

To: New Jersey Law Revision Commission
From: Benjamin Cooper
Re: Reasonable Cause in the Context of a Domestic Violence Search Warrant
(*State v. Hemenway*, 239 N.J. 111 (2019).)
Date: July 20, 2020

MEMORANDUM

Executive Summary

In *State v. Hemenway*, the New Jersey Supreme Court considered a Court's use of the statutorily prescribed standard "reasonable cause", when ordering the search and seizure of weapons pursuant to a temporary restraining order (TRO).¹

The Court held that the statutory standard of reasonable cause for issuing a domestic violence warrant for a search for weapons does not comport with the Fourth Amendment or Article I, Paragraph 7 of the New Jersey Constitution, or the requirement that all warrants be based on probable cause, barring exigent circumstances.²

Statute Considered

N.J.S. 2C:25-28(j)

... (j) Emergency relief may include forbidding the defendant from returning to the scene of the domestic violence, forbidding the defendant from possessing any firearm or other weapon enumerated in subsection r. of N.J.S.2C:39-1, ordering the search for and seizure of any such weapon at any location where the judge has **reasonable cause** to believe the weapon is located and the seizure of any firearms purchaser identification card or permit to purchase a handgun issued to the defendant and any other appropriate relief. Other appropriate relief may include but is not limited to an order directing the possession of any animal owned, possessed, leased, kept, or held by either party or a minor child residing in the household and providing that the animal shall not be disposed of prior to entry of a final order pursuant to section 13 of P.L.1991, c.261 (C.2C:25-29) (Emphasis added).

Background

On June 28, 2012, D.S. filed a domestic violence alleging that the Defendant committed numerous criminal acts against her including: entering her apartment unannounced, directing "foul language" at her, pushing her and causing her to fall, attempting to strangle her; and, shocking her with a Taser gun.³ D.S. requested that the court issue a TRO barring the Defendant from having contact with her and her family, claiming he possessed "firearms, knives, and [a

¹ *State v. Hemenway*, 239 N.J. 111, 138 (2019).

² *Id.*

³ *Hemenway*, 239 N.J. 118-119.

Taser].”⁴ In response to questions from the Court, D.S. was unresponsive about whether the Defendant possessed firearms.⁵ She did, however, confirm that the Defendant had switchblade knives.⁶ The Court entered a TRO and issued a warrant to “search and seize” handguns, knives, and switchblades from Hemenway’s home and three specified vehicles.⁷

On June 29, 2012, two police officers outside the Defendant’s apartment explained to him that they possessed a TRO and warrant to search his residence for weapons.⁸ Inside the apartment, officers found multiple controlled dangerous substances (CDS), cash, and bullets but no weapons.⁹ The Defendant was ultimately indicted for the CDS offenses.¹⁰ He moved to suppress drug-related evidence from both his home and cars, challenging the validity of both the domestic violence warrant and the criminal search warrant.¹¹

The trial court concluded that the family court that issued the TRO and related search and seizure warrant did so properly, since all four prongs of the Domestic Violence Act had been met.¹² The trial court further concluded that the warrant for weapons was not a pretext to conduct a search for drugs, and did not establish requisite cause to search his vehicles and that the domestic violence warrant provided “an adequate and independent basis for the search of those vehicles.”¹³ On appeal, the Defendant challenged the validity of both warrants.¹⁴

The Appellate Division affirmed the decision of the trial court; but noted that “N.J.S. 2C:25-28(j) is facially unconstitutional because it allows the Family Part judge to issue a search warrant based only on a finding of ‘reasonable cause,’” a lower standard than the ‘probable cause’ standard required by the Fourth Amendment.¹⁵ The Supreme Court granted the Defendant’s petition for certification.¹⁶

Analysis

In *State v. Hemenway*, the New Jersey Supreme Court considered whether the issuance of a search warrant for weapons on less than probable cause, pursuant to N.J.S. 2C:25-28(j), is consistent with the State and Federal Constitutions.¹⁷ Both the United States Constitution and the New Jersey Constitution guarantee that, “no warrant shall issue, but upon probable cause” in nearly identical language.¹⁸ The warrant and probable cause requirements of the Fourth

⁴ *Id.* at 119.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 121.

¹⁰ *Id.*

¹¹ *Id.* at 118.

¹² *Id.* at 121.

¹³ *Id.* at 122.

¹⁴ *Id.* at 118.

¹⁵ *Id.* at 120-121.

¹⁶ *Id.* at 123. (236 N.J. 42, 197 A.3d 669 (2018))

¹⁷ *Id.* at 125.

¹⁸ *Id.*

Amendment and the New Jersey Constitution apply to both criminal and civil regulatory searches of homes.¹⁹

The Court declined to apply the “special needs doctrine” in this instance, stating that the doctrine is only applied “in exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”²⁰ The Court observed that, “the language of the Domestic Violence Act, standing alone, lacks clear standards to guide a court in ordering a civil warrant for the seizure of weapons.”²¹

Instead of the ‘probable cause’ utilized in the Fourth Amendment, a judge issuing a TRO and related weapons search warrant need only find “reasonable cause to believe the weapon is located.”²² *State v. Johnson* set forth four prongs as approved by the Supreme Court as part of the “Best Practices” effort when an FRO is issued.²³ In *Hemenway*, however, neither these standards, nor the probable cause findings requirement of *State v. Dispoto*, were used when issuing the search and seizure warrant.²⁴

The Court concluded that a search warrant for weapons authorized by N.J.S. 2C:25-28(j) is directed not at recovering evidence of a crime, but rather at seizing weapons that may pose a threat to victims of domestic violence.²⁵ The Court noted, “applying the probable cause standard is a flexible and commonsense way -- guided by the standard of reasonableness that generally governs the legality of all searches and seizures.”²⁶ The use of this standard would allow the Court to “maintain the heightened right of privacy attach[ed] to the home while protecting domestic violence victims from imminent danger” and conforms to the requirements of the Federal and State Constitutions.²⁷

When issuing a search warrant for weapons, there must be a well-grounded suspicion that the defendant committed an act of violence, and that a seizure of weapons is a necessary act to protect the well-being of the victim.²⁸ Affirming the decision of the Appellate Division, the New Jersey Supreme Court found the statutory provision in question unconstitutional.

Pending Legislation

Currently, no pending legislation seeks to amend the “reasonable cause” standard in N.J.S. 2C:25-28(j).²⁹

¹⁹ *Id.* at 125-126.

²⁰ *Id.* at 127.

²¹ *Id.* at 128.

²² *Id.* at 130.

²³ *State v. Johnson*, 352 N.J. Super 41.

²⁴ *Hemenway*, 239 N.J. 130

²⁵ *Id.* at 131.

²⁶ *Id.* at 133.

²⁷ *Id.*

²⁸ *Id.* at 136-137.

²⁹ See S1146, 219th Leg., 2020 Sess. (N.J. 2020); A1078, 219th Leg., 2020 Sess. (N.J. 2020); A1317, 219th Leg., 2020 Sess. (N.J. 2020); A1736, 219th Leg., 2020 Sess. (N.J. 2020).

Conclusion

Staff seeks authorization to conduct additional research and outreach to ascertain whether modification of N.J.S. 2C:25-28(j) would be appropriate.