

**Matter of Vasiliou v Kelly**

2009 NY Slip Op 31201(U)

May 29, 2009

Supreme Court, New York County

Docket Number: 102820/2009

Judge: Carol R. Edmead

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

PRESENT: \_\_\_\_\_

PART 35

Justice

Vasiliou, G

INDEX NO. 102820/09

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

- v -

MOTION SEQ. NO. 01

Raymond Kelly

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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

The instant application is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of petitioner Georgios Vasiliou for an order and judgment (1) compelling and directing respondent Raymond Kelly to grant petitioner a simple home premise handgun license based upon the grounds that the denial of this home possession handgun license is in direct conflict with the United States Supreme Court's decision in *District of Columbia, et al., v Dick Anthony Heller*, 554 U.S. \_\_\_\_\_, 128 S.Ct. 2783 (2008); and (2) compelling and directing respondent to grant petitioner a simple home possession handgun license based upon the grounds that with the decision by the United States Supreme Court, *District of Columbia, et al., v Dick Anthony Heller*, 554 U.S. \_\_\_\_\_, 128 S.Ct. 2783 (2008), that the longstanding New York State notion that owning a handgun under a license is a "privilege," has effectively changed. Since the *Heller* case *supra*, has made owning a handgun in one's home for self protection a "right," petitioner is now legally entitled to the handgun license sought here (one

Dated: \_\_\_\_\_

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):

PAPERS NUMBERED  
**FILED**  
JUN 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

which is ONLY a home premise license, and not one for concealed carry on one's person); alternatively (3) for an order of remand by this court directing the respondent to hold a hearing on the issue of the reason for denial of this license, with leave for petitioner to restore the matter to this Court's calendar in the event that the respondent maintains its position of denial *vis-a-vis* this simple home possession handgun license, **is denied in its entirety, and the instant Petition is dismissed;** and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

**FILED**  
JUN 02 2009  
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NEW YORK

Dated 5/29/09

ENTER: [Signature] J.S.C.  
**HON. CAROL EDMEAD**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_ X  
In the Matter of the Denial of the Premises  
Pistol License of

GEORGIOS VASILIOU,

Petitioner,

Index No. 102820/2009

**DECISION/ORDER**

For a Judgment under Article 78 of the  
Civil Practice Law and Rules Granting  
Petitioner's Home Possession Handgun  
License,

-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,

Respondent.

\_\_\_\_\_ X  
EDMEAD, J.S.C.

**FILED**  
JUN 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**MEMORANDUM DECISION**

Petitioner Georgios Vasiliou ("petitioner") moves for an order and judgment (1) compelling and directing respondent Raymond Kelly ("respondent") to grant petitioner a simple home premise handgun license based upon the grounds that the denial of this home possession handgun license is in direct conflict with the United States Supreme Court's decision in *District of Columbia, et al., v Dick Anthony Heller*, 554 U.S. \_\_\_\_\_, 128 S.Ct. 2783 (2008); and (2) compelling and directing respondent to grant petitioner a simple home possession handgun license based upon the grounds that with the decision by the United States Supreme Court, *District of Columbia, et al., v Dick Anthony Heller*, 554 U.S. \_\_\_\_\_, 128 S.Ct. 2783 (2008), that the longstanding New York State notion that owning a handgun under a license is a "privilege,"

has effectively changed. Since the *Heller* case *supra*, has made owning a handgun in one's home for self protection a "right," petitioner is now legally entitled to the handgun license sought here (one which is ONLY a home premise license, and not one for concealed carry on one's person); alternatively (3) for an order of remand by this court directing the respondent to hold a hearing on the issue of the reason for denial of this license, with leave for petitioner to restore the matter to this Court's calendar in the event that the respondent maintains its position of denial *vis-a-vis* this simple home possession handgun license.

#### *Background*

Petitioner is a 43 year old man who owns an automobile sales company. Petitioner has no non-criminal convictions on his record . Petitioner has no history of mental illness whatsoever. He has never been institutionalized for any reason, and he has not been treated by a psychiatrist.

On December 24, 2003, the police arrested petitioner for assaulting a traffic enforcement agent, for obstructing governmental administration, and harassment. Upon being notified of the arrest by the New York State Division of Criminal Justice Services ("DCJS"), the NYPD's License Division initiated an investigation. On January 21, 2004, the License Division sent petitioner a letter stating that his premises residence handgun license had been suspended because of his arrest in December 2003. The letter directed petitioner to surrender his firearms and return his handgun license. In addition, the letter directed petitioner to submit a notarized statement detailing the circumstances of the arrest and to contact the investigator assigned to his case. Though petitioner surrendered his handguns, he never submitted a notarized statement about his arrest. Shortly after the License Division sent the suspension letter, petitioner's attorney did submit a letter stating that petitioner would send a notarized statement about his arrest once

his criminal case was concluded; however, the License Division never received a statement from petitioner about his arrest. Because petitioner had neither informed the License Division of his arrest nor submitted the requested statement about his arrest, the License Division revoked his handgun license. Initially, the case investigator had recommended a one-year license suspension, but, upon reviewing the case, the investigator's Commanding Officer overruled the recommendation. The Commanding Officer found that petitioner's violations were sufficiently serious to warrant revocation of his handgun license. Petitioner received a letter informing him that his handgun license had been revoked on or about December 1, 2004.

At petitioner's request, a hearing was held on July 7, 2005, to review the revocation of his handgun license. Hearing Officer Margaret L. Shields ("H.O. Shields") conducted the hearing and petitioner was self-represented. Having confirmed that petitioner had committed two separate regulatory violations, H.O. Shields then questioned petitioner about his arrest. Petitioner testified that on December 24, 2003, he parked in a no standing zone in order to stop at a bakery in Queens. While petitioner was in the bakery, Traffic Enforcement Agent Khalilah F. Morris ("Agent Morris"), who testified at the hearing, and her partner stopped to issue petitioner a traffic violation because he was illegally parked. Upon seeing Agent Morris, petitioner testified that he ran out of the bakery and started explaining the situation to Agent Morris. However, according to petitioner, Agent Morris would not let him move the car and asked him not to enter the vehicle until she was done issuing the ticket. At this point, petitioner testified that he went around Agent Morris and forcibly let himself into the car. As petitioner let himself into the car, Agent Morris was pushed, which caused her to fall and injure her back. Indeed petitioner admitted that the car door may have shoved Agent Morris. Once in the car, petitioner alleges that Agent Morris started

yelling at him, and that, as a result, he stepped out of the car and began yelling and cursing at Agent Morris. Witnessing this event, Agent Morris's partner radioed the police for assistance. Agent Morris testified that, while they were waiting for the police, petitioner continued yelling at her and using racial slurs. When the police arrived, Agent Morris told the police what had occurred, and the police arrested petitioner for assaulting a traffic enforcement agent, obstructing governmental administration, and harassment. After the hearing, petitioner sent H.D. Shields an affidavit contesting Agent Morris's testimony and an affidavit from the alleged passenger of the car. For reasons petitioner never explained, the affidavit from the alleged passenger was in Greek and not translated. Based on petitioner's regulatory violations and blatant disregard of law enforcement officials, H.D. Shields recommended that the revocation of petitioner's handgun license be upheld.

Concerning the regulatory violations, H.O. Shields found that petitioner, as a handgun licensee had an obligation to inform the License Division of any arrest. had an obligation to cooperate with investigations conducted by the Division. and had an obligation to familiarize himself with the regulations governing the possession of handguns. H.O. Shields found that petitioner's admissions and the record established petitioner violated all three obligations. H.O. Shields found that petitioner's arrest showed a clear contempt towards law enforcement officials. Based on petitioner's admission that he called Agent Morris "a fucking bitch. piece of shit." HO. Shields did not find credible petitioner's assertions that he is a respectful individual and that he did not yell racial insults at Agent Morris. Furthermore. H.O. Shields did not find credible petitioner's assertions that numerous witnesses could corroborate his version of the facts. H.O. Shields noted that petitioner had not brought to the hearing a single one of these alleged

witnesses and that the only evidence petitioner submitted was an affidavit in Greek. Therefore, not only did H.O. Shields conclude that petitioner was not credible but that he gave false and misleading testimony. After reviewing the case, the License Division adopted H.O. Shields' recommendation and sent petitioner a final determination, revoking his handgun license, on or about August 30, 2006.

Approximately two years after the hearing, petitioner applied for a new premises residence handgun license. The application was assigned to Investigator Scott who met with petitioner on May 14, 2008, to discuss the application. After the meeting, Investigator Scott performed a background check and reviewed the documents petitioner had submitted. The investigation revealed his 2003 arrest and the subsequent hearing H.O. Shields conducted. Based on the circumstances of petitioner's 2003 arrest and his regulatory violations, the License Division denied petitioner's application for a handgun license. Initially, Investigator Scott recommended approving petitioner's application and prepared a notice of approval; however, the recommendation was not adopted. Investigator Scott's supervisor found that petitioner's conduct with Agent Morris and his regulatory violations established that petitioner did not have the requisite good moral character to possess firearms.

On or about October 11, 2008, petitioner appealed the denial of his handgun license application. As a result, the Director of the License Division reviewed petitioner's application and the denial. Based on the review, the Director concluded that petitioner indeed did not have the adequate moral character necessary to possess a handgun. The Director found that petitioner's failure to notify the License Division of his arrest in 2003, his failure to submit the requested notarized statement about his arrest, his false and misleading testimony during the hearing, and

his unacceptable conduct towards Agent Morris demonstrated a clear lack of character and fitness to possess a handgun. Petitioner was notified that the denial of his application had been upheld on or about October 28, 2008.

By Order to Show Cause and a Verified Petition dated February 26, 2009, petitioner commenced the instant Article 78 proceeding.

*Petitioner's Contentions*

The Second Amendment of the United States Constitution has been interpreted by the United States Supreme Court to grant an individual right to "keep and bear arms," rendering New York State's long entrenched notion of gun ownership being a "privilege and not a right" obsolete.

Although the licensing issue was never addressed in the *Heller* decision, the Court opined that if an applicant applies for a license and is not insane or a felon said license should issue.

Petitioner herein in no way objects to the firearms "licensing requirement" within New York State. Petitioner does, however, assert that he is legally qualified for the issuance of a license for home possession of a handgun based upon his Second Amendment "right," as respondent's actions are in direct conflict with the aforementioned constitutional amendment.

*Respondent's Opposition*

Contrary to petitioner's assertions, the *Heller* decision did not curtail New York State's authority to regulate firearms. In the Verified Petition and Affirmation in Support, petitioner relies on *Heller* to argue that the denial of his application for a handgun license violated his Second Amendment rights. Petitioner's arguments are without merit as the Second Amendment does not apply to the States and the Court in *Heller* specifically held that an individual does not

[\* 9 ]

have an unfettered right to keep and bear arms. Post-*Heller*, the NYPD's authority to deny handgun licenses remains unimpeded and New York State's judicial precedent upholding this authority remains valid.

And, petitioner's argument that, based on *Heller*, he is allowed to a premises residence handgun license because he is not a felon or mentally ill is without merit. Contrary to petitioner's argument, the Court in *Heller* did not limit permissible restrictions on the possession of firearms to felons and the mentally ill. In footnote 26, Justice Scalia recognized that there are other presumptively lawful bases for denying a person's right to possess a handgun. However, petitioner wholly ignores this footnote. Therefore, New York State's and City's requirement that petitioner have good moral character remains a valid restriction post-*Heller*.

#### Analysis

CPLR 7803 states that the court review of a determination of an agency, such as License Division, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1<sup>st</sup> Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1<sup>st</sup> Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1<sup>st</sup> Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988] ). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the

License Division's determination (see *Howard v Wyman*, 28 N.Y.2d 434 [1971] ). Where the administrative interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (see *Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1<sup>st</sup> Dept.], aff'd 66 N.Y.2d 1032 [1985] ).

It has been longstanding in New York State that the New York Penal Law, Article 4, and the New York City Administration Code, Section 10-131, authorize the NYPD to grant licenses for keeping and carrying pistols.

Under Penal Law § 400.00, the License Division has broad discretion to grant or revoke licenses, and the court has been required to give great weight to the decision in this regard, particularly when the public safety is at issue, and the court lacks the expertise required for such decision. The standard has been that even if the court could have reached a contrary conclusion if the case were actually brought before it for a determination, the court may not overturn the License Division determination without finding that the decision lacks a rational basis.

It has been consistently held that the issuance of license to carry gun is a privilege, not a right. *In re Williams v Bratton*, 238 A.D.2d 269, 656 N.Y.S.2d 626 (1st Dept.1997). NYPD may well consider a licensee's behavior and suspend or revoke a license if the licensee fails in any material way to comply with the regulations. RCNY Title 38, § 5-22 clearly provides "licensees shall cooperate with all reasonable requests by the Police Department" for information and assistance in this matter.

The issue herein is whether *Heller* has modified the above-outlined longstanding standard.

The issuance of a pistol permit for self-protection in one's home has recently been held by the U.S. Supreme Court to be a right protected by the Second Amendment of the United States Constitution: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." (*District of Columbia v Heller*, 554 US -, -, 128 S Ct 2783, 2799 [2008].) However, in so holding the Supreme Court also recognized that the individual right to bear arms is limited: "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.." (*Heller*, 554 US at -, 128 S Ct at 2816 [citations omitted].)

This court rejects petitioner's contention that the denial of his request for a possession handgun violates his rights under the Second Amendment of the U.S. Constitution. Petitioner's reliance on *District of Columbia v. Heller* (--- U.S. ----, 128 S Ct 2783 [2008] ) is misplaced. While the United States Supreme Court concluded in that case that the Second Amendment confers a constitutionally protected individual right to keep and bear arms as a means of self-defense within the home, it also held that the right conferred by the Second Amendment is not absolute and may be limited by reasonable governmental restrictions ( *see District of Columbia v Heller*, 128 S Ct at 2816), and that the Second Amendment is neither applicable to nor binding upon the States ( *Heller, supra*, at 2812-13). The Court then chose not to address the validity of the District of Columbia's licensing requirement ( *supra*, at 2819) and hypothesized that "Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the

District must permit him to register his handgun and must issue him a license to carry it in the home.” ( *supra*, at 2822)

Finally, the Second Circuit has held that the Second Amendment applies only to limitations the federal government seeks to impose on rights such as the right to keep and bear arms. *Maloney v Cuomo*, 554 F3d 56 (2d Cir. 2009)

This court finds that *Heller* has not altered the longstanding rule that the 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). And, the rule continues that judicial review of a discretionary administrative determination is limited to deciding whether the agency's actions were arbitrary and capricious (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 277). 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 (*supra*, at 278).

#### Conclusion

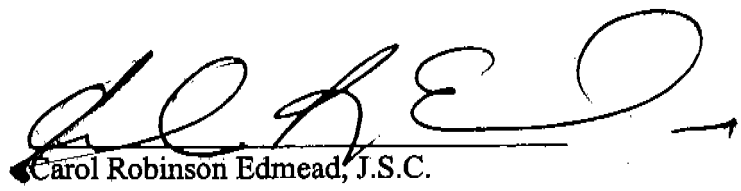
Based on the foregoing, it is hereby

ORDERED that the application of petitioner Georgios Vasiliou for an order and judgment (1) compelling and directing respondent Raymond Kelly to grant petitioner a simple home premise handgun license based upon the grounds that the denial of this home possession handgun license is in direct conflict with the United States Supreme Court's decision in *District of Columbia, et al., v Dick Anthony Heller*, 554 U.S. \_\_\_\_\_, 128 S.Ct. 2783 (2008); and (2) compelling and directing respondent to grant petitioner a simple home possession handgun license based upon the grounds that with the decision by the United States Supreme Court,

*District of Columbia, et al., v Dick Anthony Heller*, 554 U.S. \_\_\_\_\_, 128 S.Ct. 2783 (2008), that the longstanding New York State notion that owning a handgun under a license is a "privilege," has effectively changed. Since the *Heller* case *supra*, has made owning a handgun in one's home for self protection a "right," petitioner is now legally entitled to the handgun license sought here (one which is ONLY a home premise license, and not one for concealed carry on one's person); alternatively (3) for an order of remand by this court directing the respondent to hold a hearing on the issue of the reason for denial of this license, with leave for petitioner to restore the matter to this Court's calendar in the event that the respondent maintains its position of denial *vis-a-vis* this simple home possession handgun license, **is denied in its entirety, and the Instant Petition is dismissed**; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: May 29, 2009



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDM EAD**

**FILED**  
 JUN 02 2009  
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