

Matter of Leto v Mulvey

2008 NY Slip Op 32634(U)

September 16, 2008

Supreme Court, Nassau County

Docket Number: 7560-08

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

In the Matter of the Application of
JOHN A. LETO.

TRIAL/IAS, PART 31
NASSAU COUNTY

Petitioner.

- against -

Sequence No.: 001
Index No.: 007560/08
XXX

LAWRENCE W. MULVEY, COMMISSIONER OF
THE NASSAU COUNTY POLICE DEPARTMENT.

Respondents.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Petition and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	

The petitioner brings this Article 78 proceeding for an order directing the Court to annul the Nassau County Police Department's (NCPD) decision to revoke the petitioner's pistol license and the reinstatement of the pistol license.

Petitioner John Leto was issued a Nassau County Pistol License on July 14, 2004. Prior thereto, the petitioner has held a pistol license in other counties in New York. Due to a series of altercations with a former girlfriend and complaints made by her the petitioner was arrested, an order of protection issued and his license suspended.

The following facts are set forth in the Nassau County Police Department Crime Report-PDCN85ASJ-204CR0091107 prepared on November 7, 2004 and introduced into evidence at the revocation hearing that resulted in the NCPD revoking the pistol license. On November 6, 2004, petitioner observed his ex-girlfriend Donna Composto operating a motor vehicle while he was driving on Washington Boulevard in Flower Hill, New York. Petitioner followed her and repeatedly pulled in front of her and applied the brakes in order to cut Ms. Composto off. During the incident petitioner also called Ms. Composto on her cellular phone, calling her a "whore" and worse. After Ms. Composto arrived at the Sands Point Preserve to

attend a charity event, petitioner exited his vehicle and grabbed Ms. Composto by the arm, stating, "get the fuck over here bitch, you're not going in there." Approximately one hour later, petitioner entered the catering hall wearing a suit jacket and tie and approached Ms. Composto, telling her to come with him into the back room. After she refused, petitioner stated, "get your fucking ass up from this table and come with me or you'll be sorry." At approximately 11:45 p.m. Ms. Composto went out to her car where she was again confronted by petitioner. Petitioner approached Ms. Composto and displayed a silver handgun, stating "I'm going to make you suffer, the way you made me suffer." Ms. Composto, fearing for her safety, ran into her car and drove away. In response to the November 6, 2004 incident, Ms. Composto complained to the NCPD. Petitioner was arrested on November 9, 2004 for second degree menacing and second degree reckless endangerment. In addition, Ms. Composto obtained a judicial order of protection against petitioner as a result of petitioner's conduct on November 6, 2004, which required that petitioner stay away from Ms. Composto and not contact her directly or indirectly.

As a result of petitioner's November 9, 2004 arrest, his pistol license was suspended the following day pending an investigation of the events underlying the arrest. Ms. Composto also charged that despite the outstanding order of protection which required the petitioner to stay away from her, he followed her into two different restaurants on March 5, 2005. In the first restaurant petitioner confronted Ms. Composto in violation of the order of protection, approached Ms. Composto, called her names, and proceeded to seat himself in close proximity to her (Hearing Transcript at 10:14; Arrest Notification of Licensee). Ms. Composto, intimidated by petitioner's actions, left the restaurant with her friends and relocated to a second restaurant. Once again in violation of the order of protection, petitioner followed Ms. Composto and seated himself in close proximity to her, staring at her in an intimidating manner and giving her the middle finger (see, Suffolk County Arrest Data Display). As a result of his conduct on March 5, 2005, petitioner was arrested by both Nassau and Suffolk County Police for second degree criminal contempt.

It is not refuted that all criminal charges were dismissed against the petitioner due to Ms. Composto's refusal to appear in Court.

Petitioner's pistol license was revoked on March 9, 2007 by the Nassau County Police Department. Petitioner challenged the NCPD's determination in a Pistol License Hearing ("Hearing") held on October 31, 2007. At the hearing, Police Officer Paul Cappy recited the facts of petitioner's November 9, 2004 and March 5, 2005 arrests on the record and recommended revocation of petitioner's license. Petitioner denied any wrongdoing and offered into evidence a letter from Ms. Composto recanting her prior accusation that the petitioner displayed a firearm on the evening of November 6, 2004 and expressing her desire that petitioner's license be reinstated.

The possession of a handgun license is a privilege rather than a right. Sewell v. City of New York, 182 A.D.2d 469; Matter of Caruso v. Ward, 160 A.D.2d 540. While a New York handgun permit is a privilege and may be revoked at any time, the Nassau County Police

Commissioner must act rationally, and free from arbitrariness and capriciousness. Hayden v. Suffolk County Police Department, 143 A.D.2d 752; Pacicca v. Allesandro, 19 A.D.3d 500; Shapiro v. New York City Police Department, 157 Misc.2d 28.

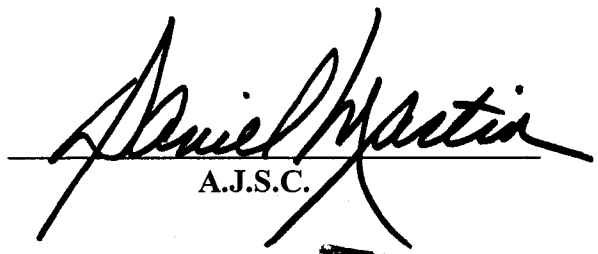
The thrust of the petitioner's argument is that the respondent should have given little or no weight to Ms. Composto's initial allegations made to the police which resulted in the petitioner's arrest and in her obtaining a judicial order of protection and accept her subsequent recantation as set forth in the letter she submitted to the Hearing Officer with a jurat accompanying her signature. Petitioner asserts he has an unblemished record except for the within altercation and needs a pistol license in his employment as a private investigator.

Petitioner's reliance on Schneider v. Mulvey, 2007 NY Misc Lexis 8574 (Sup. Ct. Nassau County December 5, 2005, Justice Lally) is misplaced. In Schneider, *supra*, the Court vacated the NCPD's revocation of a petitioner's pistol license due to the petitioner's inability to cross examine witnesses at his pistol license hearing. The facts in the within action and Schneider, *supra*, are quite different. In Schneider, *supra*, the Hearing Officer arbitrarily and without reason prohibited any cross-examination, even of the respondent's witnesses who were present at the hearing. In Schneider, *supra*, the petitioner wanted to subpoena the officer involved in the incident that led to the revocation of the pistol permit. In Justice Lally's well-reasoned opinion in Schneider, *supra*, the Court stated that "the petitioner should have an effective opportunity to defend by confronting adverse witnesses. These rights are important in cases. . . where the petitioner challenges the proposed revocation as resting on incorrect or misleading factual allegations made by a police officer." In the within action it is not the police officer, but rather Ms. Composto who made the "factual allegations" that led to the petitioner's arrest, and the issuance of the order of protection. Here, the petitioner was not denied the right to confront and cross-examine Mr. Leto's chief proponent at the hearing, to wit: Ms. Composto. A police officer testified at the hearing that he did have a telephone conversation with Ms. Composto and she showed no objections to have the license returned (Hearing Transcript pg. 19, lines 6-10). Petitioner stated at the hearing that Ms. Composto "would have been here, yet had informed me she would be out of town on business that day." Mr. Leto had every opportunity to subpoena Ms. Composto or seek an adjournment so that Ms. Composto would be available to appear.

There is no basis to disturb the Hearing Officer's rejection of the letter sent by Ms. Composto with a jurat next to her signature in which she recanted her earlier statements. In Seaman v. Cocomma, 281 A.D.2d 824, the petitioner's father filed a felony complaint charging the petitioner with assault in the second degree and a family offense petition, the latter of which resulted in a temporary order of protection. The father subsequently withdrew the family offense petition and the criminal charges were dismissed on the motion of the District Attorney. At the revocation hearing he testified that he "accidentally walked into a stick that petitioner had tossed into the air." The Court found there was no basis to disturb respondent's rejection of the oral testimony of petitioner's father at the hearing portraying the altercation "as much more benign than depicted in his sworn statements at the time of the altercation" (Seaman, *supra*, at p. 825).

This Court finds that the respondent's determination to revoke the pistol license was rational and neither arbitrary nor capricious.

So Ordered.


A.J.S.C.

Dated: September 16, 2008

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