

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

W. ALECS DEAN,

Appellant,

v.

JACLYN DIANE BEVIS,

Appellee.

No. 2D20-2348

June 4, 2021

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Lee County; Amy R. Hawthorne, Judge.

Eric J. Friday of Eric Friday Law, P.A. Jacksonville, for Appellant

No appearance for Appellee.

SILBERMAN, Judge.

This appeal arose from a temporary injunction for protection against stalking entered in favor of Jaclyn Diane Bevis and against W. Alecs Dean. The injunction prohibited Dean from possessing

any firearms or ammunition and ordered Dean to surrender them to law enforcement. Dean filed a motion seeking the immediate release of his property and argued that the trial court did not have the authority to order the seizure of his firearms and ammunition based solely on a temporary injunction for stalking. Dean now appeals a nonfinal order that denies his motion for immediate release of property. We conclude, based on the allegations in the petition, that the trial court erred in relying on section 784.0485(5)(a), Florida Statutes (2019), and thus we reverse the temporary injunction to the extent that it prohibited Dean from possessing firearms or ammunition and ordered their surrender. Therefore, we do not reach Dean's other arguments. We otherwise affirm the temporary injunction.

On March 30, 2020, Bevis filed a sworn petition for injunction for protection against stalking and made the following allegations. When Bevis was working as a news reporter, Dean would provide her with information, but over time he became obsessed with her. When Dean learned that she was romantically involved with someone else, he lost connection with reality. He sent daily texts to her and demanded that she communicate with him. He began to

contact her significant other. Among other things, he started a website in her name and threatened to blackmail her and to put disparaging information on the website. "While his threats of me have not typically been physical in nature, he did once tell me he was 'looking to kill off another character in his autobiography.' " She did not allege when he made that statement to her. She feared for her safety on the basis of "his statements, his mental state, and his access to firearms."

On the same day that Bevis filed her petition, the trial court issued a temporary injunction for protection against stalking. The court found that "[t]he statements made under oath by Petitioner make it appear that Section 784.0485, Florida Statutes, applies to the parties, and that stalking exists." Among the provisions checked on the temporary injunction are "Respondent shall not use or possess a firearm or ammunition," and "Respondent shall surrender any firearms and ammunition in Respondent's possession to the **Lee County Sheriff's Department.**" See Fla. Fam. L. Form 12.980(u). The injunction notified the parties that a hearing would be held on April 7, 2020, to determine whether the

trial court should issue a final judgment of injunction for protection against stalking.

Officers served the injunction on Dean on March 31, 2020, and Dean contends that the officers seized his firearms and ammunition. On April 6, 2020, Dean filed a motion for immediate release of property and asserted that the trial court was without authority to order the seizure of his firearms and ammunition based only on a temporary injunction for stalking. He requested an immediate return of his firearms and ammunition until the trial court held a hearing and a final order was entered on the injunction petition. After a hearing on Dean's motion for immediate release of property, the trial court denied Dean's motion, and the final hearing was set on Bevis's injunction petition. Dean then filed this interlocutory appeal.¹

¹ Under the stalking statute, the final hearing is to be held within fifteen days unless good cause is shown for a continuance. See § 784.0485(5)(c). We note that the hearing on Dean's motion and the final hearing were continued, partly due to the COVID-19 pandemic. The trial court subsequently rendered a final injunction, and Dean has a pending appeal from the final injunction in case number 2D20-2859.

Dean contends that his right to keep and bears arms as provided for in the Florida Constitution was violated when the trial court entered the temporary injunction which ordered that he "shall not use or possess a firearm or ammunition" and that he "shall surrender all firearms and ammunition" that he possessed. The Florida Constitution provides, "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Art. I, § 8(a), Fla. Const. Thus, "the plain language of article I, section 8, of the Florida Constitution explicitly authorizes the Legislature to regulate the manner of exercising the right to keep and bear arms for self-defense." *Norman v. State*, 215 So. 3d 18, 41 (Fla. 2017); *see also Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 985 (Fla. 1st DCA 2013) (Makar, J., concurring) (stating that under the Florida Constitution "[p]lacing limitations on the right to bear arms is a quintessentially legislative function"). The right to bear arms is not absolute but rather "is subject to the right of the people through their legislature to enact valid police regulations to promote the health, morals,

safety and general welfare of the people." *Norman*, 215 So. 3d at 35 (quoting *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972)).

The Florida Legislature "created a cause of action for an injunction for protection against stalking." § 784.0485(1). Stalking occurs when a person "willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person." § 784.048(2). " 'Harass' means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose." § 784.048(1)(a).

The legislature regulates firearms in chapter 790, Florida Statutes (2019). *See Norman*, 215 So. 3d at 25. For instance, section 790.23 prohibits persons convicted of felonies from owning or having in their care, custody, possession, or control firearms or ammunition, unless they have met certain conditions. § 790.23(1), (2). In section 790.233, the legislature specifically addressed the possession of firearms or ammunition by a person who has been issued a final injunction to prevent stalking. Section 790.233 provides in pertinent part as follows:

(1) A person may not have in his or her care, custody, possession, or control any firearm or ammunition if the person has been issued a final injunction that is

currently in force and effect, restraining that person from committing acts of domestic violence, as issued under s. 741.30 or from committing acts of stalking or cyberstalking, as issued under s. 784.0485.

(2) A person who violates subsection (1) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Thus, if a final injunction for stalking is in effect, a person may not possess firearms or ammunition, and a violation of this provision is a crime. Section 784.0485(6)(e) provides, in turn, that "[a] final judgment on an injunction for protection against stalking entered pursuant to this section must, on its face, provide that it is a violation of s. 790.233 and a misdemeanor of the first degree for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition." But neither section 790.233 nor section 784.0485 provide express statutory authority for a court to prohibit a person from possessing firearms or ammunition upon the issuance of a temporary injunction for protection against stalking. Therefore, the trial court did not have the express authority to prohibit the possession of firearms and ammunition based upon the temporary injunction.

The trial court determined that the "catchall" provision of section 784.0485(5)(a) provided the statutory authority for the trial court to order the surrender of Dean's firearms and ammunition upon the issuance of the temporary injunction. That catchall provision states, "If it appears to the court that stalking exists, the court may grant a temporary injunction ex parte, pending a full hearing, and may grant such relief as the court deems proper, including an injunction restraining the respondent from committing any act of stalking." § 784.0485(5)(a) (emphasis added). Dean contends that the trial court's use of the catchall provision in section 784.0485(5)(a) exceeded the court's authority.

"Where the legislature includes wording in one section of a statute and not in another, it is presumed to have been intentionally excluded." *Fla. Carry*, 133 So. 3d at 971. Here, the legislature expressly included persons who have a final injunction in effect for domestic violence or stalking as persons who are prohibited from possessing firearms. *See* § 790.233(1). And in section 784.0485(6)(e), the legislature provided that a final injunction for stalking must "provide that it is a violation of s. 790.233 and a misdemeanor of the first degree for the respondent

to have in his or her care, custody, possession, or control any firearm or ammunition." The legislature did not make this provision for temporary injunctions, and Dean contends that this omission precludes the courts from restricting his right to possess firearms based on a temporary injunction. Although the legislature did provide the trial court with implicit authority when it issues a temporary injunction to "grant such relief as the court deems proper," § 784.0485(5)(a), that language does not suggest the authority to prohibit the possession of firearms and ammunition in every case when a temporary injunction is issued.

This court recently addressed an *ex parte* temporary injunction for protection against stalking that was dissolved and the trial court's failure to grant the respondent's motion for return of his firearms in *Wolfe v. Newton*, 310 So. 3d 1077, 1078 (Fla. 2d DCA 2020). The trial court would not order return of the property without an evidentiary hearing. *Id.* at 1079. Granting prohibition relief, this court precluded the trial court from conducting an evidentiary hearing as a condition to the return of Wolfe's firearms that had been seized via the *ex parte* order. *Id.* at 1083. In the

opinion, this court noted its concern for the lack of express statutory authority for the ex parte seizure of firearms in that case.

We pause here to observe that there does not appear to be any express statutory authorization for the ex parte seizure of Mr. Wolfe's firearms in this context, and the ex parte order contained no finding and cited no legal authority that would support that provision of the order (it was simply a checked box on a form). Section 784.0485, Florida Statutes (2020), the statute that governs stalking injunctions, does not expressly empower a court to require respondents to surrender their firearms and ammunition on an ex parte basis. Section 790.233, Florida Statutes (2020), would prohibit firearm and ammunition possession if a *final* stalking injunction had been ordered and in effect, but obviously that is not the case here. Mr. Wolfe's firearms were not seized under either sections 790.401 (governing risk protective orders) or 790.08 (governing arrests). It may be that the court's ex parte command to Mr. Wolfe to surrender his firearms and ammunition was relief the court “deem[ed] proper” pursuant to section 784.0485(5)[(a)]'s ex parte provisions, but if so, it is impossible to tell from the order why the court deemed it.

That issue is not before us today. We point it out only so that our opinion will not be read as a tacit endorsement of this manner of ex parte seizure in a stalking injunction proceeding.

Wolfe, 310 So. 3d at 1080 n.4.

Similarly, in this case it is impossible to tell from the temporary injunction why the trial court deemed it proper to require Dean to surrender his firearms and ammunition. We reach only the

narrow issue of whether the allegations in this case were sufficient to support such a decision. We conclude that any authority that the catchall provision may provide did not permit the prohibition of Dean's possession of firearms and ammunition under the alleged facts of this case.

We contrast section 784.0485(5)(a) with the "red flag" law that Bevis relied upon in the trial court. Bevis asserted that the red flag law allows confiscation of a firearm when a person has not committed a crime. The red flag law, found in section 790.401, is "The Marjory Stoneman Douglas High School Public Safety Act" that provides for risk protection orders. *Davis v. Gilchrist Cnty. Sheriff's Off.*, 280 So. 3d 524, 528 (Fla. 1st DCA 2019).

Under that law, a petition "must be accompanied by an affidavit made under oath stating the specific statements, actions, or facts that give rise to a reasonable fear of significant dangerous acts by the respondent." § 790.401(2)(e)1. The law allows a petitioning law enforcement officer or agency to "request that a temporary ex parte risk protection order be issued before a hearing for a risk protection order, without notice to the respondent." § 790.401(4)(a). The petition must include "detailed allegations

based on personal knowledge that the respondent poses a significant danger of causing personal injury to himself or herself or others in the near future" based on possession of a firearm.

§ 790.401(4)(a). The law requires a trial court to "hold a temporary ex parte risk protection order hearing in person or by telephone on the day the petition is filed or on the business day immediately following the day the petition is filed." § 790.401(4)(d). The temporary ex parte order must include "[a] statement of the grounds asserted for the order." § 790.401(4)(e)1.

Thus, under the red flag law, the petitioner must file a sworn statement, like in the case of a petitioner seeking a stalking injunction. But to obtain an ex parte temporary order under the red flag law, there must be detailed allegations based on personal knowledge to show the respondent poses a significant danger of causing personal injury to himself or others in the near future based on the possession of a firearm. Here, section 784.0485 does not require detailed allegations showing that Dean posed a significant danger of causing personal injury in the near future based on his possession of a firearm. And Bevis's petition did not make such allegations.

Bevis alleged that she feared for her safety on the basis of Dean's "statements, his mental state, and his access to firearms." Her allegations stated that Dean had developed an obsession with her and that he texted her daily and demanded that she communicate with him. Bevis believed that when Dean learned that she was romantically involved with someone else he lost connection with reality. In addition, he started a website in her name and threatened to blackmail her and to put disparaging information on the website. She acknowledged that threats he made "have not typically been physical in nature," but he told her once that "he was 'looking to kill off another character in his autobiography.' " She did not allege how long ago this occurred. She did not allege any express threat of physical violence against her, and she did not allege any express or implied threat of the use of a firearm or any other weapon against her.

Bevis's allegations do not show that Dean posed a significant danger to Bevis or anyone else for personal injury based on his possession of a firearm. Under the limited allegations contained in her petition, the trial court erred by relying on the provision that it "may grant such relief as the court deems proper," § 784.0485(5)(a),

to include in the temporary stalking injunction provisions that infringed upon Dean's constitutional right to keep and bear arms as provided for in the Florida Constitution. *See* Art. I, § 8, Fla. Const. Therefore, we reverse the temporary injunction to the extent that it prohibited Dean from possessing firearms and ammunition and ordered their surrender. We otherwise affirm the temporary injunction.

Affirmed in part and reversed in part.

CASANUEVA and MORRIS, JJ., Concur.

Opinion subject to revision prior to official publication.