

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	: CONFIDENTIAL PROCEEDING
	:
Petitioner,	: C.A. No.: 20I-0192
	:
v.	:
	:
SAM SMITH,	:
	:
Respondent.	:

Submitted: June 29, 2020
Decided: August 18, 2020

Upon Appeal of Commissioner's Findings of Fact and Recommendations

AFFIRMED

MEMORANDUM OPINION AND ORDER

Stephen A. Spence, Esquire, Baird Mandalas Brockstedt, LLC, 1413 Savannah Road, Suite 1, Lewes, Delaware 19958, Attorney for Respondent.

Loren Holland, Esquire, Deputy Attorney General, 820 North French Street, 6th Floor, Wilmington, Delaware 19801, Attorney for Petitioner.

KARSNITZ, J.

PROCEDURAL HISTORY

Appellant, Sam Smith (“Respondent” or “Mr. Smith”),¹ through Court-appointed counsel, filed an Appeal of Commissioner’s Findings of Fact and Recommendations based on two orders issued by the Commissioner on February 20, 2020.

On February 20, 2020, the State of Delaware (the “State”) filed a complaint (the “Complaint”) against Respondent seeking to continue an involuntary inpatient commitment.² On the same day the State filed the Complaint, the Court held a probable cause hearing at SUN Behavior Health System, 21655 Biden Avenue, Georgetown, Delaware 19947.³ At the end of the hearing, the Commissioner: (1) found probable cause existed for involuntary commitment (the “Probable Cause Order”)⁴ and (2) entered an Order for Relinquishment of Firearms or Ammunition (the “Relinquishment Order”)⁵ (the Probable Cause Order and the Relinquishment Order, collectively, the “Orders”).

On February 27, 2020, Respondent was discharged with no outpatient treatment requirements. The Court did not hold a clear and convincing evidence

¹ In the interest of confidentiality, the Court has given Appellant a fictitious name.

² 16 *Del. C.* §5008.

³ Pursuant to 16 *Del. C.* § 5009(1), a civil commitment hearing must be held no later than 8 working days from the filing of the complaint.

⁴ 16 *Del. C.* §5009(b)(2).

⁵ 16 *Del. C.* §5009(f).

hearing. This appeal is not moot because the Relinquishment Order has ongoing effect and consequences.

For the reasons set forth below, I affirm the Commissioner's Findings of Fact and Recommendations based on the Orders dated February 20, 2020 and I deny Respondent's appeal of such Orders.

STANDARD AND SCOPE OF REVIEW

Superior Court Civil Rule 132 provides the powers and duties imposed upon Commissioners in this State. Commissioners have the power to conduct case-dispositive hearings, which includes mental hearings pursuant to 16 *Del. C.* Chapter 50.⁶

The hearing on February 20, 2020 was conducted to "determine whether probable cause exists for the involuntary patient's confinement."⁷ Probable cause means "reasonable grounds" or a "fair probability."⁸ Probable cause lies somewhere between suspicion and sufficient evidence.⁹ It is "only the probability, and not a prima facie showing."¹⁰ Moreover, "[p]robable cause can be established from either direct observation or hearsay. [Hearsay], consisting generally of incriminatory reports to the police by informants or witnesses, is acceptable,

⁶ Super. Ct. Civ. R. 132 (a).

⁷ 16 *Del. C.* §5009(a)(1).

⁸ *Stafford v. State*, 59 A.3d 1223, 1229 (Del 2012).

⁹ *State v. Trager*, 2006 WL 2194764, at *5 (Del. Super. July 28, 2006).

provided that it is sufficiently corroborated by other facts within the officer's knowledge."¹¹

The State had the burden of showing, by clear and convincing evidence, probable cause to believe Respondent 1) had a mental condition; 2) based on manifest indications, Respondent was dangerous to himself or others; 3) all less restrictive alternatives have been considered and determined to be clinically inappropriate; and, (4) the individual has declined voluntary inpatient treatment, or lacks the capacity to knowingly and voluntarily consent to inpatient treatment.¹²

I am required to "make a *de novo* determination of those portions of the report or specified proposed findings of fact or recommendations made by the Commissioner."¹³ I "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Commissioner" and "may also receive further evidence or recommit the matter to the Commissioner with instructions."¹⁴

"[T]he party filing written objections to a Commissioner's order [is required] to cause a transcript of the proceedings before the Commissioner to be prepared, served, and filed."¹⁵ "A party appealing the findings of fact and recommendations

¹⁰ *Id.* (citing *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993)).

¹¹ *Garner v. State*, 314 A.2d 908, 911 (Del. 1973).

¹² 16 *Del. C.* §§ 5008 and 5011(a).

¹³ Super. Ct. Civ. R. 132 (a)(4)(iv).

¹⁴ *Id.*

¹⁵ Super. Ct. Civ. R. 132(a)(4)(iii).

of a Commissioner under subparagraph (4) who fails to comply with the provisions of this rule may be subject to dismissal of said motion for reconsideration or appeal."¹⁶

FINDINGS OF FACT

On February 13, 2020, Respondent, an enlisted member of the Air Force, sought to buy a firearm from a store in Dover where he had purchased firearms before. The clerk (who did not testify at the hearing) declined to sell Respondent the firearm. Law enforcement was made aware of some concerning remarks Respondent made to the clerk. Agent James Reisch ("Agent Reisch"), an agent with the Federal Bureau of Alcohol, Tobacco, and Firearms ("ATF"), interviewed Respondent with two other ATF personnel on February 14, 2020, and then referred Respondent to SUN Behavior Health System, 21655 Biden Avenue, Georgetown, Delaware 19947 ("SUN") for commitment. Respondent was admitted to SUN on February 15, 2020.¹⁷

¹⁶ Super. Ct. Civ. R. 132(b).

¹⁷ Pursuant to 16 *Del C.* § 5004(a), "[a]ny person who believes that another person's behavior is both the product of a mental condition and is dangerous to self or dangerous to others may notify a peace officer or credentialed mental health screener ... and request the assistance for said person." Once a police officer or credentialed mental health screener observe "that such individual with an apparent mental condition likely constitutes a danger to self or danger to others, such person with an apparent mental condition shall be promptly taken into custody for the purpose of an emergency detention by any peace officer in the State without the necessity of a warrant."

The State's medical expert, Dr. Franklin Hamlett, a psychiatrist at SUN, testified he had made a working diagnosis, as stated in his Affidavit of Treatment Provider, that Respondent has a "Psychotic Disorder Unspecified" and he was further evaluating Respondent for "possible depression and/or psychotic disorder." Dr. Hamlett had no medical records from other providers or medical facilities that supported his "working diagnosis." He did not request records from the Air Force or any other medical providers. Dr. Hamlett stated that there were two bases for his diagnosis: Respondent's behavior prior to his admission, and that Respondent was angry and irritable in the hospital.¹⁸

The State's only other witness, Agent Reisch, testified about what reporting witnesses told him. Respondent's counsel made a hearsay objection, which the Commissioner overruled. Agent Reisch also testified about what Respondent said during the interview. The State played a portion of the video of that interview, with Agent Reisch providing commentary. During the interview, Agent Reisch suggested to Respondent that Respondent was sad and depressed. Respondent replied that he was sad and depressed. Then another ATF agent suggested to

¹⁸ Pursuant to 16 *Del C.* § 5004(b), "[a]n individual may be held on an emergency detention if it reasonably appears to a credentialed mental health screener ... that the person is acting in a manner that appears to be dangerous to self or others. The credentialed health screener ... shall verify this finding in writing and complete the Department-approved emergency detention form." The documentation shall include the screener's "rationale for the detention, including specific information regarding the alleged mental condition and dangerous behaviors observed."

Respondent that he wanted to “commit suicide by cop.” Respondent said that was his intention.

Respondent testified in his defense. He stated he was not depressed. He has never been diagnosed with, and does not take, medications for depression. He has been in the Air Force for three and a half years. He has trips planned soon to visit family and friends, and he wants to get his degree and return to his native Kenya. He has several firearms and wanted to buy a revolver. He was interested in open carry as allowed in Delaware. When he talked to the clerk about this, the clerk informed the Respondent that open carry permits could be dangerous and could lead others to be confused on whether he was a good guy or a bad guy. When asked by the clerk whether he was a good guy or a bad guy, Respondent testified that he informed the clerk that he "would not confirm or deny whether he was a good guy or bad guy." Respondent also testified that he told the clerk "whatever happens, happens, I'm not afraid to die." As for the interview, he did not recall being advised of his rights, and he felt pressured to say what the ATF agents wanted.

QUESTIONS PRESENTED

- (1) Were the Probable Cause Order by the Commissioner, and the attendant Relinquishment Order, issued in error?
- (2) Is 16 *Del. C.* §5009(f), pursuant to which the Relinquishment Order was issued, unconstitutional?

ANALYSIS

- (1) The Probable Cause Order by the Commissioner was properly issued; consequently, the attendant Relinquishment Order was properly issued.

Mr. Smith argues that the evidence before the Commissioner did not meet the requirements of the Delaware standard, discussed above, under which the State must demonstrate by clear and convincing evidence that (1) the individual is a person with a mental condition, (2) the individual is a danger to himself or others, (3) all less restrictive alternative treatments have been deemed clinically inappropriate, and (4) the individual has declined voluntary treatment or lacks capacity to consent to inpatient treatment.¹⁹ Under the statute, “dangerous to others means that by reason of mental condition there is a substantial likelihood that the person will inflict serious bodily harm upon another person within the immediate future.”²⁰ Additionally, this determination “shall take into account the person’s history, recent behavior and any recent act or threat.”²¹

I disagree. Based on the testimony of Dr. Hamlett, Agent Reisch, and Respondent himself, in my view the State was able to show there was probable cause for an involuntary inpatient commitment (the Probable Cause Order). The State provided evidence that the Respondent had a mental health condition, was a

¹⁹ 16 *Del C.* § 5011(a).

²⁰ 16 *Del C.* § 5001(3).

danger to himself or others, declined voluntary inpatient treatment, and involuntary commitment was the least restrictive alternative for treatment. As discussed above, “probable cause” has no precise definition. It lies somewhere between suspicion and sufficient evidence. It is only the probability, and not a *prima facie* showing. Moreover, probable cause can be established from either direct observation or hearsay, provided that the latter is sufficiently corroborated by other facts within Agent Reisch’s knowledge. As such, despite Respondent's objection to Agent Reisch's testimony as hearsay, this testimony was also corroborated by Respondent during his testimony. For these reasons, I am satisfied that the clear and convincing evidence standard was met to conclude that Mr. Smith had a mental condition²² and was a danger to himself or others. Thus, I find that the Commissioner did not err in finding probable cause to commit Respondent to SUN, and I affirm the Probable Cause Order.

A necessary result of the Probable Cause Order is the automatic entry of the Relinquishment Order:

"If the court makes a determination under paragraph (b)(2) of this section or subsection (c) of this section, the court *shall* order an individual subject to a determination under paragraph (b)(2) of this section or subsection (c) of this section to relinquish any firearms or

²¹ *Id.*

²² As defined under 16 *Del. C.* §5001(13).

ammunition owned, possessed, or controlled by the individual."²³
(emphasis supplied).

The Relinquishment Order states that Respondent is "precluded from purchasing, owning, possessing, or controlling firearms or ammunition from this day forward." Since I affirm the Probable Cause Order, I also affirm the mandatory attendant Relinquishment Order (see discussion of constitutionality of the statute pursuant to which the Relinquishment Order was issued, *below*).

(2) 16 Del. C. §5009(f) is Constitutional.

Under the Second Amendment to the United States Constitution and Article I, Section 20 of the Delaware Constitution, Respondent has the right to keep and bear arms, with the Delaware Constitution providing broader rights.²⁴ That right is not absolute, but it must still be protected and only abridged when the State's interest significantly outweighs the individual's interest.²⁵

In *District of Columbia v. Heller*, the United States Supreme Court stated that, "the right secured by the Second Amendment is not unlimited."²⁶ The Court

²³ 16 Del. C. §5009(f).

²⁴ *Bridgeville Rifle & Pistol Club. v. Small*, 176 A.3d 632, 652 (Del. 2017).

²⁵ *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 784 (2010); *Griffin v. State*, 47 A.3d 487, 490 (Del. 2012).

²⁶ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

in *Heller* indicated that the Second Amendment could be limited by "longstanding prohibitions on the possession of firearms by felons and the mentally ill."²⁷

Furthermore, in *Beers v. Attorney General of the United States of America*²⁸ the Third Circuit Court of Appeals held that a statute prohibiting possession of firearms by anyone previously committed to a mental institution did not violate the Second Amendment. The defendant in the *Beers* case was an individual who was involuntarily committed to a psychiatric inpatient hospital. Despite his contention that he had been rehabilitated, the Court held it was not a violation of his Second Amendment rights to prohibit him from possessing a weapon.²⁹

Both *Heller* and *Beers* allow the State to impose reasonable limitations on the right of respondents in mental health due process hearings to purchase and possess firearms, subject to the due process considerations discussed below.

As the right to bear arms is considered a fundamental right, both procedural and substantive due process must be afforded before that right may be deprived.³⁰ To determine what type of procedural due process is required, the Court considers three factors: "first, the private interest that will be affected; second, the risk of an

²⁷ *Id.* at 626 & 627 n.26.

²⁸ 927 F.3d 150 (3d Cir. 2019).

²⁹ *Id.* at 159.

³⁰ *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 784 (2010).

erroneous deprivation of such interest and the probable value, if any, of additional or substitute procedural safeguards; and finally, the State interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."³¹

As for substantive due process, when a law places a substantial burden on the right to bear arms, the Court applies an intermediate level of scrutiny: (1) the government's stated objective must be significant, substantial, or important; and (2) there must be a reasonable fit between the challenged regulation and the asserted objective.³²

Respondent argues that 16 *Del. C.* §5009(f), set forth *supra*, violates principles of both procedural and substantive due process. With respect to the latter, Respondent argues that there is not a reasonable fit between the statute and the State's stated objective, in that it is not narrowly drafted to serve the State's objective. I will summarize Respondent's arguments under *Adjile* as follows:

(1) The private interest that he is being deprived of is even greater than the usual mental health respondent. As a member of the United States Air Force, the use of firearms is a prerequisite for his job. Thus, he argues, his interest in

³¹ *Adjile, Inc. v. City of Wilmington*, 875 A.2d 632, at *2 (Table) (Del. 2005).

³² *U.S. v. Chovan*, 735 F.3d 1127, 1139 (9th Cir, 2013); *U.S. v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

the right to own and use firearms is greater, hence the deprivation of that interest is greater.

(2) The risk of erroneous deprivation is too high, for at least four reasons. First, the probable cause hearing requires the State to show only probable cause – a relatively low legal standard. This differs from other adjudications that render a person prohibited from possession and purchase of deadly weapons under Delaware law, which require a conviction or adjudication of delinquency using the higher “beyond a reasonable doubt” standard.³³ Second, the probable cause hearing is a preliminary hearing and not a final adjudication. Third, hearsay is admissible, which in effect deprives the Respondent of the right to confront adverse witnesses. Fourth, the probable cause hearing is on very short notice, making it difficult to gather facts and evidence to counter the State; Respondent’s liberty has already been deprived *ex parte* and he must remain in the institution pending the probable cause hearing.

(3) Additional or substitute procedural safeguards could be afforded. The Relinquishment Order is forever, but the State could provide a sunset provision in the statute. It already does so under similar statutes. The prohibition of a person

³³ 11 *Del. C.* § 1448. The only exception is a person subject to a Family Court protection from abuse order; “but only for so long as that order remains in effect or is not vacated or otherwise terminated.” *Id.* § 1448(a)(6). However, the prohibition stemming from a PFA sunsets; not so for an involuntary commitment probable cause finding.

subject to a PFA order sunsets when that order is vacated or terminated.³⁴ Lethal violence protective orders sunset preliminary orders after 45 days and final orders after one year.³⁵ Yet a relinquishment order under 16 *Del. C.* §5009(f) never expires, subject only to Respondent seeking relief from an administrative panel.³⁶

(4) Respondent concedes that the State's interest in keeping firearms from those who put others at risk is substantial. That interest is most apparent involving persons convicted of felonies, serious misdemeanors, or domestic violence offenses. However, Respondent argues that the State's interest is lesser involving persons who may suffer a mental condition but otherwise have not committed a crime.

(5) The fiscal and administrative burdens that the additional or substitute procedural requirements would entail are acceptable. Indeed, the State already bears such costs in the circumstances discussed above.

I do not accept Respondent's arguments that his due process rights were violated. When I apply an intermediate level of scrutiny to 16 *Del. C.* § 5009(f), I find the State's objective of reducing gun violence and preventing suicide to be significant, substantial, and important. Moreover, in my view there is a

³⁴ 11 *Del. C.* § 1448(a)(6).

³⁵ 10 *Del. C.* §7701, §7703(t), §77046).

³⁶ 16 *Del. C.* §5009(f), (h); 11 *Del. C.* § 1448(a)(2).

reasonable fit between 16 *Del. C.* § 5009(f) and the State's objective. In *Mai v. United States*³⁷ the Ninth Circuit held that Congress' goal of reducing gun violence and reducing suicide withstood the application of intermediate scrutiny. In *Kachalsky v. County of Westchester*³⁸ the Second Circuit held that the State had a substantial interest in public safety and crime prevention, and so long as State law restrictions on the possession of firearms in public were substantially related to that interest, they would be upheld on Second Amendment challenge.

Just because Respondent is in the military does not confer upon him special or greater constitutional rights. The speed and short notice of a probable cause hearing, and the use of corroborated hearsay and a relatively low legal standard, are all warranted by the imminent threat of a mentally ill person with firearms to himself and the community. I fail to see a significant difference in risk between a felon and a mentally ill person with a firearm.

The final, dispositive factor for me is that there is no need for a sunset provision in the Relinquishment Order, or a new procedure for vacation of the Relinquishment Order, which might be expensive or administratively burdensome. That is because the very statute being challenged already sets forth a detailed procedure for vacation of the Relinquishment Order before an administrative panel, with the opportunity for an appeal to the Superior Court if necessary. "[A]n

³⁷ 2020 WL 1161771, at *8 (9th Cir. 2020).

individual subject to an order of relinquishment under subsection (f) of this section may seek relief from the order under § 1448A(1) of Title 11."³⁹ This is also explicitly stated in paragraph four of the Relinquishment Order. Thus, if Respondent wishes to vacate the Relinquishment Order and regain possession of his firearms, there is a clear path forward to do so.

CONCLUSION

For the reasons stated above, I **AFFIRM** the Commissioner's Findings of Fact and Recommendations based on an Order dated February 20, 2020 and **DENY** Respondent's appeal of such Order.

IT IS SO ORDERED.



Craig A. Karsnitz

FILED PROTHONOTARY
SUSSEX COUNTY
2020 AUG 18 P 3:21

cc: Prothonotary

³⁸ 701 F.3d 81 (2d Cir. 2012).

³⁹ 16 *Del. C.* § 5009(h).