

Matter of La Tempa v Kelly

2007 NY Slip Op 30997(U)

April 26, 2007

Supreme Court, New York County

Docket Number: 0116968/2006

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: NICHOLAS FIDELLERIS
Justice

PART 46

Anthony La Sampa
- v -

Raymond Kelly

INDEX NO. 116968/06
MOTION DATE 1/10/07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

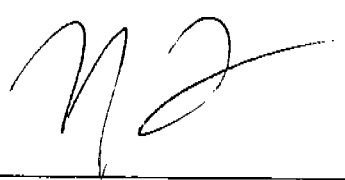
Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*All accompanying decisions
not read*

UNFILED JUDGMENT
This judgment has not been filed with the County Clerk and notice of entry cannot be served as provided hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 26, 2007



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Denial of the Business
Related Carry License Application of

Index No. 116968/06

ANTHONY LA TEMPA,

Petitioner,

**DECISION AND
JUDGMENT**

For a Judgment under Article 78 of the
Civil Practice Law and Rules Granting
Petitioner a Business Related Carry
Pistol License,

- against -

RAYMOND KELLY, as the Statutorily Designated
Handgun Licensing Officer, and As the New York City
Police Commissioner, and His Successors in Office,

Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be given based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
448)

Nicholas Figueroa, Justice:

Petitioner appeals from respondent's July 11, 2006 order denying his application for a carry
business handgun license. The denial stated that the license was denied because of:

- Your arrest history
- Guilty pleas to disorderly conduct and multiple orders of
protection issued against you demonstrate a lack of character
and fitness to possess firearms.”

The final determination affirmed respondent's initial denial of June 2, 2006. That denial read:

“On 4/08/04, you applied for a carry business license. On 09/15/04
you came to the license division for an interview. At that time, it was
determined that you did not meet the requirements necessary for a
carry business license. You were offered a premises business license,
which you did not accept. Further investigation revealed your arrest
history. The history of your arrests, cast grave doubt upon your
character and fitness to possess a pistol license. Based on this

information, your application for a pistol license is disapproved. Case closed .”

Petitioner's appeal from the latter decision stated,

“I would like to appeal the [sic] Judgment against my application for a gun license. The so called arrest history happened 10 years ago when I was still a teenager. I am a serious businessman now with a lot of responsibilities. I handle a lot of money each day. I withdraw close to \$50,000 a month from North Fork Bank acct.#301970374...”

In his verified petition, petitioner alleges that he “has had only two arrests, and they date back more than 8 years as well.” He alleges that, “He has never been convicted of a criminal offense of any kind, but was subjected to two arrests on the complaint of his ex-girlfriend. One case was dismissed and sealed, and the other resulted in...a plea to ‘disorderly conduct’, (Penal Law §240.20).”

According to petitioner, both incidents occurred in 1998, when he was a teenager. The record reveals that petitioner was nineteen years old that year.

According to petitioner, he learned that his female friend, “...his high school sweetheart, Ms. Tanya Agnello, had been seeing another guy behind his back. Although Ms. Agnello and Mr. La Tempa were not living together, they spent most nights at either his house, or at hers. Consequently, petitioner had many items at Ms. Agnello's house that belonged to him.”

Continuing, he stated that Ms. Agnello's “cheating” made him feel “very hurt and very angry”, and that he went to her home “and began to remove some items.” He contends that he “ended up breaking two items which belonged to him, including a small stereo and a television. At that point, it just didn't matter to him.”

Petitioner notes that “Ms. Agnello made a complaint against him, but the case resulted in a mere non-criminal offense plea to ‘disorderly conduct’.” He adds that although an order of

protection had been issued, Agnello kept calling him "because she wanted to put the relationship back together."

Petitioner informs the court that he returned to Agnello's home, at her request (emphasis in the original) and that when he arrived, "she related to him that it was her girlfriend who made the call to the police 'by accident' on September 28, 1998." Petitioner alleges that, "Indeed, when he got to the house, Ms. Agnello invited him in and they both ended up going to the local precinct in the morning, after they spent the night together. She appeared in court with him, and the case was ACD'd that very day..." Petitioner's abbreviation alludes to adjournment in contemplation of dismissal under Criminal Procedure Law §170.55.

According to petitioner, he and Ms. Agnello "spent another year and a half together as boyfriend/girlfriend, and eventually split up to marry different people." Continuing, he asserts that "There is nothing else derogatory in his record."

Petitioner argues that his "handgun license is ostensibly being denied based upon a claim that his 'arrest history' creates doubt as to his 'fitness and character' to possess a handgun license in New York State." Petitioner contends that because respondent denied his application based on his arrest history, it did not determine whether "proper cause" existed for petitioner to have the license (Penal Law §400.00(2)(f)).

Petitioner argues that respondent "has not considered all of the positive aspects of his background." He asserts that he is not asking the court to substitute its judgment for respondent's judgment. He argues that he meets all the requirements for a permit, including the "Proper cause" required for its issuance, as he carries substantial amounts of cash.

In opposing the petition, respondent asserts that petitioner fails to reveal his entire arrest record. Although petitioner's September, 1998 arrest culminated in an adjournment in contemplation of dismissal, petitioner's other arrest in August, 1998 arrest resulted in a conviction, on a guilty plea, to disorderly conduct. That arrest was for Criminal Mischief: Intent to Damage Property, Penal Law §145.00(1), Criminal Trespass, Second Degree, Penal Law §140.15, and Harassment, Second Degree, Penal Law §240.26(1).

Moreover, respondent notes that petitioner had yet another arrest in April, 2002, just two years prior to his application. Petitioner was an adult at the time of this arrest. Petitioner did not reveal this arrest in his papers; however, the record shows that petitioner was arraigned on the charges of Criminal Mischief, Reckless Property Damage Greater Than \$250, Penal Law §145(3), Menacing, Third Degree, Penal Law §120.15, and Harassment, Following a Person, Penal Law §240.26(2).

This arrest occurred, according to respondent, after petitioner pulled up to a motorist stopped in traffic. Petitioner repeatedly opened the passenger side door, struck the vehicle repeatedly, causing damage, and screamed profanities at the occupant.

Petitioner was sentenced to a conditional discharge. The court ordered restitution and issued an order of protection.

Respondent argues that its determination was not arbitrary and capricious or irrational. It urges that under the applicable standard of review, the court must confirm the denial and dismiss the proceeding.

On oral argument, petitioner's counsel attempted to raise an argument that was not raised in the petition: that respondent issued permits to two other applicants who had arrest records. At the

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time of argument, neither the court nor respondent's attorney had been given prior notice of the matters that counsel referred to. Subsequent to argument, without seeking permission from the court, petitioner's attorney sent the court two administrative decisions granting a pistol licenses to those applicants. The material was accompanied by petitioner's attorney's further arguments in support of the petition. The attorney sent the material purportedly to show the court that he was not making a misrepresentation to the court on oral argument and in order to respond to respondent's attorney's statement on oral argument that she could not determine the accuracy of the statements petitioner's attorney had made.

Respondent's attorney sent a letter to the court in which she distinguished the instant case from the matter petitioner's attorney referred to in his post-argument submission.

Subsequent to respondent's attorney's letter, petitioner's attorney again wrote to the court and repeated his newly raised arguments, informing the court that his further submission was necessary to demonstrate that an applicant "does not have to be 'squeaky clean' in order to qualify for a handgun license in New York City." Petitioner's attorney then raised another new argument that, "Though the agency is vested with a great deal of discretion, this power is not [sic] with limits or bounds. Here, the agency ignores the fact that they are treating similarly situated applicants in a dissimilar manner. *Matter of Goldstein*, 189 AD2d 649..."

Petitioner has not demonstrated that the respondent's determination is arbitrary and capricious. Therefore, respondent's determination is confirmed. In reaching this decision, the court has not considered petitioner's post-argument submissions, as they are not properly before the court.

The applicable standard of review on an Article 78 proceeding is whether the administrative determination under review is arbitrary and capricious (see *Matter of Pell v. Board of Education*, 34

NY2D 222, 231). The court must determine whether that decision is rational (see *Matter of Purdy v. Kreisberg*, 47 NY 2d 354,358). The reviewing court may not substitute its judgment for the agency's in reaching its decision (*id.*), and defer to its assessment of the evidence (see *Sewell v. City of New York*, 182 AD2d 469, 473). These principals apply to Article 78 proceedings involving pistol license denials (see *Matter of Kaplan v. Bratton*, 249 AD2d 199, citing *Matter of Fondacaro v. Kelly*, 234 AD2d 173).

Respondent argues that petitioner had the burden of showing “good cause” for having the permit. Respondent relies on 38 RCNY §5-03, and Penal Law §400.00(2)(f). That argument is misplaced. Respondent never reached the question of whether petitioner established good cause. Rather, it made its determination on the basis of his arrest record. Because petitioner’s record provides a sufficient oasis for the denial, there was no need to consider any other issue. Therefore, only that issue will be discussed.

Even if all the criminal charges against petitioner had been dismissed, the dismissals would not have prevented respondent from denying the permit, as the facts surrounding his arrests form a proper basis for the denial (see *Matter of Abramowitz v. Safir*, 293 AD2d 352, 353, citing *Matter of Servidio v. Bratton*, 268 AD2d 356).

Petitioner's arrests involved violent acts. He invaded another person's home and acted violently towards a motorist stopped in traffic.

Although petitioner attempted to minimize his conduct by saying that the police were summoned by mistake on one occasion and that his victim excused him, the court need not accept his attempt at mitigation including his contention that he is now leading an upstanding life (*Matter of Servidio v. Bratton, id.*).

Moreover, petitioner was not candid with the court. While he claimed that his first two arrests occurred when he was a youth, his petition failed to reveal his last arrest, when he was an adult. This lack of candor, in papers prepared by an attorney, is unacceptable and the court strongly condemns it. Notably, petitioner also failed to address the third arrest in his administrative appeal.

The new material petitioner submits, after the matter was heard on oral argument is improper. Petitioner's papers are in the nature of a reply and sur-reply, raising matters not raised in his initial papers (see *Ritt by Ritt v. Lenox Hill Hospital*, 182 AD2d 560,562). In any event, even if the court were to consider the new material, respondent has demonstrated that the circumstances in the cases in which two applicants received permits differed from those in the instant proceeding.

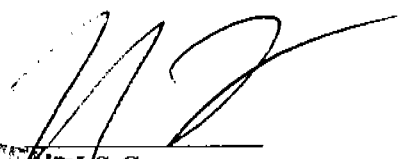
Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: April 26, 2007

ENTER



UNFILED JUDGMENT TJS.C.

This judgment has not been entered with the County Clerk and notice of entry cannot be given based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).