

<b>Matter of Bress v Kelly</b>
2007 NY Slip Op 32354(U)
July 18, 2007
Supreme Court, New York County
Docket Number: 0103572/2007
Judge: Marcy S. Friedman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Index Number : 103572/2007

BRESS, NEIL

INDEX NO. 103572/07

vs

KELLY, RAYMOND

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this <sup>petition</sup> motion to/for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion:  Yes  No Memo of Law

Upon the foregoing papers, it is ordered that this motion petition

**DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

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

Dated: 7/18/07

[Signature]  
**Hon. Marcy S. Friedman** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x  
In the Matter of the Denial of the Business Related  
Limited Carry License Application of  
NEIL BRESS,

Index No.: 103572/07

*Petitioner,*

DECISION/ORDER

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

- against -

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
118)

*Respondent.*

\_\_\_\_\_ x

In this Article 78 proceeding, petitioner seeks to annul a determination of respondent which denied petitioner's application for a limited carry gun license to be used in connection with his business as a pawnbroker. Petitioner contends that the determination is arbitrary and capricious because based solely on a 1998 arrest.

It is well settled that "[t]he issuance of a pistol license is not a right, but a privilege subject to reasonable regulation. The Police Commissioner has broad discretion to decide whether to issue a license. (Sewell v City of New York, 182 AD2d 469, 472.) Judicial review of a discretionary administrative determination is limited to deciding whether the agency's actions were arbitrary and capricious [citation omitted]. The agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary

result.” (Matter of Kaplan v Bratton, 249 AD2d 199, 201 [1<sup>st</sup> Dept 1998]; Matter of Williams v Bratton, 238 AD2d 269 [1<sup>st</sup> Dept 1997].)

By Notice of Disapproval After Appeal dated November 30, 2006, respondent denied petitioner’s appeal from a determination of respondent, dated October 18, 2006, which denied petitioner’s application for a limited carry pistol license. The original determination disapproved the application for the following reasons:

1. Discrepancies in the notarized statement pertaining to your 1998 arrest for criminal possession of stolen property and the actual details in the official police report. Your statements indicate that you were unaware the purchases involved were potential stolen goods but the officer’s arrest narrative reveals that you did take possession during undercover jewelry stings on three separate occasions. Your business judgement and your moral character are in serious question and we do not wish to give you a handgun license in connection with your business.

The Notice of Disapproval After Appeal stated that the application “is denied due to: The circumstances of your 1998 arrest demonstrates [sic] a lack of character and fitness to be licensed to possess firearms in New York City.”

The arrest at issue, which petitioner disclosed on his application for the license, was a 1998 arrest for attempted possession of stolen property. The crime was initially charged as a Class E felony and a Class B misdemeanor, and petitioner pleaded guilty to Penal Law 240.20, disorderly conduct – a violation not a crime.

It is beyond dispute that respondent was “entitled to consider the circumstances surrounding the arrest in determining petitioner’s suitability for a permit.” (Matter of Servedio v Bratton, 268 AD2d 356 [1<sup>st</sup> Dept 2000]; Matter of Zalmanov v Bratton, 240 AD2d 173 [1<sup>st</sup> Dept 1997]; Matter of Perry v Blair, 64 AD2d 870 [4<sup>th</sup> Dept 1978].) Moreover, petitioner’s plea to lesser charges did not preclude respondent from considering the arrest. (See Matter of Gonzalez v

Lawrence, 36 AD3d 807 [2d Dept 2007].) It was also proper for respondent to consider petitioner's explanation of the circumstances surrounding the arrest.

Here, however, it is not clear from respondent's determination after appeal that the determination was based on the discrepancy found in the original determination, and not solely on the circumstances of the 1998 arrest. Moreover, it does not appear on the face of either of the determinations that respondent considered all of the relevant information regarding the arrest. The papers in this Article 78 proceeding do not include the police officer's arrest narrative cited in the original determination. Thus, the nature of the discrepancy found by respondent between this arrest narrative and petitioner's own explanation of the circumstances surrounding the arrest, is not clear on this record. To the extent the finding of a discrepancy was based on the fact that the 1998 arrest followed three undercover jewelry stings made over a short period in 1998, while petitioner's explanation addressed only one of the three stings, respondent does not appear to have considered evidence that petitioner made only one of the three purchases involved in the stings, and that other employees of the pawnshop at which petitioner was working in 1998 made the other two purchases.

More importantly, it does not appear on the face of respondent's determinations that respondent considered any other evidence relevant to petitioner's application. Such evidence included the fact that the 1998 arrest was resolved by a plea to a violation; that petitioner has been engaged without incident in the pawnbroker business since the arrest; that prior to 1998, petitioner was employed in a pawnbroker business owned by his stepfather, where they had a joint gun permit for the business, and there is no evidence of any wrongdoing in connection with this permit (see Petitioner's Application [Answer, Ex.E]); and, finally, that petitioner has since

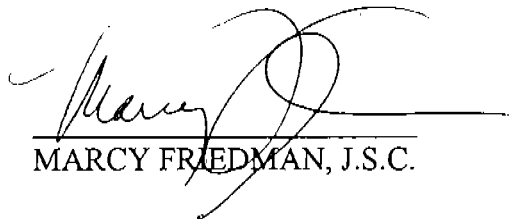
1993 held a pistol license granted by the Nassau County Police Department, and there also is no evidence of any wrongdoing in connection with this permit. (See *id.*)

As the Court of Appeals has explained, it is important that “findings of fact be made in a manner such that the parties may be assured that the decision is based on evidence of record, uninfluenced by extralegal considerations, findings of fact in some form being essential so as to permit intelligent challenge by a party aggrieved and adequate judicial review following the determination.” (*Matter of Simpson v Wolansky*, 38 NY2d 391, 396 [1975].) In the instant case, the court cannot determine from respondent’s determination whether there is a rational basis for it. A remand to an agency is proper “when further agency action is necessary to cure deficiencies in the record, such as when an agency fails to make appropriate findings.” (*Matter of Police Benevolent Assn. v Vacco*, 253 AD2d 920, 921 [3d Dept 1998], *lv denied* 92 NY2d 818.)

It is accordingly hereby ORDERED that the petition is granted to the extent of remanding the matter to respondent for *de novo* consideration of the evidence submitted on petitioner’s application for a limited carry gun license, and for issuance of a determination containing findings on which the determination is based.

This constitutes the decision and judgment of the court. If review of the determination on remand is sought, a new Article 78 proceeding shall be brought.

Dated: New York, New York  
July 18, 2007

  
MARCY FRIEDMAN, J.S.C.

**UNFILED JUDGMENT**

**no judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B)**