4]). The statute further requires that a post-deprivation hearing be promptly held by the court within three to six business days following service of a temporary extreme risk protection order, unless the deadline is extended at the respondent's request to allow the respondent additional time to prepare **[*10]** for the hearing (*see* CPLR 6343 [1]). At the hearing, the respondent has the right to be represented by counsel, to present evidence, to cross-examine adverse witnesses, and to testify on respondent's own behalf, and the petitioner has the burden of proving, by clear and convincing evidence, that the respondent is likely to engage in conduct that would result in serious harm to the respondent or others (*see* CPLR 6343 [1], [2]). Further, if the court finds that the petitioner failed to meet the burden of proof, it must order that any firearms seized from the respondent be returned (provided there is otherwise no legal impediment to the respondent's possession thereof) (*see* CPLR 6343 [5] [a]); the court is likewise required to order the return of firearms seized from third parties (*see* CPLR 6344 [2]). Finally, the fact that the extreme risk protection statute does not require that the court appoint counsel for indigent respondents does not require a contrary conclusion, because there is no constitutional right to counsel in civil proceedings (*see Matter of State of New York v Raul L.*, 120 AD3d 52, 62 [2014], citing *Matter of State of New York v Floyd Y.*, 22 NY3d 95, 103 [2013]).

Based on the foregoing, the motion is denied and the court will schedule a hearing to determine whether a final extreme risk protection order shall be issued.

This decision constitutes the **[*11]** order of the court. The filing of this decision and order, or transmittal of copies hereof, by the court shall not constitute notice of entry (*see* CPLR 5513).

Dated: April 6, 2023

Cortland, New York

HON. MARK G. MASLER

Supreme Court Justice