In re Expungement

Decided Jul 8, 2015

DOCKET NO. A-3713-13T2

07-08-2015

IN RE E.C. PETITION FOR EXPUNGEMENT

Allan Marain argued the cause for appellant E.C. (Law Offices of Allan Marain, attorneys; Mr. Marain, on the brief). John F. Kwasnik, Assistant Middlesex County Counsel, argued the cause for respondent Middlesex County (Thomas F. Kelso, Middlesex County Counsel, attorney; Mr. Kwasnik and Mario A. Ferraro, on the brief).

PER CURIAM

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION Before Judges Messano, Ostrer and Tassini. On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MISC-107-89. Allan Marain argued the cause for appellant E.C. (Law Offices of Allan Marain, attorneys; Mr. Marain, on the brief). John F. Kwasnik, Assistant Middlesex County Counsel, argued the cause for respondent Middlesex County (Thomas F. Kelso, Middlesex County Counsel, attorney; Mr. Kwasnik and Mario A. Ferraro, on the brief). PER CURIAM

Petitioner E.C. obtained an order pursuant to N.J.S.A. 30:4—80.8 to -80.11 expunging his record of "commitment" to an "institution or facility providing mental health services." However, the court included two provisos in its order: (1) the expungement "shall not apply to applications for a firearms identification card and/or permits to purchase, possess or carry a firearm"; and (2) E.C. "must divulge this civil commitment" on *2 any such application. E.C. argues on appeal that the provisos were contrary to law. We agree and reverse that aspect of the order. However, as the trial court failed to make essential findings of fact that the expungement law requires prior to entry of an order of expungement, we remand.

I.

We discern the following facts from the record, which includes the testimony of E.C. and his parents at the February 28, 2014, hearing on E.C.'s application.

E.C. was a child victim of sexual abuse. Apparently, as a result of that abuse, E.C. was troubled as a teenager by what he described as "feelings of extreme inward anger," which were "solely aimed towards . . . the perpetrator . . . ." One of his teachers was concerned that E.C. was going to harm himself.

In February 1989, when E.C. was sixteen years old, he requested voluntary admission to Fair Oaks Hospital in Summit. He did so at the urging of his parents. E.C. executed a "Request for Voluntary Admission of a Minor Fourteen Years of Age or Older (Pursuant to R. 4:74-7)." He stated on the form, "I was told if I didn't sign in on my own then I would be forced. I've been feeling extreme anger and I'd like to know why." *3

A Law Division judge entered an order on March 17, 1989, approving E.C.'s voluntary admission. The court rule then in effect required a judge to determine whether a minor's request for admission

was, indeed, voluntary. Pressler, Current N.J. Court Rules, comment 11 on R. 4:74-7(j) (1989). Nonetheless, the court's March 1989 order was entitled "Civil Commitment Order." However, in the case of voluntary admissions, the court was not required to find that the child met the standard for involuntary commitment. R. 4:74-7(j) (1989). Any voluntarily admitted minor was, "for discharge purposes, in the same category as adults who voluntarily commit themselves and, therefore, may, pursuant to the statute, discharge himself on 72 hours' notice." Pressler, Current N.J. Court Rules, comment 11 on R. 4:74-7(j) (1989); see also In re Williams, 140 N.J. Super. 495, 496, 499 (J. & D.R. Ct. 1976) (noting that because the court found a fifteen year-old voluntarily admitted himself, he would have "the right to sign himself out of the hospital without parental approval").

E.C. participated in group and individual therapy to come to terms with his emotions. He successfully completed treatment and was discharged about two months after admission. The court entered an order directing that E.C. be
4 discharged by May 17, *4 1989.[1] E.C. continued therapy on an outpatient basis in 1990. Since then, he explained, "My anger issues have been under control and I have moved on."

[1] It is unclear why the court entered a discharge order, which apparently was to be entered in commitment cases. R. 4:74-7(g) (1989) ("If the court concludes at the review hearing that the evidence does not warrant continued commitment, it shall order that the patient be discharged.") (emphasis added).

E.C. graduated from high school in 1991. He completed nursing school in 1996, and earned a B.S. in nursing in 2005. He became a registered professional nurse in New Jersey in 1996, and in Colorado in 1999, where he has worked as a nurse since January 2000. E.C. stated he moved to Colorado because of the "mountains, the hunting, the fishing. It has everything I want."

E.C.'s curriculum vitae reflects a distinguished professional career. He has attained leadership positions in professional associations; has served as a teacher of nursing; and has received numerous service awards. E.C. has never been arrested, and states that he has neither sought nor needed mental health treatment since his teens.

In 2013 or thereafter, E.C. attempted to purchase a firearm in Colorado. He asserted that he was unable to complete the purchase because, in February 2013, New Jersey reported his 1989 voluntary admission, apparently treating it as a
5 commitment, for *5 inclusion in the National Instant Criminal Background Check System (NICS).[2]

[2] See 18 U.S.C.A. § 922(d)(4), which prohibits the sale of a firearm to a person who "has been adjudicated as a mental defective or has been committed to any mental institution." We do not determine whether E.C.'s voluntary admission as a minor constitutes a "commitment" under state or federal law. We have noted above that E.C. was free to discharge himself. Moreover, the court was not required to make a finding E.C. was a danger to himself, others or property; rather, the court was required to find that E.C.'s decision to enter the hospital was voluntary. We note that N.J.S.A. 30:4-80.8 refers to a person "who has been . . . committed to any institution or facility providing mental health services . . . by order of any court or by voluntary commitment . . . ." See, e.g., United States v. Waters, 23 F.3d 29, 31-36 (2d Cir.), cert. denied, 513 U.S. 867, 115 S. Ct. 185, 130 L. Ed. 2d 119 (1994) (discussing what constitutes a "commitment" under 18 U.S.C.A. § 922(g)(4)); 27 C.F.R. § 478.11 (2015) (defining "commitment" for purposes of 18 U.S.C.A. § 922(g)(4) to exclude "voluntary admission"); see also Clayton E. Cramer, Mental Illness and the Second Amendment, 46 Conn. L. Rev.

1301, 1323 (2014) (criticizing New Jersey's submission to NICS of voluntary commitment records).

In January 2014, E.C. filed a verified complaint pursuant to N.J.S.A. 30:4-80.8, seeking expungement of his voluntary admission record, which he characterized as a civil commitment. Specifically, he sought expungement of records in the files of the court and the hospital. In support, he submitted three character references: a supervisor wrote that E.C. was a respected course instructor in the program she oversaw; a co-worker wrote that E.C. was professional and calm in a stressful environment; and a friend from New
6 Jersey stated that E.C. saved *6 his life on two occasions. E.C. also provided a letter from a psychologist, who concluded after examining E.C. that he did "not meet criteria for any psychological or psychiatric disorder, and has been free of symptoms for many years." The psychologist credited petitioner's long-term work history; the fact petitioner did not report any psychological distress; and petitioner's presentation at the appointment.[3] The submissions were not certified or sworn.

[3] E.C. was unable to obtain medical records of his voluntary inpatient admission and outpatient treatment programs. He submitted a letter from the hospital stating that it did not retain records after seven years.

Consistent with N.J.S.A. 30:4-80.9, notice of the petition was provided to the county adjuster and the medical director of the hospital. E.C.'s petition was unopposed.

Although the trial judge lauded E.C. for his professional and personal accomplishments, the judge did not explicitly find that E.C. was not a danger to the public safety, and relief was "not contrary to the public interest." Cf. N.J.S.A. 30:4-80.9 (requiring findings regarding dangerousness and public interest as preconditions to expungement). Moreover, given E.C.'s desire to obtain a firearm, the judge determined that it was appropriate to limit the expungement. The judge relied on In re J.D., 407 N.J. Super. 317 (Law Div.
7 2009). *7

[An expungement order] would be tempered, [E.C.], because there's a . . . reported decision [In re J.D.] . . . [which] takes the position that an expungement is analogous [to] a privilege, a legal privilege which is waiv[]able. So, in other words, you can't assert an expungement and not reveal certain information provided, however, and in the context of firearms that if you apply for a firearms identification card or any permits to purchase . . . that privilege is deemed to be waived and you would have to reveal that.

In other words, when it comes to firearms this expungement is not going to help you. . . .

I have no jurisdiction over what Colorado does, but I can tell you that the . . . Expungement Order . . . shall not apply to applications for firearms, identification card[s], and/or permits to purchase, possess, and/or carry firearms. As such [E.C.] must divulge his civil commitment on any application for a firearm, identification card, and/or permits to possess, purchase, or carry a firearm.

. . . .

So, in other words . . . you can . . . enforce the expungement, but if you're going to apply for a firearm, something to do with a firearm then that privilege would have to be waived.

. . . .

I can't tell Colorado what to do. I have no jurisdiction in that regard. But you seem like a real nice guy. I wish you the best of everything. I think you did well.

8 *8

In a subsequent order, the trial court directed that "[a]ll records related to the March 17, 1989 Order of Commitment . . . and all records of medical treatment provided in connection with the Order of Commitment are hereby expunged." The court ordered the clerk to expunge the commitment order from the court's records. However, the court added: "This expungement order shall not apply to applications for a firearms identification card and/or permits to purchase, possess or carry a firearm. As such, [E.C.] must divulge this civil commitment on any application for a firearms identification card and/or a permit to possess, purchase or carry a firearm."

On appeal, E.C. argues that the provisos were arbitrary and capricious, and an abuse of discretion. He also argues that the limitations violate the NICS Improvement Act of 2007. Although the Middlesex County Counsel did not participate before the trial court, he appears before us to oppose E.C.'s appeal.

II.

A.

This appeal requires us to apply N.J.S.A. 30:4-80.8 to -80.11, which authorize a court to order the expungement of court records of mental health commitments. Relief is available to three categories of persons: (1) "[a]ny person who has been, or shall be, committed to any institution or facility providing 9 *9 mental health services; (2) any person who "has been determined to be a danger to himself, others, or property"; and (3) any person who has been "determined to be an incapacitated individual as defined in N.J.S.[A.] 3B:1-2." N.J.S.A. 30:4-80.8. The commitment or determinations shall be "by order of any court or by voluntary commitment." Ibid.

In order to qualify for relief, the statute requires that the petitioner "was, or shall be, discharged from such institution or facility as recovered, or whose illness upon discharge, or subsequent to discharge or determination, is substantially improved or in substantial remission Ibid. The

petitioner may apply to "the court by which such commitment was made, or to the Superior Court by verified petition." Ibid. [4] *10

[4] Section 80.8 reads, in its entirety, as follows:

> Any person who has been, or shall be, committed to any institution or facility providing mental health services, or has been determined to be a danger to himself, others, or property, or determined to be an incapacitated individual as defined in N.J.S. [A.] 3B:1-2, by order of any court or by voluntary commitment and who was, or shall be, discharged from such institution or facility as recovered, or whose illness upon discharge, or subsequent to discharge or determination, is substantially improved or in substantial remission, may apply to the court by which such commitment was made, or to the Superior Court by verified petition setting forth the facts and praying for the relief provided for in this act.

Upon the filing of a petition, the court shall schedule a hearing upon notice to two parties: (1) the county adjuster, and (2) either the medical director of the place where the person was committed or "upon the party or parties who applied for the determination that the person be found to be a danger to himself, others, or property, or determined to be an incapacitated individual as defined in N.J.S.[A.] 3B:1-2 . . . ." N.J.S.A. 30:4-80.9

At the hearing, the court shall consider evidence regarding "the circumstances of why the commitment or determination was imposed upon the petitioner, the petitioner's mental health record and criminal history, and the petitioner's reputation in the community." Ibid. The statute requires the court to make two-pronged findings as to the petitioner's dangerousness and the impact of relief on the public interest:

> If the court finds that the petitioner will not likely act in a manner dangerous to the public safety and finds that the grant of relief is not contrary to the public interest, the court shall grant such relief for which the petitioner has applied and, an order directing the clerk of the court to expunge such commitment from the records of the court.

*11 [Ibid.]

Once an expungement is granted, "the commitment shall be deemed not to have occurred and the petitioner may answer accordingly any question relating to its occurrence." N.J.S.A. 30:4-80.11.

B.

We consider de novo the court's interpretation of the statute governing expungement of mental health commitment records. See In re Kollman, 210 N.J. 557, 577-78 (2012) (applying de novo standard of review to questions of interpretation of statute governing expungement of criminal records); In re Expungement of the Criminal Records of R.Z., 429 N.J. Super. 295, 300 (App. Div. 2013).

On the other hand, we are obliged to give deference to the findings of the trial court if they are based on the court's opportunity to hear live witnesses, and assess demeanor. See, e.g. In re Civil Commitment of R.F., 217 N.J. 152, 174-75 (2014). Thus, we may defer to a trial court's factual assessment whether a petitioner "will not likely act in a manner dangerous to the public safety." See N.J.S.A. 30:4-80.9. We apply a similar, deferential standard of review to the trial court's determination, pursuant to N.J.S.A. 30:4-80.9 that expungement would be "contrary to the public interest." Cf. *12 Kollman, supra, 210 N.J. at 577-79 (applying abuse of discretion standard of review to public interest determination for

criminal expungements after five years, but statute expressly assigns determination to court's discretion, N.J.S.A. 2C:52-2(a)(2); In re Appeal of the Denial of the Application of Z.L., ___ N.J. Super. ___, ___ (App. Div. 2015) (applying deferential standard of review to trial court denial of firearms purchaser identification card (FPIC) because "issuance would not be in the interest of the public health, safety or welfare" under N.J.S.A. 2C:58-3(c)(5) (internal quotation marks and citation omitted)).

C.

There is scant case law interpreting N.J.S.A. 30:4-80.8 to -80.11. What satisfies the two-pronged standard for relief — "not likely [to] act in a manner dangerous to public safety and . . . the grant of relief is not contrary to the public interest" — is open to interpretation. Moreover, we must explore whether the provisos added by the trial court were permitted by the statute.

Inasmuch as the statute's meaning is not self-evident, we turn to consideration of legislative history. See Kollman, supra, 210 N.J. at 568 (stating that where legislative language is ambiguous, the court may resort to extrinsic materials including legislative history). The
13 Legislature substantially *13 amended the mental health commitment expungement law in 2009.[5] It did so in order to qualify for federal grants, to assist the State in developing systems for the transmission of mental health records to the NICS. See Assembly Law & Public Safety Comm. Statement to Assembly Bill No. 4301, 213th Legislature (December 3, 2009) (Assembly Statement) (stating that the bill's purpose was "to bring New Jersey law into conformance with changes to the Brady Handgun Violence Protection Act of 1993, Pub. 103-159 (Brady Act), which the federal government adopted in response to the Virginia Tech tragedy in April 2007").

[5] The legislation was passed at the end of 2009 and signed into law on January 11, 2010 as 2009, 183.

One of the goals of the 2007 federal law, to which the New Jersey legislation responded, was to expand the national database of persons who had been committed for mental health treatment, to enhance the effectiveness of federal law barring the purchase of firearms by such persons. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2, 121 Stat. 2559, 2560 (2008) (stating that the "primary cause of delay in NICS background checks is the lack of" among other things "automated access to information
14 concerning persons prohibited *14 from possessing or receiving a firearm because of mental illness . . . .").[6]

[6] The statute cited fatal shootings in Lynbrook, New York in 2002 and a mass shooting at Virginia Polytechnic Institute in April 2007, by persons with a history of mental illness who were able to purchase firearms despite the background check system then in place. Ibid.

On the other hand, the federal law provided a mechanism for persons to obtain relief from the disabilities associated with such commitments — that is, the prohibitions on their ability to purchase or possess firearms. Id. § 101, 121 Stat. at 2563. The federal law encouraged states to adopt such programs as well. It did so by requiring their adoption as a condition of grants to enable states to upgrade their systems. Id. § 103(c), 121 Stat. at 2568.

Under the federal law, a qualifying state program is one that offers "relief from . . . disabilities" to a person "who has been adjudicated as a mental defective or [who has been] committed to a mental institution, pursuant to 18 U.S.C.A. § 922(g)(4)."[7] Id. § 105(a)(2), 121 Stat. at 2569-70. Under a qualifying program, relief is mandated if the applicant meets the two-pronged standard of lack of dangerousness, and not contrary to the public
15 interest: *15

7 We observe that the federal law does not expressly describe the relief as "expungement."

> [A] State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest . . . .
>
> [Ibid. (emphasis added).]

The qualifying program must also permit de novo judicial review, apparently if the initial decision is by a non-judicial entity. Id. § 105(a)(3), 121 Stat. at 2570.[8]

8 The two pronged standard — "not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest" — had long been a part of federal gun control law authorizing relief from disabilities arising out of convictions. 18 U.S.C.A. 925(c). Congressional opposition to the granting of such relief culminated in appropriations act provisions that barred the federal government from granting such relief, which engendered considerable litigation over whether the appropriations provisions effectively barred such relief. See, e.g., Coram v. State, 996 N.E.2d 1057, 1065-80 (Ill. 2013) (discussing history of federal relief from disabilities provisions).

The federal law provides that if relief is granted pursuant to a qualifying program, "the adjudication or commitment . . . is deemed not to have occurred for purposes of subsection[] (d)(4)" — which prohibits the sale of firearms to a person "adjudicated as a mental defective or who has been committed to a mental institution" — or

16 subsection "(g)(4) of section 922 of *16 title 18, United States Code," which prohibits the purchase, transportation or possession of firearms by such persons. Id. § 105(b), 121 Stat. at 2570.

Initially, the federal government denied a grant to New Jersey because New Jersey law did not adequately allow individuals to apply for an expungement; did not require courts to hear evidence "expressly required by federal law in such expungement cases"; contained "language and phraseology concerning the factors to be considered" that were too vague; and did not grant the federal government access to State mental health records. Assembly Statement. The 2009 amendments to the New Jersey law were designed to address these concerns. In particular, the 2009 law, as we quoted above, imported the two-pronged federal standard for relief from disabilities, and the mandate for relief if the

17 standard is met. See N.J.S.A. 30:4-80.9.[9] *17

9 It is worth noting that New Jersey's expungement law was not previously tied so closely to firearms regulation. Indeed, trial court opinions concluded that the principal policy goal in affording expungements was to remove the stigma of commitments that might interfere with former patient's ability to obtain employment. See In re D.G., 162 N.J. Super. 404, 408-09 (J. & D.R. Ct. 1977) (stating the statute was designed to prevent discrimination based on a past mental illness and "to eliminate any stigmas that might attach to a person who was committed to a psychiatric hospital"). The 2009 amendments substantially altered the New Jersey statute, which authorized petitions by anyone who was "discharged . . . as recovered" or "whose illness . . . is substantially improved or in substantial remission." N.J.S.A. 30:4-80.8. The statute provided no explicit standards for the nature of proofs required of the petitioner, or the standards governing the court's decision whether to grant relief, stating only that "if no reason appears to the

contrary an order shall be made" expunging the record. N.J.S.A. 30:4-80.9 (amended by L. 2009, 183, § 2).

Notwithstanding the federal standard's long history, we have found little case law illuminating what constitutes "not contrary to the public interest." In addressing the two-pronged standard as found in 18 U.S.C.A. 925(c), the Third Circuit has characterized the standard as "amorphous." Pontarelli v. U.S. Dep't of Treasury, 285 F.3d 216, 225 (3d Cir. 2002) (en banc); see also McHugh v. Rubin, 220 F.3d 53, 59 (2d Cir. 2000) (stating "the standard for granting relief [under section 925(c)] is worded . . . broadly" and implicates "the broad policy question of what is in the 'public
18 interest'").[10] *18

[10] When McHugh was decided, section 925(c) granted the Secretary of the Treasury the power to grant relief from disabilities. The power was transferred to the Attorney General in 2002. See Blaustein & Reich, Inc. v. Buckles, 365 F.3d 281, 283-84 n.3 (4th Cir. 2004), cert. denied, 543 U.S. 1052, 125 S. Ct. 887, 160 L. Ed. 2d 774 (2005). The BATF's regulations to implement the relief from disabilities provisions do not directly define the "contrary to the public interest standard," although they do require a showing, in the case of a person deemed a mental defective or involuntarily committed, that "the applicant was subsequently determined by a court, board, commission, or other lawful authority to have been restored to mental competency, to be no longer suffering from a mental disorder, and to have had all rights restored." 27 C.F.R. § 478.144(d) - (e).

We conclude that the petitioner bears the burden to satisfy the two-pronged standard. See Kollman, supra, 210 N.J. at 570 (stating that applicant for expungement of criminal record bears burden to prove objective elements of statute). We also conclude that the petitioner must meet his or her burden through the presentation of competent, cognizable evidence. See Kollman, supra, 210 N.J. at 576; R. 1:6-6.

The petitioner must show he or she will not likely act in a manner dangerous to the public safety. In making this determination, the court shall consider the identified forms of evidence: "the circumstances of why the commitment or determination was imposed upon the petition, the petitioner's mental health record and criminal history, and the petitioner's reputation in the community." N.J.S.A. 30:4-80.9.

The "not contrary to the public interest" standard is more problematic. The test is a negative one. By its phrasing the petitioner is required to show that relief would do no harm, as opposed to demonstrating that expungement would benefit the public. A petitioner is not required to show affirmatively that expungement promotes the public interest. Compare N.J.S.A. 2C:52-2(a)(2) (requiring, as a condition of expungement five but less than ten years after conviction or completion of sentence, a finding "that expungement is in the
19 public interest" based on *19 balancing "the nature of the offense" and the "applicant's character and conduct since conviction"). However, even where the criminal expungement statute has required such an affirmative showing, "[p]etitioners are not required to demonstrate that they are 'exceptional' or 'extraordinary' applicants." Kollman, supra, 210 N.J. at 574. In terms of doing no harm, we must read the "not contrary to the public interest" to reach concerns other than "public safety." Otherwise, the "not contrary to the public interest" provision would be surplusage. See In re Civil Commitment of J.M.B., 197 N.J. 563, 573 (stating that interpretations that render the Legislature's words mere surplusage are disfavored), cert. denied, 558 U.S. 999, 130 S. Ct. 509, 175 L. Ed. 2d 361 (2009). The statute apparently contemplates that there may be a public interest in disclosure of a person's commitment for mental illness unrelated to a possible threat to public safety.

D.

Applying the foregoing analysis, we are persuaded that the trial court failed to comply with the statute.

We turn first to the provisos. Simply put, the statute does not authorize the grant of qualified relief. According to its plain language, if the predicate findings are made, "the court shall grant such relief for which the petitioner has *20 applied." N.J.S.A. 30:4-80.9. The relief sought is expungement of court records, without qualification.

The statute expressly provides that if an expungement is granted, "the commitment shall be deemed not to have occurred and the petitioner may answer accordingly any question relating to its occurrence." N.J.S.A. 30:4-80.11. This provision was intended to enable successful petitioners to omit any reference to the commitment in any personal history or questionnaire. See Senate Institutions, Health and Welfare Comm. Statement to Senate Bill No. 333 (March 29, 1976). Contrary to the statute's plain language, the trial court compelled petitioner to "divulge [his] civil commitment on any application for a firearms identification card and/or a permit to possess, purchase or carry a firearm."

Where the Legislature has intended to limit the scope of an expungement, it has expressly authorized exceptions to the general principle that an expunged record is treated as one that did not exist. It has not done so with respect to expungement of commitment records. In contrast, the criminal expungement statute provides that "[u]nless otherwise provided by law," expunged arrests and convictions "shall be deemed not to have occurred" and "petitioner may answer any questions relating to their occurrence accordingly." N.J.S.A. 2C:52-27 (emphasis *21 added). The statute expressly requires disclosure of information on expunged records by a petitioner if he or she seeks employment with the judicial branch, law enforcement, or corrections. Ibid.; see also N.J.S.A. 2C:52-17 (providing that an agency may use expunged records to ascertain whether a person had prior convictions expunged, and may provide such information to a court); N.J.S.A. 2C:52-18 (authorizing Violent Crimes Compensation Board to access expunged records); N.J.S.A. 2C:52-20 (permitting judges to use expunged records in reviewing applications for admission to diversionary programs); N.J.S.A. 2C:52-21 (authorizing the use of expunged records in setting bail and sentencing); N.J.S.A. 2C:52-22 (authorizing use in parole decisions); N.J.S.A. 2C:52-23 (permitting the Department of Corrections to use expunged records for purposes of the classification, evaluation, and assignment of individuals in custody).

The provisos also run afoul of the legislative intent of 2009 amendments. The explicit purpose of the amendments was to comply with the federal standards for a program of relief from disabilities imposed by federal law in the sale and acquisition of firearms. Qualifying programs must provide relief from the disabilities imposed by 18 U.S.C.A. §§ 922(d)(4) and (g)(4), governing the sale and purchase of firearms to persons who have *22 been "adjudicated as a mental defective or . . . committed to any mental institution." Contrary to this intent, the trial court's order expressly states that the expungement order "shall not apply to applications for a firearms identification card and/or permits to purchase, possess or carry a firearm," and it does so without limitation to New Jersey; and it compels petitioner to divulge his commitment on such applications.

The trial court's reliance on J.D. is misplaced. In that case, an applicant appealed the denial of his application for a FPIC. J.D., supra, 407 N.J. Super. at 320. The applicant answered "no" to two questions on his application: whether he had ever been confined or committed to a mental institution; and whether he ever had been treated or observed by a doctor or psychiatrist for mental or psychiatric conditions. Ibid. An investigation

revealed the applicant had been involuntarily committed a few decades prior. Ibid. The police chief denied the application on the basis of "'Falsification of Application.'" Ibid. The applicant asserted he answered "no" because the records were expunged. Id. at 321-22. In upholding the denial, the Law Division compared one's medical history to a privilege, and found the applicant waived the privilege of this medical history by applying for a permit, and thereby authorized disclosure of his past treatment and commitment. Id. at 328-29. *23

The issue presented in this case is not what E.C. would be deemed to waive under N.J.S.A. 2C:58-3, were he to apply in New Jersey for a FPIC or permit to purchase a handgun. Rather, the issue is whether the scope of an expungement order may be limited, so as not to apply to firearms-related applications.

Moreover, it is uncertain whether an applicant under N.J.S.A. 2C:58-3 is required to waive the confidentiality of a commitment that has been expunged. In re H.M.H., 404 N.J. Super. 174 (Law Div. 2008) is enlightening. H.M.H. sought an order expunging his twelve-year-old disorderly persons conviction for simple assault, which constituted an act of domestic violence. Id. at 175. H.M.H. separately sought a FPIC and handgun permit. Id. at 176 n.1. The court held that expungement was warranted pursuant to N.J.S.A. 2C:52-2, and rejected the county prosecutor's argument pursuant to N.J.S.A. 2C:52-14(b) that the benefits from expungement for H.M.H. were outweighed by the need for the availability of the records — particularly the need to keep guns out of the hands of a person who committed an act of domestic violence.[11] Id. at 176-80. *24

[11] The Supreme Court later commented that the court in H.M.H. "properly declined to hold that convictions for domestic violence could not be expunged as a general rule. . . . Instead, the court considered the request as part of the law's balancing of interests." Kollman, supra, 210 N.J. at 575.

The court held that expungement would relieve H.M.H. of the impact of N.J.S.A. 2C:58-3(c)(1), which bars issuance of a handgun purchase permit or FPIC to "any person who has been convicted of any crime, or disorderly persons offense involving an act of domestic violence. . . ."

> The effect an expungement of H.M.H.'s records will have to remove any bar to his owning or possessing a firearm appears to be the very consequence intended by our Legislature; that is, a person convicted of a domestic violence offense may, upon having that offense expunged, apply for gun permits and have those applications considered by the appropriate reviewing agencies as if the domestic violence offense had not occurred.
>
> [Id. at 178.]

Also, we have noted that expungements of domestic violence convictions relieve applicants of the federal disability barring persons convicted of domestic violence from obtaining firearms. See State v. Wahl, 365 N.J. Super. 356, 370 (App. Div. 2004) (noting "if the conviction [for domestic violence] has been expunged or set aside, a person shall not be considered to have been convicted of such an offense" pursuant to 18 U.S.C.A. § 921(a)(33)(B)(ii)).[12] *25

[12] We recognize that federal law expressly states that an expunged conviction shall not be considered a conviction for purposes of the federal gun law, see 18 U.S.C.A. §§ 921(20), 921(33)(B)(ii), and N.J.S.A. 2C:58-3 includes no comparable provision. However, N.J.S.A. 2C:52-27 provides, subject to exceptions, that convictions "shall be deemed not to have occurred." Likewise, N.J.S.A. 30:4-80.11 states that an expunged commitment is "deemed not to have occurred." --------

Moreover, assuming a New Jersey applicant for a permit or FPIC may omit disclosure of a commitment, New Jersey law nonetheless requires

disclosure of mental health treatment — whether in a confined setting or not. N.J.S.A. 2C:58-3(e) states that applicants for permits to purchase a handgun or for a FPIC shall:

> state whether he [or she] has ever been confined or committed to a mental institution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis, . . . [and] whether he [or she] has been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an inpatient or outpatient basis for any mental or psychiatric condition.

The trial court also failed to make the essential findings regarding the two-pronged standard. The statute predicates relief upon these findings. N.J.S.A. 30:4-80.9. We recognize that neither party has addressed this point. The County apparently assumes that expungement was warranted, so long as the provisos remain in place. However, we are not prepared to infer a finding of the predicates to relief. See R. 1:7-4; see also In re D.M., 313 N.J. Super. 449, 454 (App. Div. 1998)
26 *26 ("Naked conclusions do not satisfy the purpose of R. 1:7-4. Instead, the trial court is obliged to state clearly its factual findings and correlate them with the relevant legal conclusions.") (internal quotation marks and citations omitted).

A trial court plays an essential role in expungement cases. As this case demonstrates, petitions for relief may be unopposed. The court therefore assumes a critical role in scrutinizing an application to assure it meets the statutory requisites. The court must make predicate findings of fact.

In light of the court's role, it is also essential to require the presentation of competent evidence. Although E.C. supports his petition with an appropriate verification and an affidavit, E.C. also relies on character references and a psychological evaluation that are not in admissible form. See R. 1:6-6. In other cases, the question of a petitioner's recovery may be significantly more debatable than it apparently is here. If a court is prepared to rely upon a written submission from a mental health expert, it should require that it comply with Rule 1:6-6, and that opinions be expressed within a reasonable degree of psychological or medical certainty. See L.C. v. Bd. of Review, 439 N.J. Super. 581, 591 (App. Div. 2015) (noting that written evidence "should be in the form of a
27 certification consistent with Rule 1:6-6"). *27

Assuming E.C.'s proofs are resubmitted in proper form, we anticipate no basis for the court to deny the relief requested. E.C. stated in his affidavit that he does not suffer from any mental illness, and has not since he completed treatment twenty-five years ago. The record does not disclose a formal diagnosis of his mental health condition that prompted his treatment. We know only that he suffered from anger issues that emanated from his victimization. There is no evidence that E.C. threatened to do harm to anyone else, even when he sought treatment. Although a teacher feared E.C. might hurt himself, there is no judicial finding that E.C. was a danger to himself, others, or property; as E.C. was voluntarily admitted, no such finding was required. E.C. states he has no criminal history (although he supports that claim with an FBI document which was provided solely for E.C.'s review for correctness and "not provided for the purpose of licensing or employment or any other purpose enumerated in 28 C.F.R. 20.33"). We anticipate he will be able to present competent evidence that he is well-respected in the community.

In short, the record once supplemented will apparently support a finding that he is not likely to act in a manner dangerous to the public safety, and expungement would not be contrary to the public
28 interest. *28

The trial court shall afford E.C. a brief period of time to resubmit his documentary evidence in proper form. The court shall then conduct a hearing, and enter findings consistent with the statute. The court shall complete the proceedings on remand within sixty days after E.C. has resubmitted his evidence.

Reversed and remanded. We do not retain jurisdiction. I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION