

[Cite as *Rieger v. Montgomery Cty.*, 2009-Ohio-4125.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

JOSEPH M. RIEGER	:	Appellate Case Nos. 23145
	:	23162
Plaintiff-Appellant	:	
v.	:	Trial Court Case Nos. 07-CV-7374
	:	08-CV-8912
	:	
MONTGOMERY COUNTY, OHIO, et al.	:	
	:	(Civil Appeal from
Defendant-Appellees	:	Common Pleas Court)
	:	

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OPINION

Rendered on the 14th day of August, 2009.

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JOSEPH M. RIEGER, 443 McGuerin Street, Dayton, Ohio 45431
Plaintiff-Appellant, *pro se*

MATHIAS H. HECK, JR., by JOHN A. CUMMING, Atty. Reg. #0018710, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
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BROGAN, J.

{¶ 1} Joseph M. Rieger appeals *pro se* from the trial court’s dismissal of his complaints on the basis of *res judicata* in two consolidated cases.

{¶ 2} In Mont. C.P. No. 07-CV-7374, Rieger filed a complaint against Montgomery County seeking relief under 18 U.S.C. §925A, which provides a remedy for individuals wrongly deprived of the ability to purchase a firearm under the federal Brady Handgun Violence Prevention Act. Rieger's complaint alleged that Montgomery County Common Pleas Court Judge Timothy O'Connell had provided erroneous information on a "Brady Form 10 A" and had submitted the form to law-enforcement personnel, precluding Rieger from purchasing a firearm.

{¶ 3} In the other case, Mont. C.P. No. 08-CV-8912, Rieger filed a complaint against Montgomery County, the Montgomery County Sheriff's Office, Sheriff Phil Plummer, and Judge O'Connell, seeking damages for the violation of his civil rights as a result of the allegedly erroneous "Brady Form 10 A."

{¶ 4} The trial court consolidated the foregoing two cases. Following an evidentiary hearing, it filed a December 5, 2008 judgment entry dismissing Rieger's complaints on the basis of res judicata. The trial court found that Rieger's inability to purchase a firearm under the Brady Act flowed from the issuance of a civil stalking protection order ("CSPO") against him in an earlier case, *Podeweltz v. Rieger*, Mont. C.P. No. 05-CV-3846.¹ According to the trial court, Judge O'Connell, who was then a magistrate, had found Rieger to be Brady disqualified as part of the civil-stalking case. The trial court noted that Rieger unsuccessfully had appealed the civil-stalking

¹The trial court also mentioned a second civil-stalking case that is cited by the parties. That case, *Rieger v. Podeweltz*, Mont. C.P. No. 05-CV-7497, involved Rieger's own unsuccessful attempt to obtain a CSPO against his victim. Because Rieger was the *plaintiff* in that case and not the alleged stalker, it did not result in his inability to purchase a firearm. Therefore, for purposes of our analysis herein, all references to the civil-stalking case below will be to *Podeweltz v. Rieger*, Mont. C.P. No. 05-CV-3846,

case to this court. The trial court also stressed Rieger's failure to raise his Brady disqualification as an issue in the civil-stalking appeal. Based on a finding that the Brady issue had been before Judge O'Connell in the civil-stalking case, and that Rieger had failed to raise the issue on appeal in that case, the trial court held that res judicata precluded him from challenging his Brady disqualification now. The trial court reasoned that any objection Rieger had to his firearm disqualification under the Brady Act could have been, and should have been, raised in *Podeweltz v. Rieger*, Mont. C.P. No. 05-CV-3846, the civil-stalking case. Because Rieger's complaints in Mont. C.P. No. 07-CV-7374 and Mont. C.P. No. 08-CV-8912 both were predicated on the allegedly erroneous Brady disqualification, the trial court dismissed them on the basis of res judicata. This timely appeal followed.

{¶ 5} Rieger's pro se appellate brief contains ten repetitive assignments of error addressing issues far beyond what the trial court decided below. For present purposes, we will focus our analysis on the only issue properly before us: whether the trial court erred in dismissing Rieger's two complaints on the basis of res judicata.

{¶ 6} As noted above, Rieger filed his complaint against Montgomery County under 18 U.S.C. §925A, which provides that any person denied a firearm "due to the provision of erroneous information relating to the person by any State or political subdivision thereof * * * may bring an action against the State or political subdivision responsible for providing the erroneous information * * * for an order directing that the erroneous information be corrected[.]"

{¶ 7} Another federal statute, 18 U.S.C. §922(g)(8), prohibits the purchase of

which allegedly did lead to Rieger's Brady disqualification.

a firearm by any person subject to a court order that restrains the person “from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child * * *.” The firearm prohibition in 18 U.S.C. §922(g)(8) only applies if the court’s restraining order was issued after a hearing at which the person had a chance to participate and if the order either (1) includes a finding that the person “represents a credible threat to the physical safety of such intimate partner or child,” or (2) “by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[.]” *Id.* As used in the statute, “[t]he term ‘intimate partner’ means, with respect to a person, the spouse of the person, a former spouse of the person, and individual who is a parent of a child of the person, and an individual who cohabits or has cohabited with the person.” 18 U.S.C. §921(a)(32).

{¶ 8} The essence of Rieger’s complaint in Mont. C.P. No. 07-CV-7374 is that, based upon the issuance of a CSPO against him in the earlier case of *Podeweltz v. Rieger*, Mont. C.P. No. 05-CV-3846, Judge O’Connell completed a “Brady Form 10 A” and submitted it to law-enforcement officials. As noted above, Rieger contends this form contains erroneous information that has prevented him from purchasing firearms. The allegedly erroneous information is that Rieger is subject to a CSPO precluding him from harassing stalking, or threatening an “intimate partner” or the child of an intimate partner. While Rieger admits being subject to a CSPO, he insists that he and the victim in the civil-stalking case do not

qualify as “intimate partners” under 18 U.S.C. §921(a)(32). Therefore, he contends Judge O’Connell erred in relying on the CSPO to file a Brady Form 10 A that disqualifies him from purchasing firearms. Rieger’s complaint in Mont. C.P. No. 08-CV-8912 makes the same argument, seeking money damages for the submission of the allegedly erroneous information to law-enforcement officials.

{¶ 9} In dismissing both complaints on the basis of res judicata, the trial court found that the CSPO issued in the civil-stalking case included the challenged Brady disqualification. The trial court also reviewed a hearing transcript from the civil-stalking case in which Rieger admitted having had a romantic relationship with the victim and having lived with her for several months before breaking up. In light of this testimony, the trial court opined that the judge in the civil-stalking case reasonably could have found Rieger and the victim to have been “intimate partners” under 18 U.S.C. §921(a)(32). Believing that the “Brady issue” was before the court in the civil-stalking case, the trial court reasoned:

{¶ 10} “The doctrine of res judicata includes the concepts of both claim preclusion and issue preclusion. The doctrine prevents a court from litigating matters that were previously decided, or could have been decided[,] in a prior action. *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69.

{¶ 11} “Therefore, the Court finds that because the ultimate issue in this case was or could have been litigated in the prior CSPO action, and because all of the appeals of those actions have been completed, the plaintiff has waived any error in this regard, and the subsequent litigation of the factual issues already determined [is] barred by res judicata. And, no action may lie as a result of this prior determination in

this or any other collateral action. Therefore, both of these pending actions must be dismissed.

{¶ 12} “In reconciling the holding herein and the provisions of 18 U.S.C. 925A, the court would note that if Mr. Rieger were simply attempting to correct a clerical error that resulted in the ‘Brady qualification,’ an action would lie against either the State or Montgomery County pursuant to that Federal statute. However, when the error cited is an alleged error of fact already determined by the court in the prior proceeding, his only recourse is through an appeal. The appellate process being completed in the underlying cases, the court may not revisit those factual determinations.”

{¶ 13} Upon review, we disagree with the trial court’s determination that res judicata precludes the present lawsuits. Having carefully examined the record in *Podeweltz v. Rieger*, Mont. C.P. No. 05-CV-3846, the civil-stalking case against Rieger, we find no entry by the magistrate or the trial court disqualifying Rieger from purchasing a firearm under the Brady Act. The record in that case contains no “Brady Form 10 A” or any similar document, and there is no finding that Rieger and his victim were “intimate partners” within the meaning of 18 U.S.C. §922(g)(8). A hearing transcript in that case does include some discussion between the trial court and the parties about the possibility of Rieger being “Brady disqualified” if found to have engaged in menacing by stalking and about the potential implications of such disqualification. That discussion, which took place *before* the CSPO hearing, necessarily was tentative, however, and there is no finding anywhere in that case actually disqualifying Rieger under the Brady Act from purchasing a firearm. In short,

whatever, if anything, the magistrate or the trial court may have done to disqualify Rieger from purchasing a firearm under 18 U.S.C. §922(g)(8) simply is not reflected in the record in the civil-stalking case.² Indeed, during a hearing below, Rieger testified that he did not even discover his Brady disqualification until two years *after* the civil-stalking case. (May 29, 2008 transcript at 24). That being so, we have no basis for determining that he could have raised his alleged Brady disqualification as an issue on appeal in the civil-stalking case. Because we are unable to conclude that Rieger could have raised a Brady argument as an issue in his civil-stalking appeal, we see no basis for applying the claim-preclusion branch of res judicata to his present complaints.³

{¶ 14} We find the issue-preclusion branch of res judicata equally inapplicable. The only substantive issue raised by the civil-stalking complaint was whether the victim was entitled to a CSPO because Rieger had engaged in menacing by stalking under R.C. 2903.211(A)(1). To prevail, the victim was required to prove that Rieger, through a pattern of conduct, either (1) knowingly caused her to believe he would cause her physical harm or (2) knowingly caused her mental distress. *Walker v.*

²Parenthetically, we note that the record in the other civil-stalking case, *Rieger v. Podeweltz*, Mont. C.P. No. 05-CV-7497 which Rieger initiated against his victim, is equally devoid of anything disqualifying him from purchasing a firearm under the Brady Act.

³Notably, during a hearing below, the trial court correctly observed that the alleged “Brady disqualification” was not part of any judicial judgment and, therefore, *was not* previously appealable. (May 29, 2008 transcript at 21-22). The trial court nevertheless subsequently appears to have applied the issue-preclusion branch of res judicata to find that Rieger could not relitigate certain factual findings in the civil-stalking case that allegedly rendered him Brady disqualified. We will address that aspect of the trial court’s ruling *infra*.

Edgington, Clark App. No. 07-CA-75, 2008-Ohio-3478, ¶23. Notably, the menacing-by-stalking statute does not require that the perpetrator and the victim ever lived together or engaged in sexual relations. The existence of a personal relationship between the parties is not an element of menacing by stalking, and proof of some type of special relationship is not required to obtain a CSPO.

{¶ 15} Consequently, even if the civil-stalking case contains sufficient evidence to support a finding that Rieger and the victim were “intimate partners” within the meaning of 18 U.S.C. §922(g)(8), the issue was not actually and necessarily decided in that case. The only way Rieger and the victim might qualify as “intimate partners” under federal law is if they “cohabited.” See 18 U.S.C. §921(a)(32). A finding of an “intimate partnership” or “cohabitation” was not required, however, for the victim in the civil-stalking case to obtain her CSPO. Therefore, even if the civil-stalking decision might be read as implicitly including such a finding, it has no preclusive effect in the present case.

{¶ 16} “[I]ssue preclusion, [or] collateral estoppel, holds that a *fact or a point that was actually and directly at issue in a previous action*, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.” *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 392, 2008-Ohio-6254, quoting *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435 (emphasis added). As explained above, the existence of an “intimate partnership” or cohabiting relationship was not actually and directly at issue in the

civil-stalking case. It follows that the entry granting the victim a CSPO in the civil-stalking case does not preclude Rieger from now seeking to establish that he and the victim were not intimate partners under the federal Brady Act. Therefore, res judicata does not bar him from seeking relief under 18 U.S.C. §925A on the basis that mistaken information wrongly deprived him of the ability to purchase a firearm. For the same reason, res judicata also does not preclude him from seeking money damages for the submission of the allegedly erroneous information to law-enforcement officials.⁴

{¶ 17} Finally, we turn briefly to two additional arguments raised by the appellees in an effort to avoid reversal of the trial court's judgment. First, they contend Rieger has failed to state a claim under 18 U.S.C. §925A. They point out that a person seeking relief under the statute must have been denied a firearm pursuant to subsection (s) or (t) of 18 U.S.C. §922. The appellees assert that Rieger has not alleged the denial of a firearm under either subsection.

{¶ 18} We reject the foregoing argument for at least two reasons. First, the appellees never raised it in the trial court in either of the two consolidated cases. Therefore, the trial court had no opportunity to address the argument. It is well settled that a party may not raise a new argument for the first time on appeal. *State v. Wilson*, Montgomery App. No. 22001, 2007-Ohio-6581, ¶12.

{¶ 19} Second, the appellees appear to misread the statute and Rieger's

⁴We express no opinion about other potential defects in Rieger's complaint under 18 U.S.C. §925A or his separate complaint for money damages. For present purposes, we hold only that res judicata does not preclude him from pursuing the complaints.

complaint. Rieger plainly filed a complaint pursuant to 18 U.S.C. §925A alleging that he has been denied a firearm due to erroneous information being provided to law-enforcement officials. The appellees correctly point out that §925A provides a remedy when a person has been denied a firearm pursuant to subsection (s) or (t) of 18 U.S.C. §922. We note that 18 U.S.C. §922(t) requires firearm sellers to conduct instant criminal background checks before transferring a firearm to a prospective buyer. Under subsection (t), the seller is not allowed to transfer the firearm if receipt by the prospective buyer would violate subsection (g) or (n) of 18 U.S.C. §922. As explained above, subsection (g)(8) makes it unlawful for a person to receive a firearm if that person is subject to a court order restraining the person from harassing, stalking, or threatening an “intimate partner.” Rieger expressly cited 18 U.S.C. §922(g)(8) at page three of his amended complaint. Moreover, during the hearing in the trial court, he testified under oath that Judge O’Connell had provided erroneous information to law-enforcement officials who then entered the information into a national instant criminal background check data base, making it impossible for him to purchase a firearm. (May 29, 2008 transcript at 14-15). The allegedly erroneous information at issue concerned Rieger and the civil-stalking victim qualifying as “intimate partners” under the Brady Act. Therefore, Rieger adequately has alleged the denial of a firearm pursuant to subsection (t) of 18 U.S.C. §922, and his complaint sets forth a claim under 18 U.S.C. §925A.

{¶ 20} In a final argument, the appellees contend the “erroneous information” Rieger is seeking to correct is actually the final judgment in the civil-stalking case. They insist, however, that his only recourse was through an appeal in the

civil-stalking case. We disagree. This argument by the appellees essentially repeats the res judicata argument we rejected above. Moreover, the allegedly erroneous information challenged by Rieger is not the civil-stalking judgment itself. Rather, as we have explained, it is an alleged determination by Judge O’Connell that Rieger and the civil-stalking victim qualified as “intimate partners” under the Brady Act and the inclusion of this purportedly erroneous information on a “Brady Form 10 A.” As we observed above, the record in the civil-stalking case contains no “Brady Form 10 A,” and there is no finding in that case that Rieger and his victim were “intimate partners” within the meaning of 18 U.S.C. §922(g)(8). Therefore, a direct appeal in the civil-stalking case would not have provided Rieger with any recourse for his current complaint.

{¶ 21} Based on the reasoning set forth above, we sustain Rieger’s assignments of error insofar as he contends the trial court erred in dismissing his complaints on the basis of res judicata. The judgment of the Montgomery County Common Pleas Court is Reversed and the cause is Remanded for further proceedings.

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DONOVAN, P.J., and FAIN, J., concur.

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