

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2436-20

K.D.M.,

Plaintiff-Respondent,

v.

J.A.M.,

Defendant-Appellant.

Argued December 19, 2022 – Decided December 28, 2022

Before Judges Haas, DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Burlington County,
Docket No. FV-03-1148-21.

Joseph R. Donahue argued the cause for appellant
(Brickfield & Donahue, attorneys; Joseph R. Donahue,
on the brief).

Eli L. Eytan argued the cause for respondent.

PER CURIAM

Defendant J.A.M.¹ appeals from two Family Part orders: (1) the May 3, 2021 amended final restraining order (FRO) entered against him pursuant to the Prevention of Domestic Violence Act (the Act), N.J.S.A. 2C:25-17 to -35, and awarding attorney's fees to plaintiff K.D.M.; and (2) the August 13, 2021 order denying his motion to settle the trial court record by including a transcript of a court-generated audio recording of comments made by the trial judge outside the presence of the parties immediately after issuing his oral opinion. We reverse the August 13, 2021 order and, in light of the contents of the audio recording, vacate the May 3, 2021 amended FRO, and remand for a new hearing.

I.

K.D.M. filed a domestic violence complaint alleging that J.A.M., at a time she resided in the same household with him, subjected her to assault and harassment. On January 27, 2021, the trial court entered an amended temporary restraining order (TRO) against J.A.M.

A hearing was held on February 8, 2021. Shortly after hearing testimony from the parties, the court issued an oral opinion with counsel and the parties present virtually. The court found that over a period of approximately two-and-

¹ We use initials to preserve the confidentiality of court records concerning domestic violence. R. 1:38-3(d)(9).

a-half years, K.D.M., then a new mother in her late teens and early twenties, lived with J.A.M., the sixty-two-year-old father of her then fiancé. The court found credible K.D.M.'s testimony that J.A.M. subjected her to a pattern of unwanted physical contact of a sexual nature. The court rejected as lacking in credibility J.A.M.'s denials of K.D.M.'s allegations.

The court concluded that J.A.M.'s behavior constituted harassment pursuant to N.J.S.A. 2C:33-4 (b) and (c), a predicate act of domestic violence under N.J.S.A. 2C:25-19(a)(13). The court also found that entry of an FRO is necessary to protect K.D.M. from further abuse. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). In its opinion, the court noted that it was applying the preponderance of the evidence standard, which the court accurately defined. In light of its conclusions, the court, on February 8, 2021, entered an FRO against J.A.M.

On May 3, 2021, the trial court granted K.D.M.'s application for attorney's fees. To effectuate its decision, the court, on May 3, 2021, entered an amended FRO awarding K.D.M. \$4,034 in attorney's fees. J.A.M. thereafter filed a notice of appeal challenging the May 3, 2021 amended FRO.

While the appeal was pending, J.A.M. filed a motion in the trial court pursuant to Rule 2:5-5(a) to settle the trial court record. According to a

certification of J.A.M.'s counsel, shortly after entry of the first FRO, his office requested the audio recording of the February 8, 2021 hearing. The recording he received captured the following conversation between the judge and a member of the court staff after the court issued its oral opinion and dismissed the parties:

Judge: So, [Staff Member].

Staff Member: Yes?

Judge: Surprised?

Staff Member: I was going back and forth, I didn't –

Judge: Yeah.

Staff Member: [Inaudible].

Judge: At the end of the day, like you said, I didn't believe him so much and I figured if I'm kinda thinking he did it, then, you know, I'm going down that road. You know? I don't need, don't need a dirty old man hanging around.

Staff Member: [Laughter] Right.

Judge: Oh God, what a messed up situation.

In support of his motion, J.A.M. argued it was necessary to his appeal to include a transcript of the post-opinion discussion in the trial court record. He

argued that the exchange "speaks directly to the [c]ourt's decision making process, the evidence the [j]udge considered and whether the trial [j]udge properly applied the relevant legal standard" when issuing the FRO.

In addition, he explained that he requested a written transcript of the hearing, including the post-decision discussion captured by the recording. The transcriber, however, refused his request to include the post-decision exchange in the transcript, stating that she was not permitted to transcribe an off-the-record communication.²

J.A.M.'s motion was assigned to a judge who did not preside at the hearing. That judge denied the motion, concluding the recording of the post-decision discussion was not evidence within the meaning of Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A., 189 N.J. 436 (2007), and In re Gastman, 147 N.J. Super. 101 (App. Div. 1977), and could not, therefore, serve to supplement the trial court record. An August 13, 2021 order memorializes the court's decision on the motion.

J.A.M. filed an amended notice of appeal challenging the August 13, 2021 order. He raises the following arguments.

² K.D.M. does not dispute the accuracy of J.A.M.'s recitation of the post-decision discussion. We have listened to the recording and are confident that the exchange is accurately set forth in this opinion.

POINT ONE

APPELLANT DID NOT RECEIVE A FAIR AND IMPARTIAL HEARING IN VIOLATION OF HIS DUE PROCESS RIGHTS AND THEREFORE THE ISSUANCE OF THE FINAL RESTRAINING ORDER WAS IMPROPER AND MUST BE VACATED.

POINT TWO

THE TRIAL COURT ERRED IN FINDING THAT THE ACTS OF THE APPELLANT ESTABLISHED THE PREDICATE ACT OF HARASSMENT UNDER N.J.S.A. 2C:33-4.

POINT THREE

[THE MOTION JUDGE] ERRED IN DENYING APPELLANT'S MOTION TO SUPPLEMENT THE RECORD IN LIGHT OF THE DISCOVERY OF THE HIGHLY INFLAMMATORY AND BIASED COMMENTS MADE BY THE TRIAL JUDGE IMMEDIATELY FOLLOWING HIS RULING THAT DENIED APPELLANT OF A FAIR HEARING IN VIOLATION OF HIS DUE PROCESS RIGHTS.

POINT FOUR

THE COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR ATTORNEYS' FEES AND THEREFORE THIS ORDER SHOULD BE VACATED.

II.

We begin with the August 13, 2021 order. J.A.M. moved not to supplement the trial court record, but to settle the trial court record. According

to Rule 2:5-5(a), "[a] party who questions whether the record fully and truly discloses what occurred in the court . . . below shall . . . apply on motion to that court . . . to settle the record." Where a party challenges the accuracy of the transcript of a trial, the appropriate avenue of recourse is a motion to settle the trial court record, made either in this court or the trial court. State v. Yough, 208 N.J. 385, 403 (2011). "The trial court is clearly in the best position to settle the record, particularly when the record is a stenographic transcript and in many instances when it is a sound recording." Ibid.

A motion to supplement the trial court record, on the other hand, concerns "evidence unadduced in the proceedings below [that] may be material to the issues on appeal" R. 2:5-5(b).³ Generally, the factors applicable to a motion to supplement the record are the excusability of the omission of the evidence from the record and whether the evidence is likely to affect the outcome. Liberty Mutual, 189 N.J. at 453.

J.A.M. did not seek to supplement the trial court record with evidence not adduced at trial. He instead sought to correct what he viewed to be an unjustified

³ Although Rule 2:5-5(b) refers only to supplementing the record on appeal from a decision of a state administrative agency, this court has the inherent authority to supplement a trial court record. Liberty Surplus, 189 N.J. at 452. We presume that the trial court, too, has the inherent authority to reopen its record to accept previously unadduced evidence in appropriate circumstances.

abbreviation of the transcript of the February 8, 2021 hearing. The transcriber refused to include in the transcript the trial judge's post-decision exchange with a staff member. J.A.M. argued that without the exchange between the judge and the staff member the transcript did not fully and truly disclose what occurred at the trial court hearing. It was, therefore, error for the trial court to apply the factors relevant to a motion to supplement the record when deciding J.A.M.'s motion.

Viewing J.A.M.'s motion as one to settle the record, we conclude that the trial court record is not fully and truly complete without the post-opinion exchange. We acknowledge that the exchange at issue took place after the hearing was concluded and the court's oral decision was issued. Strictly speaking, the discussion was off-the-record. Yet, as discussed more fully below, the exchange, immediately after the issuance of the court's opinion, and presumably in the courtroom or while the court's virtual medium remained operative, was captured on the court's recording system. The exchange substantively relates to the evidentiary standard applied by the judge when he granted the FRO and conveys a pejorative opinion of J.A.M. that seriously undermines the appearance of the judge's impartiality. In these unusual

circumstances, settlement of the record to include the post-opinion exchange was warranted.⁴

We turn to the effect of the judge's post-decision remarks on J.A.M.'s due process rights. "The United States Supreme Court has recognized the due process guarantee expressed in the Fourteenth Amendment to the United States Constitution includes 'the requirement of "fundamental fairness" in a legal proceeding.'" In re Adoption of Child ex rel. M.E.B., 444 N.J. Super. 83, 88 (App. Div. 2016) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981)). While the New Jersey Constitution "does not expressly refer to the right to due process of law[,] our Supreme Court "has engrafted these protections upon Article I, Paragraph 1 of the State Constitution, concluding it also 'protect[s] against injustice and, to that extent, protect[s] values like those encompassed by the principle[s] of due process.'" Ibid. (quoting Crespo v. Crespo, 408 N.J. Super. 25, 34 (App. Div. 2009)). The right to due process encompasses the right to a fair hearing. Ibid. A crucial element of a fair hearing

⁴ Although Rule 2:5-3 requires filing a transcript of the relevant portions of the trial court's proceedings, we relax the rule to permit this appeal to continue based on the court-produced recording. We see no benefit in delaying resolution of this matter to obtain a written transcript of the short, undisputed exchange.

is "an unbiased tribunal." Nicoletta v. N. Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 164 (1978).

To establish a due process violation, it is not necessary to prove actual bias on the part of a tribunal. "[T]he mere appearance of bias may require disqualification" Panitch v. Panitch, 339 N.J. Super. 63, 67 (App. Div. 2001) (quoting State v. Marshall, 148 N.J. 89, 279 (1997)). An objectively reasonable belief that the tribunal is not impartial will suffice to constitute a constitutional deprivation. Ibid.

Here, the judge's post-decision comments raise concerns about the impartiality of the tribunal. "Dirty old man" is a pejorative term. The comment suggests a disfavored view of J.A.M. that may have influenced the judge's decision making. The judge did not use the term in the presence of J.A.M. or his counsel, and surely did not intend for his comments to be shared outside of his chambers. In addition, J.A.M. points to no instance of demonstrated bias by the judge during the hearing. Our review of the transcript uncovered no suggestion that the judge, who granted some of J.A.M.'s evidentiary objections and rejected K.D.M.'s allegation of assault by J.A.M., was not impartial. These facts, however, are immaterial to our analysis. After issuing his opinion, the judge uttered a description of J.A.M., captured on the court's recording system,

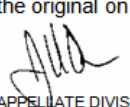
that any listener could reasonably consider to be indicative of bias against J.A.M., whether or not such bias actually existed. J.A.M. is entitled to a hearing before a tribunal free from any suggestion of bias against him.

The post-decision comments also introduce into the record ambiguity with respect to whether the court applied the correct evidentiary standard when reaching its decision. The court's oral opinion unambiguously applies the correct preponderance of the evidence standard. The post-decision discussion, however, suggests the court may have made its findings of fact based on a less certain basis than the oral opinion would indicate.

In light of these conclusions, we are constrained to vacate the amended FRO, and remand the matter for a new hearing before a different judge. Given that the amended FRO is vacated, so too is the award of attorney's fees contained therein.

The August 13, 2021 order is reversed. The May 3, 2021 amended FRO is vacated and the matter is remanded for a new hearing before a different judge. The January 27, 2021 amended TRO is reinstated and shall remain in place until issuance of the trial court's decision on remand. 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