

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

W. ALECS DEAN,

Appellant,

v.

JACLYN DIANE BEVIS,

Appellee.

No. 2D20-2859

December 1, 2021

Appeal from the Circuit Court for Lee County; Lisa S. Porter, Judge.

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

Michael Mummert of Mummert & Starling, PLLC, Fort Myers, for Appellee.

PER CURIAM.

Affirmed.

KELLY and ATKINSON, JJ., Concur.
VILLANTI, J., Dissents with opinion.

VILLANTI, Judge, Dissenting.

I respectfully dissent. On appeal, Dean argues that section 784.0485(6)(e), Florida Statutes (2020), is unconstitutional as applied because it deprives him of his Second Amendment right to keep and bear arms without due process.^{1,2} This is an issue of first impression; there is no Florida caselaw on point with the facts in this case. Because this is a stalking injunction involving a petitioner who does not have an intimate relationship with the respondent and there has been no threat of physical violence, caselaw recognizing the authority of a trial court to remove a

¹ See Amends. II, V, & XIV, U.S. Const.

² Technically, Dean is challenging the constitutionality of section 790.233(1) as applied to section 784.0485(6)(e). Section 790.233(1) states, "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." (Emphasis added.) Section 784.0485(6)(e) states, "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."

respondent's firearms in cases involving domestic violence should be inapplicable here.

Importantly, sections 790.233³ and 784.0485(6)(e) only come into play where a trial court has issued a final injunction to prevent stalking. No corresponding legislative fiat exists with respect to the entry of a temporary injunction, and the trial court's discretion to prohibit a respondent from possessing firearms or ammunition and ordering their surrender at the temporary injunction stage is extremely limited, if not outright proscribed. *See Dean v. Bevis*, No. 2D20-2348, 2021 WL 2272444 (Fla. 2d DCA June 4, 2021) (holding that section 784.0485(5)(a), which allows the trial court the authority to "grant such relief as the court deems proper," did not confer upon the trial court the discretion to prohibit the possession of firearms and ammunition in connection with a temporary injunction, and that the petition and the evidence did not support

³ Section 790.233 was enacted in 1988. *See* ch. 98-284, §1, Laws of Fla. At that time, the statute pertained solely to injunctions against domestic violence entered pursuant to section 741.30. The prohibition against possession of a firearm or ammunition by a respondent who is the subject of a stalking injunction pursuant to section 784.0485 was added to section 790.233 in 2012. *See* ch. 2012-153, §5, Laws of Fla.

the prohibition under the "red flag" provisions found in section 790.401 ("The Marjory Stoneman Douglas High School Public Safety Act").

It is inconsistent and illogical to allow for the continued possession of firearms and ammunition while a temporary injunction for protection against stalking is in effect but require their surrender upon entry of a final injunction. Absent a continuance, the final hearing must be held within fifteen days of the entry of the temporary injunction. The implication that during these two weeks the respondent is not a danger makes no sense; and the implied legislative declaration that the respondent poses a danger as a matter of law upon the entry of a final injunction makes just as little sense.⁴ Conversely, a respondent who presents a threat to the petitioner's safety may retain his or her firearms for up to two weeks (or more) pending the final hearing; and a respondent who presents no physical threat to the petitioner is compelled to

⁴ My comments here are limited to the application of section 790.233(1) to the stalking statute. I believe the mandatory prohibition against the possession of firearms or ammunition by a respondent in cases involving domestic violence would likely withstand constitutional scrutiny.

surrender his or her firearms upon entry of a final injunction for protection against stalking without due process of law.

Under circumstances such as those presented in this case, I believe the trial court should be required to make a specific finding of a credible threat to the petitioner's safety before ordering the surrender of the respondent's firearms. We already use such a procedure in cases involving a final judgment of injunction for protection against repeat violence, sexual violence, or dating violence pursuant to section 784.046. *See, e.g., Langner v. Cox*, 826 So. 2d 475, 475 (Fla. 1st DCA 2002) ("Such provisions are not mandatory [but] may be included if the trial court concludes that they are necessary to protect the petitioner. *See* § 784.046(7)(b), Fla. Stat. (2001). Because they were entered without due process of law, we vacate those portions of the final judgment which prohibit appellant from using or possessing firearms or ammunition . . . and remand for a hearing at which appellant may present such evidence as he deems appropriate regarding the necessity of incorporating such provisions into the final judgment.");⁵ *see also Blaylock v.*

⁵ Section 784.046(7) provides, in pertinent part, that the trial court may "order such other relief as the court deems necessary for

Zeller, 932 So. 2d 479, 480-81 (Fla. 5th DCA 2006) (reversing firearms prohibition in final injunction for protection against repeat violence under section 784.046 and holding that respondent's due process rights were violated where petitioner "did not ask for such a prohibition and the issue was not presented or discussed during the hearing").

In contrast to section 784.046, section 790.233 does not allow for such a finding; instead, the statute compels the trial court to order the respondent to surrender his or her firearms and ammunition upon entry of a final judgment of injunction for protection against stalking without consideration of the petitioner's need for such protection. This mandatory provision—in the context presented here—deprives the respondent of his constitutional right of due process. Accordingly, I believe that Dean's constitutional challenge to the validity of this statute as applied to his circumstances has merit. *See Notami Hosp. of Fla. v. Bowen*, 927 So. 2d 139, 142 (Fla. 1st DCA 2006) ("To the extent a statute

the protection of the petitioner," including injunctions or directives to law enforcement agencies. This wording is almost identical to that of section 784.0485(6)(a)(4).

conflicts with express or clearly implied mandates of the Constitution, the statute must fall.").

Here, absent the mandatory application of section 790.233 to section 784.0485, there is no reason our courts could not apply the same procedure we use in cases involving injunctions for protection against repeat violence, sexual violence, or dating violence pursuant to section 784.046. Indeed, the trial court may find that in a particular case the respondent does pose a threat to the safety of the petitioner. In such cases, the trial court should, of course, be permitted to exercise its broad discretion to impose restrictions on the respondent's ability to possess firearms and/or ammunition.

I urge the legislature to revisit this issue in the context of both temporary and final injunctions for protection against stalking with a view toward protecting the petitioner to the extent possible if good cause is shown while also observing the respondent's Second Amendment and due process rights.

Opinion subject to revision prior to official publication.