

New York State Police Investigator Kyle W. Hutter v Redacted
2022 NY Slip Op 33882(U)
November 18, 2022
Supreme Court, Saratoga County
Docket Number: Index No. 20222132
Judge: Richard A. Kupferman
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SUPREME COURT
STATE OF NEW YORK COUNTY OF SARATOGA

NEW YORK STATE POLICE INVESTIGATOR
KYLE W. HUTTER,

DECISION

Index No.: 20222132

Petitioner,

-against-



Respondent.

KUPFERMAN, J.,

Before the Court is a petition for an extreme risk protection order (“ERPO”), pursuant to CPLR Article 63-A, seeking to prohibit Respondent from being able to legally purchase or possess a gun for a period of one year.

Allegations Set Forth in the Petition and Supporting Papers

This ERPO application was made after Respondent allegedly discharged his rifle within 500 feet of a neighboring residence in the Town of Greenfield (“Town”). According to his supporting deposition, Respondent’s neighbor, T.C., observed Respondent discharge the rifle while sitting in a chair on his driveway, pointing the gun towards the roadway. He heard Respondent discharge the rifle five or six times. He also observed gravel in the driveway being displaced and projected into the air. Respondent was approximately 250 feet away.

Shortly after the incident, Trooper Stephen Yaw (“Trooper”) responded to a “shots fired” call from the 911 dispatch, which reported that the subject was firing a rifle at an abandoned trailer. According to his supporting deposition, upon arriving at the scene, the Trooper observed Respondent sitting in his driveway. A .22 caliber rifle was laying on a nearby log, with expended casings and live ammunition near the rifle. Respondent reportedly informed the Trooper that he

had been shooting blank ammunition. The Trooper, however, did not locate any blank ammunition at the scene. The Trooper further smelled the odor of an alcoholic beverage coming from Respondent as he was speaking, and he observed that Respondent had slurred speech.

The application also includes a supporting deposition from Petitioner, a New York State Police Investigator, who assisted the Trooper at the scene. Based on his investigation, Petitioner concluded that Respondent presents a danger to others and that a final ERPO should be issued against him.

Summary of the Proceedings

Based on the petition and supporting papers, the Court determined that probable cause existed to grant temporary relief. As a result, on September 26, 2022, the Court issued a temporary extreme risk protection order (“TERPO”), ex parte (see CPLR 6342). The Court further scheduled a hearing for October 3, 2022, at 2:00 p.m. (see CPLR 6343).¹

Prior to the hearing, Petitioner conducted a background investigation into Respondent and reported the results to the Court to consider on the application, as required by the applicable statute (see CPLR 6342[9]). The background investigation revealed that as a result of the subject incident, Respondent was arrested and charged with reckless endangerment in the second degree (Penal Law § 120.20) and improper discharge of a firearm within 500 feet of a dwelling (ECL § 11-0931[4][a][2]). In addition, Respondent was previously convicted in August 2020 for DWAI Alcohol (Infraction) in the Town of Malta. A stay away order of protection was also issued against the Respondent in favor of T.C.’s wife on an unrelated matter. Respondent was also arrested in

¹ On September 26, 2022, Respondent acknowledged service of the hearing notification and supporting documents.

June 2021 for discharging a rifle within 500 feet of a residence. The background investigation report, however, did not provide any details of the prior incident or the disposition of the charge.

Respondent did not appear at the hearing. Given that Respondent had been duly and properly notified of the hearing date and time, the Court proceeded to conduct the hearing in the Respondent's absence. Because Petitioner was not represented by counsel, Petitioner was prohibited from calling/examining witnesses and making legal arguments. Notwithstanding, the Court considered the petition, the materials submitted in support of the petition, and the background investigation report (see CPLR 6343[2]). The Court also separately placed Petitioner and T.C. under oath and questioned them about the incident.

Petitioner testified that Respondent had been discharging live ammunition on the day in question. He reached this conclusion based on his examination of the discharged rounds. They were not crimped on the end; rather, they were round. He also examined jars and/or cans that Respondent had allegedly used for target practice; he observed holes in them, consistent with the .22 rifle. He measured the distance between T.C.'s residence and Respondent's location as 160 feet. However, he believed that the other nearby residences were more than 500 feet away.

Petitioner testified that Respondent had a strong smell of alcohol, and that he was not stable on his feet. After conducting a field sobriety test, the Trooper concluded that Respondent was not intoxicated, but that his decision making was impaired by alcohol. He testified that Respondent admitted to him that he was shooting towards the roadway. However, he did not present any physical evidence that any bullets had crossed the roadway. Although he observed a hole in a residence across the street, he could not say that a bullet from the rifle caused the hole. Petitioner further testified that Respondent did not threaten him or anyone else at the scene that day.

T.C. testified that his wife heard gunshots around 4:10 p.m. on the day in question. He later observed Respondent aiming his rifle towards the roadway and shooting the gun, 60 feet from the roadway. He testified, "I [saw] him pick up the gun, aim [it] towards the road ... he shot 3 or 4 [times]." He was shooting "[a]t the road, at the gravel ... aiming right towards the rear of the garage ... shooting directly toward the road[.]" T.C. called 911 to report the incident.

An order of protection was issued against Respondent for an unrelated matter. According to T.C., Respondent kept visiting his property, disturbing his family, and they told him to leave. T.C.'s wife received the order of protection. It has since expired. That incident did not involve the use of a weapon or any threats of physical harm.

T.C. further testified that his wife runs a business at their home and yelled at Respondent in the past (apparently once) for shooting in the side yard. T.C., however, provided few, if any, details regarding any prior shooting incidents. He did not testify that he previously observed any prior incidents or that he possessed any personal knowledge regarding them.

When first asked whether any other litigation existed between his family and Respondent, T.C. responded "no". However, upon further questioning, T.C. ultimately disclosed that there was a zoning/land use dispute between them. Respondent allegedly resides in an RV/Barn without septic (and, until recently, without power), and T.C.'s wife has followed up with the Town to make sure that Respondent follows the applicable zoning/land use law. He admitted that his wife keeps calling the Town to follow up on the matter.

T.C. testified that Respondent has never threatened him or his family. When asked whether he felt endangered by Respondent, T.C. paused briefly, and then responded, "I would say, yeah, a little bit, just because I think he's a little out there."

At the conclusion of the hearing, the Court reserved decision on whether the proof was sufficient to grant the petition.

Summary of the Law

CPLR Article 63-A (also known as the “red flag” law) sets forth the basic procedure for police officers (among others) to request a court order to temporarily keep guns away from people who are likely to use them to hurt themselves or others. Such an order prohibits a respondent from purchasing or possessing a firearm, rifle, or shotgun for up to one year.² The statute is intended to help prevent and reduce the number of mass shootings, suicides, and other acts of gun violence.

To obtain a final ERPO, the petitioner must establish that the respondent is likely to engage in conduct that would result in serious harm to himself, herself or others (see CPLR 6343[2]). There must be either, “1. substantial risk of physical harm to himself [or herself] as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he [or she] is dangerous to himself [or herself], 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” (Mental Hygiene Law § 9.39 [a][1]-[2]; see CPLR 6343[2]).

“The court may consider the petition and any evidence submitted by the petitioner, any evidence submitted by the respondent, any testimony presented, and the report of the relevant law enforcement agency submitted [for the proceeding]” (CPLR 6343[2]). In addition, the Court must consider various factors or so-called red flags, taking into consideration the date when the event(s) occurred and the age of the person at the time (see id.; CPLR 6342[2]). Such red flags include, but are not limited to, the following acts of the respondent:

“(a) a threat or act of violence or use of physical force directed toward self, the petitioner, or another person;

² This one-year period may be extended for an additional period upon application (see CPLR 6345).

- (b) a violation or alleged violation of an order of protection;
- (c) any pending charge or conviction for an offense involving the use of a weapon;
- (d) the reckless use, display or brandishing of a firearm, rifle or shotgun;
- (e) any history of a violation of an extreme risk protection order;
- (f) evidence of recent or ongoing abuse of controlled substances or alcohol; or
- (g) evidence of recent acquisition of a firearm, rifle, shotgun or other deadly weapon or dangerous instrument, or any ammunition therefor” (CPLR 6342[2]).

A petitioner seeking a final order (ERPO) has the burden of proving his or her case by clear and convincing evidence (see CPLR 6343 [2]). This is a higher standard than the preponderance of the evidence standard (see Matter of Duane II. (Andrew II.), 151 AD3d 1129, 1130-1131 [3d Dept 2017]). The imposition of this higher standard reflects the fundamental constitutional right at issue, namely, the right to keep and bear arms (see US Const, 2nd Amend; Matter of Cappoccia, 59 NY2d 549, 553 [1983] [recognizing the applicability of this higher standard for cases involving the “denial of personal or liberty rights”]; Delgado v Sinagra, 72 Misc 3d 233, 236 [County Court, Ulster County 2021] [imposing this higher standard in a case involving an application pursuant to CPL 530.14(5)(b) for the return of long guns surrendered to the government]).

To satisfy this standard, the evidence must make it “highly probable that what [he or she] claims is what actually happened” (PJI 1:64; see Matter of Duane II. (Andrew II.), 151 AD3d at 1130-1131). This requires “evidence that is neither equivocal nor open to opposing presumptions, and it forbids relief whenever the evidence is loose, equivocal, or contradictory” (Matter of Monto v Zeigler, 183 AD3d 1294, 1295 [4th Dept 2020] [internal quotation marks and citations omitted]).

The Evidence Did Not Satisfy the Burden

The hearing evidence demonstrated that Respondent improperly discharged his rifle within 500 feet of his neighbor's residence, in violation of the Environmental Conservation Law (see ECL § 11-0931[4][a][2]).³ T.C. heard and observed Respondent discharging his rifle, approximately 250 feet away from his residence. Upon arriving on the scene, the responding officers observed Respondent's rifle and live ammunition in plain sight on his property, nearby his physical location. Petitioner further measured the distance between the place of discharge and T.C.'s residence as 160 feet.

Respondent has failed to refute any of these allegations. He did not appear at the hearing. He has also not provided a shred of evidence in support of his self-serving assertion that he was using blank ammunition. The officers did not locate any blank ammunition at the scene. Rather, they recovered live ammunition. The shape and appearance of the discharged rounds were also consistent with the use of live ammunition (rather than blanks), as opined by the officers who personally observed the discharged rounds. The nearby jars/cans also contained bullet holes.

Notwithstanding, the finding of an ECL violation alone does not authorize the Court to grant the petition. Rather, to issue a final ERPO based on the theory that Respondent is a danger to others, the record must contain proof of "homicidal" or "violent" conduct, and others must be placed "in reasonable fear of serious physical harm" (Mental Hygiene Law § 9.39 [a][2]; see also CPLR 6343). No such proof exists on this record.

³ Notably, no finding or determination made during these proceedings "shall be interpreted as binding, or having collateral estoppel or similar effect, in any other action or proceeding, or with respect to any other determination or finding, in any court, forum or administrative proceeding" (CPLR § 6347).

The record reveals that Respondent was attempting to engage in target practice. While he may have been careless, no evidence exists that he aimed his rifle at or fired it towards any vehicles, pedestrians, or occupied buildings. No evidence exists that Respondent intended to harm anyone. Nor was he attempting to harass or intimidate anyone. In fact, on his ERPO application, Petitioner did not mark off the box alleging that the case involved a threat or act of violence or the use of physical force. Petitioner and T.C. also both acknowledged during their testimony that Respondent did not act in any threatening or intimidating manner towards them or anyone else.

Assuming for the sake of argument that reckless behavior may suffice as a “homicidal” or “violent” act, the only evidence of recklessness submitted at the hearing concerned the vague statements that Respondent was shooting “towards” the roadway. This was arguably not even sufficient to establish that any bullets crossed the road.⁴ Nonetheless, even if any bullets had crossed the road, utterly lacking is any proof regarding the circumstances that existed on the roadway on the day in question or on any other day. The potential harm from Respondent’s alleged reckless act therefore exists in this case only in the abstract. There is no evidence for example that anyone was using the subject roadway at or around the time in question or, assuming it had been used, the extent and frequency of any such usage. No general statistics were provided, nor was any evidence provided regarding the general use of the road by vehicles or pedestrians.

Apart from the ECL violation, the record also contains red flags based on allegations of substance abuse and a prior instance of similar misconduct. Regarding the allegations of substance abuse, Respondent certainly displayed poor judgment by discharging his rifle while under the

⁴ The ECL prohibits a person from discharging rounds over a public highway (see ECL § 11-093 1[4][a][1]; People v Maille, 136 AD2d 829 [3d Dept 1988]). Respondent should be aware that the term “public highway” is defined broadly and includes the public road in question (see VTL § 134; <https://www.dot.ny.gov/highway-data-services/lhi-local-roads>). If the rounds had crossed over the subject road, such conduct would have been a violation of the ECL.

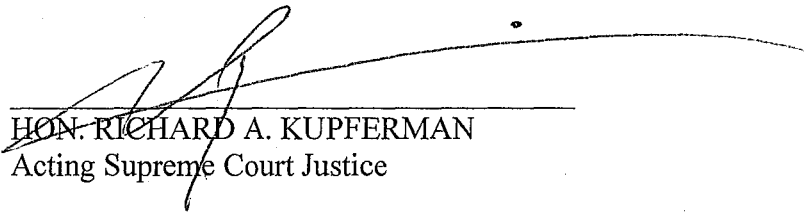
influence of alcohol. However, Petitioner testified that Respondent was not intoxicated. He was able to speak, stand, and pass a sobriety test. Further, no evidence exists in the record regarding any other instances of recent alcohol use or abuse (see CPLR 6342[2] [defining “recent” as “within the six months prior to the date the petition was filed”]; CPLR 6343). Nor does any evidence exist of any “ongoing abuse” (CPLR 6342[2][f]). In fact, the only proof presented of any prior alcohol consumption/abuse was the DWAI conviction from August 2020, which occurred more than two years ago.

Similarly, while T.C. testified that his wife yelled at Respondent in the past for shooting on the side yard, his testimony indicated that he did not personally observe or hear the prior incident. This testimony was also too generalized and lacked sufficient details of the prior incident for the Court to make any intelligent findings regarding it. The background investigation also reported only an arrest for the prior incident; there was no conviction reported for it.

Accordingly, the record lacks clear and convincing evidence that Respondent is likely to engage in conduct that would result in serious harm to himself or others (see CPLR 6343 [2]). The Court therefore denies Petitioner’s application and vacates the TERPO issued in this matter. The Court, however, is not directing the return of the rifle at this time. In particular, the record indicates that the subject rifle was retained by the NYS Police in connection with the charges filed against Respondent. To the extent those charges remain pending, a legal impediment exists that prevents the return of the rifle.

Dated: November 18, 2022
at Ballston Spa, New York

Enter.


HON. RICHARD A. KUPFERMAN
Acting Supreme Court Justice