Domestic Violence - Gun Permits
Colonna v Pennsville

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-3742-08T1

STEVEN COLONNA,

Plaintiff-Appellant,

v.

TOWNSHIP OF PENNSVILLE,

PENNSVILLE TOWNSHIP POLICE

DEPARTMENT,

Defendants-Respondents.

Submitted April 28, 2010 - Decided

Before Judges Graves and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Docket No. L-23-07.

Glen L. Schemanski, attorney for appellant.

Powell, Birchmeier & Powell, attorneys for respondents (James R. Birchmeier, on the

brief).

PER CURIAM

Plaintiff appeals from the dismissal of his complaint against defendants that alleged the negligent deprivation of his liberty, property, and firearms purchaser identification card by

local government.1 We find no basis to disturb the grant of summary judgment in favor of defendants and therefore we affirm.

I.

We recite the facts most indulgently in favor of plaintiff because summary judgment was granted against him in the Law Division. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995); Pote v. City of Atlantic City, 411 N.J. Super. 354, 356 (App. Div. 2010).

On January 3, 2005, a representative of defendant Pennsville Township Police Department (Department) received information from plaintiffs girlfriend, Tracy Neciles,2 that plaintiff had told her that he was going to kill himself and

that he also had waved a wooden-handled handgun in the air in her presence. At least six police officers were dispatched to plaintiffs residence in response to this information. At the scene, plaintiff calmly exited his dwelling——empty-handed——at

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Although the complaint is couched in constitutional terms of alleged deprivations of a liberty interest, property rights, and civil rights, plaintiff seeks no redress pursuant to federal or state civil rights acts. See 42 U.S.C.A. § 1983; N.J.S.A. 10:6-1 to -2. Instead, plaintiff firmly plants his common law tort cause of action within the embrace of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3.

2

The record contains differing references to the surname of plaintiffs girlfriend. In plaintiffs deposition, he spelled her name for the court reporter as "Tracy Neciles, N-E-C-I-L-E-S." In the spirit of giving plaintiff the benefit of all reasonable inferences, we adopt plaintiffs spelling.

the request of a police officer, and thereafter fully cooperated with law enforcement officials.

In his deposition, plaintiff denied waving a firearm, but conceded that he and Neciles had argued, and that he uttered words indicating that he was going to kill himself,3 or at least gave that impression to Neciles:

Q. Do you ever recall threatening that you were going to kill yourself during the course of that argument?

A. Yeah. I think my words were to the effect that she was so vehement. I said Ive had it, Im getting out of here, words to that effect, Ive had it Im getting out and I meant it. I was tired of fighting with her all the time over everything and I was the only guy there trying to help her out. I was at my saturation point with her at that moment and I said Im out of here, leave me alone, Im leaving, which never

materialized.

Q. And in addition to what youve told me about what you said, do you recall saying anything about harming Tracy, harming yourself, or harming anyone else?

A. I probably——Im sure——I probably did use my poor grammatical example of, you know, Im going to jump out the window, so to speak, leave me alone. Words to that effect. I think thats why she went to the police. She actually thought I was going to do something stupid.

3

The police report indicated that plaintiff told an officer that "he did tell Ms. [Neciles] that he was going to die in her bed, but did not really mean it."

After plaintiff surrendered to police officers at his home, he was not arrested, handcuffed, or charged with an offense. Instead, plaintiff was transported by police officers directly to Memorial Hospital of Salem County for what plaintiff described as "some kind of a psychological evaluation." Several hours later, after a mental health screening assessment had been administered to plaintiff, he was released. Although ultimately diagnosed with a major depressive disorder and referred for counseling, plaintiff was not found to be a danger to himself or to others. He called his girlfriend, who obligingly picked him up from the facility to drive him home. During this time, the police seized plaintiffs three firearms and firearms purchaser identification card that had remained in his dwelling.4

This incident was not plaintiffs first encounter with the Pennsville police. In April 2004, plaintiff uttered "derogatory comments without intent" that brought two police officers to his residence:

Yeah. It was along the lines of Ive had it,
Im ready to jump off a building or jump off
a cliff. Words to that effect. It was mostly

in anger.

After being interviewed over the telephone——presumably by a mental health screening service——plaintiff was advised that the

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Presumably, this seizure was pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35; N.J.S.A. 2C:25-21(d)(1)(b).

police would call him back after a few hours and "if everything is okay . . . that was pretty much the end of it." Indeed, plaintiff was not arrested, not charged with an offense, and not transported to a psychiatric facility for a mental health examination. On this prior occasion, plaintiffs weapons and firearms purchaser identification card were not seized.

Neciles ultimately declined to file a complaint against plaintiff pursuant to the PDVA for the more recent 2005 incident. Nevertheless, the police treated the matter as falling within the PDVAs framework and transferred plaintiffs firearms

to the Salem County Prosecutors Office (the Prosecutors Office) in February 2005 pursuant to N.J.S.A. 2C:25-21(d)(2). After several unsuccessful informal efforts to retrieve his weapons and firearms identification card from the Department and the Prosecutors Office directly, plaintiff turned to the judiciary.

On May 27, 2005, notwithstanding the absence of any actions then pending in either the Family or Criminal Parts, plaintiff filed a motion——without a docket number——in the Criminal Part for "the return of weapons and firearms [purchaser]

identification card seized on Jan[uary] 3, 2005."5 On July 25, 2005, an order was entered requiring that plaintiffs firearms and firearms purchaser identification card be returned to him.

On December 29, 2006, just five days shy of the second anniversary of the police encounter at the root of this appeal, plaintiff filed a three-count civil action that outlined his grievances with defendants Department and Township of Pennsville. The complaint did not seek remedies against any individual police officers, the Prosecutors Office, or the

County of Salem. After extensive discovery, defendants moved for summary judgment, claiming good faith immunity in the handling of plaintiff individually, as well as the seizure of plaintiffs firearms and firearms purchaser identification card.

The Law Division granted defendants motion, concluding that "no reasonable juror could find in favor of the plaintiff" on plaintiffs claim of the violation of his personal liberty by the police on January 3, 2005. The court noted that the TCA, N.J.S.A. 59:3-3, grants good faith immunity to public employees

We believe that in the absence of an action under the PDVA (which would have required a motion in the Family Part) or the pendency of a revocation proceeding under N.J.S.A. 2C:58-3(f) (which would have required the stewardship of the Superior Court in the county where the firearms purchaser identification card was issued) there was no clear basis for the Criminal Part to consider plaintiffs motion. Rather, a civil replevin action, pursuant to N.J.S.A. 2B:50-1 to -5 and Rule 4:61-1, was the more appropriate procedural vehicle in this case.

and additionally that "there are no facts to support a finding of bad faith on the part of the officers in investigating [plaintiff]——the allegations that [plaintiff] was going to commit suicide and having him scree[ned] to determine whether he was——he posed a danger to himself or others." We agree.

The Law Division disposed of the property rights claim in the same manner. That is, the court concluded that the seizure and temporary retention of the weapons and firearms purchaser identification card were nothing more than good faith mistakes by the police who believed that the matter fell within the purview of the PDVA, and that they were therefore entitled to TCA immunity. Relying upon what it referred to as the community caretaking function of police officers, the Law Division held that because the responding police officers were acting "under the need to protect [plaintiffs] and others safety," the defendants were not liable to plaintiff. Again, we agree.

On appeal, plaintiff raises one point for our consideration:

POINT ONE: WHETHER ACTING UNDER COMMUNITY

CARETAKING/EXIGENT CIRCUMSTANCES OR UNDER THE PREVENTION OF DOMESTIC VIOLENCE ACT ABSOLVES DEFENDANTS OF CULPABILITY AS TO PLAINTIFFS CLAIMS RESULTING/OCCURRING ON JANUARY 2, 2005.

We are satisfied that plaintiffs argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Nevertheless, we add the following brief comments.

II.

We use the same standard as the Law Division to conduct our de novo review of the motion for summary judgment. Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009). Thus, we must consider, as the trial court did, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536).

Police officers will not be held liable for their actions if they act "in good faith in the execution or enforcement of any law." N.J.S.A. 59:3-3. This immunity also applies to the Department and to the Township. N.J.S.A. 59:2-2(b)("A public entity is not liable for an injury from an act or omission of a public employee where the public employee is not liable."); Fielder v. Stonack, 141 N.J. 101, 118 (1995).

To pierce the shield of good faith immunity, "a plaintiff must prove more than ordinary negligence." Dunlea v. Twp. of Belleville, 349 N.J. Super. 506, 511 (App. Div.), certif. denied, 174 N.J. 189 (2002). Rather, a plaintiff must prove

recklessness. Id. at 512. "Recklessness, unlike negligence, requires a conscious choice of a course of action with knowledge or a reason to know that it will create a serious danger to others." Id. at 513-14 (quoting Schick v. Ferolito, 167 N.J. 7, 19-20 (2001)). Recklessness is characterized as "an extreme departure from ordinary care, in a situation in which a high degree of danger is apparent." Id. at 513. In distinguishing between the elements of recklessness and negligence, the latter

"may consist of an intentional act done with knowledge that it creates a risk of danger to others, but recklessness requires a substantially higher risk. The quantum of the risk is the important factor." Schick, supra, 167 N.J. at 19-20.

The evidence in this case does not establish that defendants or their police officer employees acted recklessly at any time. Rather, the evidence clearly shows that on January 3, 2005, police officers were performing a police activity under emergent circumstances requiring quick action to protect the public safety, and pursuant to a reasonable and good faith belief that plaintiff might harm or kill himself. Moreover, the

immunity provisions of N.J.S.A. 30:4-27.76 provide further justification for the transportation of plaintiff to the hospitals screening service to ensure that he received an adequate mental health assessment. Accordingly, defendants are entitled to good faith immunity for any alleged liberty deprivations.

In like vein, we find immunity for the initial seizure of

plaintiffs weapons together with his firearms purchaser identification card, as well as the subsequent transfer of those same firearms to the Prosecutors Office and later refusal (without a court order) to return the property. The community caretaking function of the police justified the initial police intrusion into plaintiffs home. See Cady v. Dombrowski, 413 U.S. 433, 439-48, 93 S. Ct. 2523, 2527-31, 37 L. Ed. 2d 706, 713-18 (1973); State v. Bogan, 200 N.J. 61, 73-75 (2009); State v. Diloreto, 180 N.J. 264, 276 (2004); State v. Garbin, 325 N.J. Super. 521, 526-27 (App. Div. 1999), certif. denied, 164 N.J. 560 (2000). These attributes of good faith are fortified by the police officers perception that they were acting——albeit erroneously——under the auspices of the PDVA. We are unpersuaded

"A law enforcement officer, screening service or short-term care facility designated staff person or their respective employers, acting in good faith pursuant to this act who takes reasonable steps to assess, take custody of, detain or transport an individual for the purposes of mental health assessment or treatment is immune from civil and criminal liability." Id.

by plaintiffs argument that defendants mere imperfect fidelity to the PDVAs procedures regarding handling of seized firearms somehow excludes them from statutory immunity pursuant to the TCA.

Affirmed.