

Thomas v O'Neill

2019 NY Slip Op 31017(U)

April 9, 2019

Supreme Court, New York County

Docket Number: 151785/2018

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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Application of Devon Thomas,

Petitioner,

Index No.: 151785/2018

For an Order and Judgment Pursuant to CPLR
Article 78

-against-

Mot. Seq. No. 001

JAMES P. O'NEILL, POLICE COMMISSIONER OF
THE CITY OF NEW YORK, JONATHAN DAVID,
DIRECTOR OF THE NEW YORK CITY POLICE
DEPARTMENT LICENSE DIVISION, NEW YORK
CITY POLICE DEPARTMENT, and THE NEW YORK
CITY POLICE DEPARTMENT LICENSE DIVISION,

Respondents,

-----X
MELISSA A. CRANE, J.S.C.:

In this Article 78 proceeding petitioner, Devon Thomas, asks this Court to overturn the respondents' determination that revoked petitioner's carry-guard and gun custodian handgun licenses. Petitioner claims that respondents' decision is: (1) arbitrary and capricious; (2) an abuse of discretion that violated petitioner's constitutional right to bear arms; and (3) an error of law, not based in fact. Petitioner also claims that substantial evidence does not support the NYPD's determination to revoke the license.

Facts

Petitioner resides in Elmont, New York. For the past seventeen years he has worked at the Taino Towers as a security guard. Taino Towers is a 4-building housing complex located between 2nd and 3rd Avenues and 122nd and 123rd Streets in Manhattan. At the License Division hearing before Administrative Law Judge Margaret Shields, Esq ("ALJ Shields"), petitioner testified that he carries a firearm for his safety: "I'm like public enemy number one. So I'm

walking most of the time, and I'm by myself. The only reason I had my firearm was for my safety" (respondent's memo of law, exh J at 60).

The License Board issued petitioner a handgun license in 1995. In 2013, petitioner applied for a carry-guard and gun custodian license. The License Division approved petitioner's gun custodian license, but denied petitioner a carry-guard license based on his prior arrest record. Petitioner has three prior arrests from 1999, 2008, and 2011, that are sealed. He received a money judgment from the City of New York stemming from his 2008 arrest. Despite providing conflicting testimony at his hearing, petitioner also has been the subject of an Order of Protection that resulted from an April 2011 domestic incident involving his wife.

Petitioner appealed the denial of a carry-guard license and prevailed. In 2016, petitioner applied to renew his carry-guard and gun custodian licenses. The License Division approved petitioner's application at first. But the Division later revoked petitioner's licenses. It based its determination on: (1) an incident in April 2016 where petitioner wore his handgun outside of his clothes in plain view; (2) petitioner's failure to notify the License Division that he had received a criminal court summons; (3) an Order of Protection filed against the Petitioner; and (4) petitioner's prior history of arrests and incidents.

Specifically, on April 21, 2016, petitioner attended a retirement party at the 25th Precinct. He wore his firearm outside his clothing. Petitioner stated, during a personal interview at the License Division, that he had gone to the 25th Precinct to say goodbye to Deputy Inspector Harnisch and did not think he had done something wrong.

The License Division had accused petitioner of the same violation, two years prior. On June 20, 2014, petitioner displayed his firearm during a political rally. Officers stated that petitioner wore a holstered firearm outside his clothing, that consisted of cargo pants and a tee-

shirt. According to the NYPD, petitioner was not in uniform or wearing anything that could indicate his employment at Taino Towers.

Petitioner appealed respondent's decision to revoke his two licenses and sought a hearing. The License Division held a hearing in February 2017. At the hearing, petitioner and NYPD Detective Cook both appeared as witnesses and testified. ALJ Shields issued a decision in October 2017. ALJ shields recommended the revocation of petitioner's gun license. She noted that petitioner routinely carried his firearm in public and displayed outside his clothing, thus exceeding limitations of his restricted concealed carry-guard handgun licenses. ALJ Shields also found that petitioner not credible. In fact, ALJ Shields concluded that petitioner provided false testimony about a 2011 Order of Protection against him.

Discussion

Pursuant to Penal Law § 400.00 and Administrative Code § 10-131, the NYPD Commissioner has broad discretion to grant or revoke pistol license, and to regulate the possession of guns within New York City (Penal Law § 400[11]). Specifically, § 400.00(1) states that "applicants for firearms must be of good moral character and there must be no good cause for the denial of such application" (Penal Law § 400[1]). To maintain a firearm in New York City, in addition to good moral character, license holders must demonstrate that they can safely handle their firearms in accordance with the terms and restrictions of their licenses (38 RCNY §§ 5-02, 5-10). A carry-guard permit restricts the licensee to the days and hours that the licensee is actually engaged in employment or when traveling from his/her residence to employment or from employment to residence (38 RCNY §5-24[b]). The NYPD should strictly interpret these restrictions and violations result in the immediate suspension of the license (*id.*).

CPLR 7803 provides for very limited judicial review of administrative actions. The scope of judicial review in an Article 78 proceeding is limited to the issue of whether the administrative action is rationally based (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-31 [1974]). A court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and capricious or an abuse of discretion (*id.* at 232). If an agency conducts a hearing, the standard for review for the Article 78 proceeding is whether substantial evidence supported the agency's determination (CPLR 7803). Substantial evidence is more than "bare, surmise, conjecture, speculation or rumor" but "less than a preponderance of evidence" (*300 Gramatan Avenue Assocs v State Div of Human Rights*, 45 NY2d 176, 180 [1978]).

The License Division based its determination to revoke petitioner's handgun license on: "(1) petitioner's chronic disregard for the limitations of his Restricted Concealed Carry Guard handgun license; (2) petitioner's failure to inform the License Division that he was the subject of an Order of Protection; (3) petitioner's failure to immediately surrender his firearms after the License Division issued a license suspension notice; and (4) the false testimony repeatedly provided by petitioner at his Administrative Hearing, which reflected poorly on his moral character" (*see* respondents' memo of law by Darren Trotter, p. 3). ALJ Shields declined to consider petitioner's sealed arrest history (the 1999, 2008, and 2011 arrests) (respondent's memo of law, exh K, p. 8, ¶ 8). Instead, ALJ Shields found that petitioner had given false testimony and lied about the 2011 Order of Protection that a court issued following an April 30, 2011 domestic incident involving petitioner's wife (respondent's memo of law, exh K, p. 8, ¶ 5, 6). This court cannot say that there is no rational relationship between petitioner's history of domestic violence, petitioner's attempt to conceal the Order of Protection, and petitioner's moral

character (*see Matter of Delgado v Kelly*, 127 AD3d 644, 644 [1st Dept 2015] [First Department affirmed lower court's finding that the NYPD's License Division had a rational basis to conclude that petitioner did not meet the good moral character standard where petitioner made an untruthful statement on his application regarding a domestic violence incident that involved him, his wife, and the police]).

The License Division also found, in its discretion and judgment, a disturbing pattern of how petitioner routinely exceeded the limitations of his restricted concealed carry-guard permit. The License Division determined that petitioner carries his firearm when not engaged in guard duties, carries his firearm exposed to public view (while out of uniform and wearing civilian clothes), and in the past has not vouchered his firearm when directed (respondent's memo of law, exh K, p. 8, ¶ 11). The record supports the License Division's finding that petitioner carried his firearm, whether actually engaged in guard duties at Taino Towers. Petitioner testified before the License Division that he carried his firearm to/from his workplace and the 25th Precinct for his personal protection (respondent's memo of law, exh J at 60).

The court has considered petitioner's constitutional claims. However, they do not override the police department's authority to evaluate a person's fitness and moral character to maintain a gun license. New York courts have upheld the constitutionality of New York City's licensing scheme under the Second Amendment (*see Knight v Bratton*, 48 Misc3d 536 [2015] [although the Second Amendment confers the right to bear arms, that right is not absolute and the government may reasonably restrict that right]; *see also, Allen v O'Neill*, 2019 WL 270127 [Sup Ct, New York County 2019] [Second Amendment right to bear arms does not overcome government's interest in maintaining public safety]). In this case, petitioner gave false testimony about a domestic violence incident, casting doubt on his character and fitness to possess a

firearm permit. "It is in the government's interest to keep guns away from people who have shown they cannot be trusted to obey the law..." (see *Caputo v Kelly*, 117 Ad3d 644, 645 [1st Dept 2014]).

Petitioner argues that the NYPD's consideration of the number of dismissed arrests rather than the quality, or the underlying facts, of those arrests in its determination whether to grant firearm license has a disparate impact on African Americans, including the petitioner. This disparate impact is undoubtedly true and the court is sympathetic to petitioner's argument. However, the License Division, in its most recent decision to revoke petitioner's firearm license explicitly stated that it had not considered the dismissed arrests. Instead the License Division focused its determination on a finding that petitioner provided false testimony about an Order of Protection (see *Matter of Delgado v Kelly*, discussion supra, 127 AD3d 644 [1st Dept 2015]).

Accordingly, it is

ORDERED that the court denies the Verified Petition. The Clerk is directed to enter judgment dismissing this Article 78 proceeding.

Dated: 4-9-2019

ENTER:



HON. MELISSA A. CRANE, J.S.C.
HON. MELISSA A. CRANE
J.S.C.