

Matter of Koenig v Kelly
2007 NY Slip Op 32777(U)
September 4, 2007
Supreme Court, New York County
Docket Number: 0103424/2007
Judge: Jane S. Solomon
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) 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: SOLOMON
Justice

PART 55

Koenig, Albert

INDEX NO. 103424107

MOTION DATE 7-10-07

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Kelly, R

The following papers, numbered 1 to 9 were read on this ~~_____~~ Article 78 Petition

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-4</u>
<u>5-7</u>
<u>8-9</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~_____~~ Petition is decided in accordance with the annexed memorandum decision, order and judgment.

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

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 11B)

Dated: 9/4/07

JANE S. SOLOMON
JANE S. SOLOMON 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: IAS PART 55

-----X

In the Matter of the Revocation
of the Pistol License and
Rifle/Shotgun Permit of

ALBERT S. KOENIG,

Petitioner,

INDEX NO. 103424/2007

-against-

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

DECISION, ORDER and
JUDGMENT

Respondent,

For a Judgment under Article 78
of the Civil Practice Law and Rule
Granting Petitioner a Reinstatement
of His Firearms Licenses.

UNFILED JUDGMENT
his 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
115)

-----X

JANE S. SOLOMON, J.

Petitioner Albert S. Koenig brings this Article 78
proceeding to annul a November 16, 2006 determination by Thomas
M. Prasso, director of the New York City Police Department
("NYPD") License Division ("Division"), which revoked
petitioner's premises residence pistol license, covering nine
handguns, and his rifle/shotgun permit, covering 13 firearms.
Respondent Raymond Kelly, the Commissioner of the NYPD, is the
statutorily designated firearms licensing officer for the City of
New York. Administrative Code of City of New York § 10-131.
Penal Law § 400.00 (1) (d) bars firearms licensing officers from
issuing a license to carry, possess, repair, or dispose of
firearms to an applicant who has had a license revoked.

The Challenged Determination

Petitioner's travails began in April 2005, when his name was discovered during the execution of a criminal search warrant on the offices of the Kings County Society for the Prevention of Cruelty to Children ("Society"). The Society solicited contributions for its purportedly worthy activities and distributed to contributors forged police shields and identification cards. On April 20, 2005, petitioner transferred custody of all his firearms to T&T Tactical ("T&T"), a firearms dealer licensed by the Nassau County Police Department.

By letter dated April 18, 2005, the Division notified petitioner that his handgun license was suspended pending investigation, and it directed him to surrender "any and all firearms" at his local police station and to forward to the Division a copy of the precinct property clerk's invoice showing surrender of the firearms. The letter also notified petitioner that the investigator assigned to his case was Police Officer Alda Levine.

On April 24, 2005, petitioner wrote to Officer Levine stating that he had taken all of his weapons to T&T because he had learned that members of the Society were being arrested and that their weapons were being seized, and because at an earlier time, when he had not received a renewal of his pistol permit prior to the expiration date, he had attempted to deposit his guns at his local precinct house and was told to take them back home and to call "downtown." The letter also stated that: he had

found her April 18th letter on April 20th, when he returned home from T&T; he had called her the following morning and told her where his guns were; she had directed him to retrieve them and to take them to a police precinct; he had, thereupon, called T&T and had been told that, because his license had been suspended, T&T could not lawfully return any of his weapons without a written document authorizing them to transfer the weapons; and that he had then again called Officer Levine, this time to report his conversation with T&T.

The Division thereupon conducted its investigation. In her final report, Officer Levine noted that the document by which petitioner transferred custody of his weapons to T&T appeared on its face to evidence a sale of his handguns to T&T; that his handgun license was automatically voided by that apparent sale; that disposal of a lawfully possessed handgun without prior notification to the Division constitutes a Class A Misdemeanor; and that petitioner had failed to comply with the Division's directive to bring all of his guns to his local precinct house. Officer Levine recommended that petitioner's license and permit be cancelled. By letter dated July 5, 2005, the Division notified petitioner that his license and permit had been cancelled. A person whose license has been cancelled, unlike a person whose license has been revoked, may subsequently apply for another license and permit.

Petitioner thereupon requested an informal hearing challenging the Division's determination. At the hearing,

Officer Levine testified that she had found no evidence of criminal activity on petitioner's part in relation to the Society; that if, indeed, petitioner had disposed of his guns before receiving her April 18th letter, he could not possibly have complied with her directive to bring the guns to his local precinct house; and that, but for petitioner's failure to give the Division prior notice of his intent to dispose of his handguns, as required by Penal Law § 265.10 (7) and 38 RCNY § 265.10 (7), she would have recommended that his license be continued. Petitioner testified that he had not intended to sell his handguns to T&T, but rather, temporarily to transfer custody of them, and that when he called Officer Levine to report on his discussion with T&T, he told her that T&T would not release his guns without a letter from the Division authorizing such a release.

Hearing Officer Margaret L. Shields found that petitioner's testimony that he did not know that he could not lawfully bring his handguns to a gun dealer merely for safekeeping was not credible, and that petitioner was aware that his license was about to be suspended and had tried to do an end run around the Division. She stated that, had petitioner not voided his license by dispossessing himself of his handguns, she would have recommended that both his license and his permit be suspended until December 31, 2006, but that, because petitioner had voided his license, the license had to be either cancelled or revoked. Accordingly, she recommended that his license be

cancelled, that his permit be suspended until December 31, 2006, and that he be barred from re-applying for a handgun license until December 31, 2006.

Thomas M. Prasso, the Director of the Division, rejected Officer Shield's recommendations and issued the final agency determination, which is here quoted in full:

The licensee's actions in attempting to evade the requirement to voucher his firearms demonstrate a lack of character and fitness to possess firearms. Under those circumstances revocation is the only appropriate disposition for this case.

Discussion

While petitioner's action in forestalling what he feared would be a police seizure of his guns at his house was unwise and subjected him to possible prosecution, when he removed his guns to T&T, he was not under any obligation to voucher them, and he would have been free to sell them, had he given the Division the prior notice required by Penal Law § 265.10 (7) and 38 RCNY § 265.10 (7). There is no evidence in the record that petitioner knew, as distinguished from fearing, that he would be required to voucher his guns, either at his home or at his local precinct. In addition, it is undisputed that petitioner informed Officer Levine of the location of his guns the morning after he received her letter, and immediately sought to comply with the requirement that he bring the guns to his local precinct. Accordingly, Director Prasso's statement, that petitioner sought to evade a requirement, is entirely irrational.

In view of this discussion, the court need not address

petitioner's argument that revocation was a disproportionately harsh penalty.

Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is granted, and the determination revoking petitioner Albert S. Koenig's premises residence license no. 10050573 and his rifle/shotgun license no. 6716765 is annulled, said licenses are restored, and the matter is remitted to the New York City Police Department License Division for such action as is appropriate consistent with this decision.

This constitutes the decision, order and judgment of the court.

Dated: September 4, 2007

ENTER:



J.S.C.
JANE S. SOLOMON

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)