An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-395

No. COA21-784

Filed 7 June 2022

Wake County, No. 21CVD600449

Lisa Markaj, Plaintiff,

v.

Tom Markaj, Defendant.

Appeal by Defendant from order entered on 1 June 2021 by the Honorable Julie Bell in Wake County District Court. Heard in the Court of Appeals 27 April 2022.

Perry & Brandt, Attorneys at Law, Trevor D. Brandt, for Defendant-Appellant.

No brief filed for Plaintiff-Appellee.

CARPENTER, Judge.

¶ 1 Defendant Tom Markaj ("Defendant") contends the trial court improperly ordered him to surrender his firearms, ammunition, and gun permits to the sheriff; prohibited Defendant from possessing, receiving, or purchasing a firearm; and suspended Defendant's concealed handgun permit for the effective period of the domestic violence protective order ("DVPO") entered against him ("the firearm instruction"). Because the trial court failed to make the requisite findings of fact

necessary to sustain said portion of the DVPO, we vacate the portion of the order requiring Defendant to comply with the firearm instruction.

I. Factual & Procedural Background

¶ 2 Plaintiff filed a complaint and motion for a DVPO using a form AOC-CV-303 ("DVPO complaint form") on 12 March 2021. The DVPO complaint form asks whether "[t]he defendant has attempted to cause or has intentionally caused" the complainant "bodily injury[] or has placed" the complainant "in fear of imminent serious bodily injury or in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. . . ." In response, Plaintiff described no instances of any threatened or actual physical violence or any use or threatened use of a firearm by Defendant. Rather, Plaintiff described only harassment via forms of communication and "emotional and financial distress."

¶ 3 The DVPO complaint form further asks whether "[t]he defendant has firearms and ammunition[.]" In her response to this prompt, Plaintiff stated: "I am not certain how many or where he keeps them; we have been divorced since March 2016. While married, [Defendant] had multiple firearms." The DVPO complaint form also included a prompt asking whether "[t]he defendant has used or threatened to use a deadly weapon against" the complainant "or minor child(ren)" in the complainant's custody or "has a pattern of prior conduct involving the use or threatened use of violence with a firearm against any persons[.]" Plaintiff left the space below this

prompted language blank. The last page of the DVPO complaint form lists ten "action items" the complainant can request from the trial court. Of the ten action items listed, Plaintiff checked only one box, indicating she wanted "the defendant to be ordered to have no contact" with her. The box beside the item "I want the Court to prohibit the defendant from possessing or purchasing a firearm" was left blank.

¶ 4 On 1 June 2021, the trial court held a hearing on the matter and ultimately entered a DVPO against Defendant. During the hearing, Plaintiff testified that while she was "granted sole legal and sole physical custody" of the couple's two children, Defendant "was [required] to complete substance abuse counseling and psychological counseling in order to petition the Court to see [the] children." Plaintiff further testified Defendant had been arrested with marijuana in his vehicle after showing up, uninvited, to Plaintiff's place of work. Plaintiff stated:

> I've purchased a security system. I'm nervous whenever I go outside with our children. They're not allowed to play outside without me being out there with them because I'm nervous that he's going to be there. And I just -- I don't know what [Defendant is] capable of. I -- his behavior since, you know, the day that I left him has been irate, and I'm just -- it's hard to sleep at night.

¶ 5 The trial court used a form AOC-CV-306 ("DVPO form") to create the DVPO. The DVPO form contains a series of boxes the trial court can check indicating circumstances surrounding the entry of the order. Under the "findings" section of the DVPO form, the trial court checked boxes to indicate that Defendant "placed

[Plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." The trial court did not check any boxes indicating Defendant "used" or "threatened to use a deadly weapon against" Plaintiff, or that Defendant had a "pattern or prior conduct involving" the "use" or "threatened use of violence with a firearm" against Plaintiff.

¶ 6 In the "conclusions" section of the DVPO form, the trial court checked boxes indicating: "1. The defendant has committed acts of domestic violence" against Plaintiff; "3. There is danger of serious and immediate injury" to Plaintiff; and "4. The defendant's conduct requires that he/she surrender all firearms, ammunition and gun permits." Under the "order" section of the DVPO order, the trial court checked boxes indicating Defendant is "prohibited from" either "possessing," "receiving," or "purchasing" a firearm, and that Defendant's "concealed handgun permit is suspended for the effective period" of the DVPO. In the same section, the trial court also indicated Defendant should "surrender to the sheriff serving this order the firearms, ammunition, and gun permits described in block No. 4 of the Findings of Page 2 of this Order and any other firearms and ammunition in the defendant's care, custody, possession, ownership or control." "Block No. 4. of the Findings of Page 2" of the DVPO, however, was left blank.

¶ 7 On 11 June 2021, Defendant filed a motion to modify the DVPO against him, asking the trial court to "modify conclusions box 4" (indicating "[t]he defendant's

conduct requires that he/she surrender all firearms, ammunition and gun permits"); "modify order box 11" (indicating Defendant is "prohibited from" either "possessing," "receiving," or "purchasing" a firearm, and that Defendant's "concealed handgun permit is suspended for the effective period" of the DVPO order); and "modify order box 12" (indicating Defendant should "surrender to the sheriff serving this order the firearms, ammunition, and gun permits described in block No. 4 of the Findings of Page 2 of this Order and any other firearms and ammunition in the defendant's care, custody, possession, ownership or control"). On 7 July 2021, Defendant's motion to modify the DVPO was denied. Defendant filed written notice of appeal on 14 July 2021.

II. Jurisdiction

¶ 8 This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issue

¶ 9 The sole issue on appeal is whether the trial court erred in in ordering Defendant to surrender firearms, ammunition, and gun permits after the entry of a domestic violence protective order against him.

IV. Standard of Review

¶ 10 This Court reviews a domestic violence protective order to determine "whether there was competent evidence to support the trial court's findings of fact

and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009).

IV. Analysis

¶ 11 Defendant contends the trial court erred in ordering him to surrender firearms, ammunition, and gun permits after the entry of the DVPO against him. For the following reasons, we agree, and vacate said portion of the DVPO.

¶ 12 N.C. Gen. Stat. § 50B-3.1(a) discusses when a trial court may order a defendant to surrender all firearms:

> Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:
> (1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.
> (2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.
> (3) Threats to commit suicide by the defendant.
> (4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

N.C. Gen. Stat. § 50B-3.1(a) (2021).

¶ 13 In *Stancill v. Stancill*, this Court agreed with a defendant's contention that in its entry of a DVPO against him, the trial court erred in also ordering him to surrender all firearms, ammunition, and gun permits where competent evidence was not provided in the order to support the instruction. 241 N.C. App. 529, 544, 773 S.E.2d 890, 899 (2015). As in the case at bar, the trial court in *Stancill* "failed to check any of the boxes" on the DVPO form containing the statutory findings necessary to order the surrender of firearms pursuant to N.C. Gen. Stat. § 50B-3.1(a). We held the trial court erred in ordering the defendant to surrender all firearms, ammunition, and gun permits, and vacated the corresponding portion of the DVPO as a result. *Id.* at 544, 773 S.E.2d at 900.

¶ 14 If competent evidence existed in the record to support a finding of fact necessary to sustain an order of the surrender of firearms pursuant to N.C. Gen. Stat. § 50B-3.1(a), such a finding was not explicitly made by the trial court. Rather, the trial court failed to check any box indicating Defendant "used" or "threatened to use a deadly weapon" against Plaintiff; had a "pattern of prior conduct" involving the "use" or "threatened use of violence with a firearm;" "made threats to seriously injure or kill" Plaintiff; or "made threats to commit suicide."

¶ 15 Competent evidence, including testimony from Plaintiff regarding excessive contact made by Defendant, existed to support the trial court's finding Defendant "placed [Plaintiff] in fear of continued harassment that rises to such a level as to

inflict emotional distress." This finding supported the entry of the DVPO, which indicated Defendant "shall not commit any further acts of domestic violence or make any threats of domestic violence," and that Defendant "shall have no contact with" Plainitiff. However, no finding was made by the trial court that could have formed a basis for the trial court to order Defendant to surrender his firearms pursuant to N.C. Gen. Stat. § 50B-3.1(a). We therefore vacate the portion of the DVPO ordering Defendant to surrender his firearms, and purposely leave the rest of the DVPO intact.

VI. Conclusion

¶ 16 While competent evidence existed to support the findings of fact necessary to sustain the general entry of a DVPO against Defendant, the trial court failed to make the particular requisite findings of fact necessary to sustain the firearm instruction portion of the DVPO. We therefore affirm the DVPO in part, and vacate the portion of the order requiring Defendant to comply with the firemarm instruction.

AFFIRMED IN PART AND VACATED IN PART.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).