People v Brown
2022 NY Slip Op 32290(U)
July 15, 2022
Supreme Court, Bronx County
Docket Number: Ind. No. 71673-22
Judge: Ralph Fabrizio
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, PART TRP
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THE PEOPLE OF THE STATE OF NEW YORK

Decision and Order
Ind. No. 71673-22

-against-

DAVE BROWN,

Defendant
----------x
FABRIZIO, J.

On May 31, 2022, defendant filed an omnibus motion.[1] The motion includes an application "to dismiss all the weapons charges because New York's gun prohibition violates the U.S. Constitution's Second Amendment." The motion pre-dates the Supreme Court's ruling in New York State Rifle and Pistol Ass'n v. Bruen, __ U.S. __, 2022 U.S. LEXIS 3055 (June 23, 2022). Counsel's annexes two briefs filed in the Supreme Court as exhibits to the motion. One is the brief filed by the New York State Rifle and Pistol Association on behalf of two petitioners, requesting that the Court find a part of New York State's "carry permit" application unconstitutional. The other is an amicus brief jointly submitted by the NAACP Legal Defense and Education Fund ("LDF") and the National Urban League. That brief was filed in support of the respondents in Bruen, and asked the Supreme Court to find the New York carry permit licensing regulations constitutional.

The People responded to the motion after Bruen was decided. Their arguments in opposition to the application to dismiss this case on Second Amendment grounds reflect the holding and language in the decision, and other law. Since Bruen, New York State courts have received a flood of motions where defendants charged with Criminal Possession of a Weapon in the Second Degree, Penal Law 265.02(3), have sought to have their cases dismissed based on the allegation that their prosecution also violates the Second Amendment in light of Bruen. Based on the defense motion and the exhibits, and the People's response, this Court finds that the dismissal argument basically boils down to this: since the Supreme Court was asked to, and has now found, New York State's century-old law restricting licensed possession of publicly carried guns, in part, to those individuals who could demonstrate "proper cause" to be unconstitutionally burdensome, cases such as this in which a defendant is being prosecuted for carrying and possessing an unlicensed firearm in a public place must be

[1] This Court's rulings on other forms of relief sought in that omnibus motion will be addressed by this Court in a separate decision.

dismissed on the same constitutional grounds.[2] For the reasons stated below, the motion is denied.

According to the felony complaint as well as the evidence presented to the grand jury, on April 21, 2022, at about 9:36 p.m., defendant is alleged to have sold crack cocaine to an undercover police officer in the rear area of a building located at 695 East Tremont Avenue in Bronx County. When the back-up team moved in, defendant violently struggled with the officers. It is alleged that defendant carried a loaded and operable .9mm semi-automatic Smith and Wesson firearm secreted inside his waistband. Defendant is now charged by indictment with, inter alia, Criminal Sale of a Controlled Substance in the Third Degree¸ Penal Law 220.39(1), and Criminal Possession of Controlled Substance (With Intent to Sell) in the Third Degree, Penal Law 220.16(1). He is also charged with violating Penal Law 265.02(3), based on the allegation that he possessed a loaded and operable, and unlicensed, semi-automatic pistol outside of his home or place of business, as well as Penal Law 265.03(1)(b), based on the allegation that he knowingly and unlawfully possessed the same firearm "with intent to use it unlawfully against another." This branch of his omnibus motion deals with these gun charges.

In Bruen, the Supreme Court considered arguments raised on behalf of two petitioners, described as "two ordinary, law-abiding adult citizens," Id. at * 39, who had applied for a "carry permit," and whose requests had been denied. These individuals had already been issued licenses allowing them to possess firearms, but the licenses allowed the petitioners to possess their legal firearms only for hunting and/or recreational purposes. Id. at * 18 - 19. The question presented to the Court was whether the "denial of petitioners' [carry permit] license applications violated the Constitution." Id. at *20. The Court held that requiring these applicants to demonstrate "proper cause" in order to receive a license to possess and carry a firearm outside the home and not for hunting or recreational purposes placed an unconstitutional "burden" on these "law-abiding citizen's right to armed self-defense." Id. at *36, *90. The Court rejected New York appellate law which interpreted the licensing statute at issue as requiring "law-abiding, responsible citizens to 'demonstrate a special need for self-protection distinguishable from that of the general community' in order to carry arms in public." Id. at *89 (citing Klenosky v. N.Y. City Police Dep't.,75 A.D.2d 793, 793 (1st Dept.1980). The Court nonetheless cited the long-standing rule that "the right to bear commonly used arms in public" can still be "subject to certain reasonable, well-defined restrictions." Id. at *88. The Court reaffirmed its prior holding that "laws forbidding the carrying of firearms in sensitive places" would not violate the Second Amendment. Id. at *37 (citing District of Columbia v. Heller, 554 U.S. 570, 626 (2008)). Indeed, the Court once again held that there is no Second Amendment right "'to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'" Id. at *25 (citing

[2] To this Court's knowledge, this the first "completely submitted" motion filed in Bronx County Supreme Court requesting dismissal of a gun possession charge based on Bruen. Dozens more motions have been filed. There are currently more than 800 cases pending in Bronx County charging defendants with criminal possession of various firearms. Undoubtedly, there will be other decision based on arguments raised in potentially thousands of motions in cases state-wide.

Heller, 554 U.S. at 626). Moreover, states can prohibit "the carrying of 'dangerous and unusual weapons.'" Id. at * 25-26 (citing Heller, 554 U.S. at 627).

Here, defendant's continued prosecution for publicly carrying a concealed semi-automatic unlicensed handgun does not violate the Second Amendment. First, unlike the petitioners in Bruen, he has not demonstrated, let alone even alleged, that he ever applied for any type of handgun license, let alone a concealed public carry permit. As the People correctly point out, the Supreme Court did not invalidate all of New York's carry-permit licensing requirements. Indeed, the Court recognized that New York's requirements that even an applicant for a permit to possess a weapon in their home or place of business must demonstrate that they are "of good moral character," that they have "no history of mental illness" (a "red flag" law), and that they have no criminal history, conditions that raise no constitutional concerns. Id. at *15-16 (citing Penal Law § 400.00(1)(a) – (n)). Having "failed to apply for a gun license in New York, [defendant therefore] lacks standing" to challenge his prosecution based on the limited finding in Bruen that part of the licensing law that existed at the time of his arrest is unconstitutional. See United States v. Decastro, 682 F.3d 160, 164 (2d Cir 2012), cert. denied, 568 U.S. 1092 (2013); see also Johnson v. J.P.Morgan Chase Bank, N.A., 488 F. Supp.3d 144, 153 (SDNY 2020); Powell v. Tomkins, 926 F.Supp.2d 367, 384 (D. Mass. 2013), aff'd, 783 F.3d 332 (1st Cir. 2015); cert. denied, 577 U.S. 1219 (2016).

The briefs annexed as exhibits to the defense motion do not raise any arguments that could be read to support dismissing criminal cases based on a finding that the licensing statute at issue in Bruen should be found unconstitutional. The petitioners were not being prosecuted criminally, so their brief is about the narrow issue considered by the Supreme Court. (Defense motion, Exhibit A). The joint LDF/National Urban League brief actually appears to advocate against defendant's current application. In its statement of its interest in the outcome of the Bruen matter, LDF writes, "In cities and states across the country, handgun violence deprives many residents of an equal opportunity to live, much less to succeed. The effects of gun violence on Black Americans are particularly acute… ." The Urban League wrote that their "constituents live in the very communities that suffer from the cycle of gun violence and trauma. The National Urban League's work is directly impacted by gun violence and the flow of legal and illegal firearms through circulation." (Defense motion, Exhibit B). Defendant's point in citing to these exhibits in support of his motion to dismiss his criminal case is perplexing to say the least. This Court is puzzled about why they would have been considered relevant to a judge deciding this motion before Bruen

This Court thought that the inclusion of the LDF/National Urban League brief might have been a mistake. As defendant is represented by a public defender organization, this Court reviewed the amicus brief filed in the Bruen matter in support of the petitioner's argument on behalf of a number of public defender organizations. Supremecourt.gov/docketPDF/20-843. The brief raised constitutional challenges to all aspects of New York's gun licensing laws, including laws that would allow their clients to apply for a license to have a gun in their homes. These amici argued that the licensing laws led to unfair prosecutions of their clients for unlicensed gun possession, which is really what defendant argues is happening to him after Bruen. These amici asked the Supreme Court to rule that "New York's licensing regime is unconstitutional." Id. One

legal argument connected with a challenge to the Sullivan law was that the law was unconstitutional because it left the decision to grant a license to possess a gun in the home or concealed in a public place to the "discretion" of the police officers who review licensing applications. (citing Voisine v. United States, 136 S. Ct. 2272, 2291 (2016, Thomas, J. dissenting).Id.

The Supreme Court agreed with the arguments raised by the Bruen petitioners. Obviously, it rejected the arguments raised by the amicus LDF/National Urban League brief. While it agreed with the position of the public defender providers that the carry statute was unconstitutional, it did so on a narrow ground. The majority decision written by Justice Thomas did not invalidate New York's licensing regime. The Court did not hold that licensing of a firearm in New York was left to the whim or discretion of a police officer. Bruen did not disapprove of the requirement that individuals be trained in the proper use of firearms as a prerequisite to obtaining a carry permit. The Court said that "law-abiding, responsible citizens" who apply for a carry permit should not have to show "proper cause," as that term was interpreted by New York's courts, before having a license application approved. According to New York court interpretation, "proper cause" could not be found at all on a claim that the permit was being requested for mere self-defense purposes. This left no easy path for "law-abiding, responsible" individuals to obtain a carry permit for purposes of "ordinary self-defense needs." Bruen, at * 90. This did not leave room for discretion; it was a bright-line rule.

Thus, Bruen does not hold that this provision of New York's Sullivan law constituted a "prior restraint;" those words are not even in the decisions. This is not a situation like Staub v. City of Baxley, 355 US 313 (1958). There, the Supreme Court considered the constitutionality of the prosecution of a defendant who held a meeting in a private home in an attempt to organize a local union. Id. at 315-17. This was in violation of a city ordinance which required that an individual had to obtain a "permit" to "solicit" a person to join any "organization," including a "union." Id. at 314, n. 1. The Court recognized that the ordinance gave the mayor of the town the right to refuse to grant such a permit simply because the mayor did "not approve of the applicant or of the union." Id. at 322. The Court held that the permit ordinance was "without semblance of definitive standards or other controlling guides," and therefore permitted the mayor to act with "uncontrolled discretion." Id. For this reason, the Court found the criminal statute based on the ordinance to itself be unconstitutional as it was based on an unconstitutional "prior restraint" on the exercise of several First Amendment rights. Id. at 321. Of course, in New York, decisions of a reviewing police official to reject a gun licensing application is not the final word; the decision may be challenged and reviewed in an Article 78 proceeding. See Goldstein v. Brown, 189 A.D.2d 649 (1st Dept. 1993). Here, the Court did not invalidate all of New York's gun licensing statutes. The core of the licensing elements remain unchanged by this decision. And the right to prosecute an individual for possession of an unlicensed firearm remains as well.

There are other reasons this Court is of the opinion that Bruen cannot be read to require dismissal of this action charging defendant with unlicensed possession of a firearm in a public place. New York's Sullivan law, which required applicants to demonstrate "proper cause" to obtain a license to possess a gun in a public place, has not only been on the books in New York for well over a century, but it has also been

found constitutional by every court asked to rule on that issue prior to Bruen. Notably, less than a decade ago, the Supreme Court let stand a post-Heller Second Circuit decision finding New York's carry permit statute, including the proper cause requirement, to be constitutional. Kachalsky v. County of Westchester, 701 F.3d 81, 90 - 97 (2nd Cir. 2012), cert. denied, 569 U.S. 918 (2013). New York's Sullivan law continued to be recognized as constitutional under exhaustive Second Amendment analysis in many post-Heller cases prior to Bruen. See Libertarian Party v, Cuomo, 970 F.3d 106, 119-20 (2d Cir. 2020), cert. denied, 141 S. Ct. 2797 (2021); N. Y. State Rifle & Pistol Assn. v City of New York, 883 F.3d 45, 55-62 (2nd Cir. 2018), vacated by and remanded to lower court, 140 S. Ct. 1525 (2020). While the majority opinion in Bruen gave short shrift to New York's long-standing concern with regulating firearms as a way of curbing gun violence in holding the "proper cause" requirement of the licensing statute to be unconstitutional because it involved the use of a balancing test, the Court did not find that enforcement of Penal Law Article 265 in cases involving individuals who are charged with possession of an unlicensed firearm outside the home to be unconstitutional. The Supreme Court did not sweep away the "Safe Act" and all other parts of New York's criminal justice legislation aimed at severely punishing those who illegally possess weapons in these places. It did not magically de-criminalize the acts of individuals who chose to violate state law by arming themselves and carrying and concealing whatever firearms they wanted to conceal, whenever and wherever they wanted to do so, without bothering to apply for a license. As noted, the Supreme Court only found one part of the licensing statute violated the Second Amendment. The requirement for having a "license" to legally possess a gun in a public place in New York State remains the law. Therefore, possession of an unlicensed firearm remains a crime.

This Court believes there is no need to engage in the type of specific "case by case" analysis to determine whether this particular defendant might have satisfied all licensing conditions for a "carry permit" outside of the condemned "proper cause" requirement. Bruen is a case where the Court considered a situation where applicants for carry permits had already obtained licenses to possess firearms, but for restricted purposes. Here, defendant does not allege he ever applied for any type of gun license. New York's licensing statute does not and did not implicate a total ban on gun possession. There was no total ban on obtaining a license to possess a gun for self-defense purposes in one's home under the licensing regime. See People v. Nivar, 30 Misc.3d 952, 958 (Sup Ct. Bronx County 2011).

Some courts have found a type of case-by-case analysis to be appropriate in determining whether continuing prosecutions were viable against individuals charged with unlicensed possession of firearms in the home the wake of Heller. See Plummer v. United States, 983 A.2d 323 (D.C. Ct. of Appeals 2009). However, Heller involved a challenge to a statute that on its face instituted a "total ban" on an individual's ability to obtain a license to possess a firearm within the home "for self-defense, family defense, and property defense." Id. at 341. In Bruen, the Court recognized a state's right to have a total ban on possession of firearms in certain public areas, even when a person claims a Second Amendment right to possess a gun for "self-defense," where the public area is a "sensitive" location. Bruen, at * 37. The Court said that New York could not "effectively declare the island of Manhattan a 'sensitive place' simply because it is

crowded." Id. at *38 - *39. But the Court unequivocally recognized that New York, and other states, could prohibit a person from carrying a firearm in "'sensitive places such as schools and government buildings," as well as what the Court found to be historically justifiable locations such as "legislative assemblies, polling places, and courthouses." Id. at *37 (citations omitted). Federal Law codifies a host of common-sense restrictions on a person's ability to carry an unlicensed firearm in particular public locations. For example, it is a crime to knowingly possess an unlicensed gun obtained in the stream of interstate commerce within 1000 feet of a school building, see United States v. Guzman-Montanez, 756 F.3d 1, 10 (1st Cir 2014), and in post offices or in parking lots adjacent to post offices. See Bonidy v. United States Postal Serv., 790 F.3d 1121, 1123 (10th Cir 2015), cert. denied, 577 U.S. 1216 (2016); United States v. Dorosan, 2008 U.S. Dist. LEXIS 49628 (E.D. La., June 30, 2008). It is a federal crime to attempt to board an aircraft with a concealed weapon. See United States v. Lewis, 67 Fed. Appx. 435 (9th Cir), cert. denied, 540 U.S. 973 (2003). On the other hand, a "home" cannot be considered a "sensitive place" for Second Amendment purposes. Cf. Doe. v. Wilmington Housing Auth., 880 F. Supp. 2d 513, 531-32 (Del. Dist. Ct. 2012), rev'd in part, 568 Fed. Appx. 128 (2014).

In light of this nuanced, but important, distinction in the continued vitality of the constitutional rule that a "locational" restriction on a "carry permit" does not violate the Second Amendment, using a Plummer-like formula, this Court would not only have to determine whether defendant, charged with unlicensed gun possession outside the home, was the type of "law-abiding responsible citizen" who qualifies for any license under Bruen, but also determine whether there are public policy concerns connected with the place he is alleged to have possessed the gun. As noted, the two individuals in Bruen had already demonstrated that they met the "law-abiding, responsible citizen" requirement, because they had applied for and been granted licenses to possess firearms under Penal Law Article 400. And, in a similarly situated case, where a licensed New York citizen without a carry permit is charged with possession of a firearm in a public setting, and that person had applied for a carry permit and their application was rejected for failure to show "proper cause," it would appear that Bruen would dictate a colorable argument could be raised that a Penal Law 265.02(3) charge should be dismissed. For everyone else, including this defendant, it would be contradictory to find that a person who never applied for a license and violated existing law by arming themselves with a gun in a public places subject to constitutional "sensitive location" criteria to be either "responsible" or "law-abiding." The petitioners in Bruen did the right thing; they challenged the law, but never violated the Penal Law. The public policy and public safety consequences of dismissing this and perhaps all cases en masse where defendants have been charged with illegal possession of an unlicensed gun in public places is unwarranted, under any legal or historical analysis.

As Justice Alito noted in his concurring opinion, "No one apparently knows how many of the 400 million privately held guns are in the hands of criminals, but there can be little doubt that many muggers and rapists are armed and are undeterred by the Sullivan law." Bruen, at *93 - 94 (Alito, J. concurring). Based on its own experience in presiding over only a portion of the ever-increasing number of cases involving individuals charged with firing guns in unjustified and unjustifiable public locations, and

shooting, and sometimes killing all sorts of law-abiding individuals simply trying to live their lives in trying times, this Court concurs with the notion that the Sullivan law has been a poor deterrent. Granting defendant's application would be an invitation to disaster. Dismissal of these gun charges would only embolden others who, like defendant, allegedly choose to violate all our gun laws. It took more than a century for the Supreme Court to come to a consensus about the constitutionality of this part of the New York statute. They have now done so, and the decision must be respected. It also must be viewed for what it really represents. Bruen does not de-criminalize what has always been criminal and remains criminal – the carrying of concealed, unlicensed guns in public. Public policy demands that defendant's prosecution continue because he was on notice prior to his crime that the Sullivan law had been ruled constitutional, he chose to be undeterred by that formerly valid law, and therefore violated more than one law by not seeking a license to legally possess the semi-automatic pistol he is charged with possessing and choosing to carry anywhere he wanted to do so. In a way, based on Justice Alito's observation, Bruen requires, as New York and various amici argued, that citizens must be afforded an opportunity to obtain a license to carry a concealed weapon in non-sensitive public places for purposes of ordinary self-defense. Dismissing this case is not consistent with that view.

The "sensitive location" finding that would be required in this Court's opinion as the second component in a derivative Plummer analysis cannot be made in this case. Defendant alleges no facts to show that the location in which he is alleged to have possessed his gun was a place that would not be considered "sensitive" under the dicta in Bruen or under federal statutory location restrictions. This Court also believes that in this transition time after Bruen, a lower court judge should not opine about what other locations might be considered "sensitive." In Bruen, the Court declined to "comprehensively define 'sensitive places' in this case." Id. at *37-38. That is the type of restriction that is best left to legislative debate, rather than a ruling on a motion to dismiss.[3]

Thus, for all the legal reasons just stated, this Court denies the motion to dismiss the pending gun possession charges in this indictment.

As an alternative holding, this Court will address the People's fact-specific arguments that defendant not only fails to allege standing, but would also fail the "I have a right to possess this gun in a public place for self-defense without a license because of Bruen" claim. The standing question is actually more involved in defendant's case than just the failure to have alleged he applied for a carry permit. In his affirmation in support of the motion, he denies possessing the gun. Put simply, defendant wants this Court to dismiss the gun possession charges voted by the grand jury, based on an alleged deprivation of his Second Amendment right to carry a .9mm semi-automatic gun in a public place in the Bronx, based on sworn allegations of fact that he did not even

[3] This Court is able to take judicial notice of the fact that the location where defendant is charged with possessing this semi-automatic weapon in connection with his alleged drug-dealing business is located at the corner of East Tremont Avenue and Crotona Avenue. According to "Google Maps," there are three churches, a public school, and a day care center located within two blocks of this intersection.

possess that gun. This odd position is at itself at odds with defendant's claim that his prosecution violates any of his constitutional rights connected with the grand jury's finding that he should face trial on gun possession charges. For this fact-specific reason, the motion is denied.

Defendant also does not allege any facts supporting an argument that he would have been able to satisfy all aspects of the Sullivan law's licensing requirements, which in total require that he demonstrate he is a "law-abiding, responsible citizen." After all, defendant is charged with violating a number of laws and not just gun laws in this matter. He is alleged to have sold a narcotic drug. He is alleged to have engaged in a serious physical altercation with police officers who were doing their job and attempting to place him under arrest for that crime. In defining the type of "responsible" individual who qualifies under the Second Amendment for a carry permit, the Supreme Court chose to use the words "law-abiding." Those words should be read broadly. They did not chose to use the words "conviction-free." Moreover, as the People note, and the defendant's NYSID report confirms, defendant knows how to apply for a license. He has applied, on two occasions, for a "certificate" to become a security guard in New York State. The Court credits the People's representation that they have found no evidence that New York State granted either of those applications. In order to qualify to be a certified security guard, the applicant must, inter alia, demonstrate that they are "of good moral character and fitness." Gen. Bus. Law 89-h(6). If defendant could not clear that hurdle to get that certificate, this Court finds, based on the People's claims, that defendant would not have qualified for the issuance of any type of firearms license.

Finally, the facts alleged do not support any finding that defendant chose to arm himself for "ordinary self-defense" reasons. In Bruen, the majority of the Court accepted the petitioners' credible claims that their sole purpose in seeking the carry permits was for "ordinary self-defense" reasons. That finding is supported by the facts of that case. Bruen provided no guidance for other courts to determine whether any other person's decision to arm themselves could be unequivocally found to have been for an "ordinary self-defense" purpose. No matter what, this would require a credibility finding. Here, defendant does not even make that claim. If he had, this Court would not credit it. He is alleged to have armed himself at a time and location he is also alleged to have sold drugs. This indicates an intent to possess the gun for an unlawful, non-self-defense purpose: namely, to protect his criminal business. And, if the allegations are true, he did not choose to possess this gun for "ordinary self-defense" reasons in his own neighborhood. According to the defendant's statements to the CJA interviewer, he lives in Yonkers, and not the Bronx. This raises a kind of chicken-and-egg question; by allegedly carrying a gun into the Bronx and allegedly selling highly addictive narcotic drugs on Bronx streets, defendant created a dangerous situation that might require himself, and others, to act in self-defense. Defendant is alleged to have fought with police officers who identified themselves, and struggled with them while he was in knowing possession of a loaded and operable semi-automatic pistol in his waistband. This was not an act of justifiable "ordinary self-defense." Penal Law 35.27. The secreted loaded semi-automatic gun alleged to be in defendant's possession only heightened the danger these police officers faced. Accordingly, even if a Plummer-like analysis were required, this Court finds defendant would handily fail that test.

For all the aforementioned reasons, this Court denies the motion to dismiss the gun possession charges in this indictment based on an allegation that this defendant's continuing prosecution for those charges violates the Second Amendment.

This is the Decision and Order of the Court.

Hon. Ralph Fabrizio, JSC.

Dated: July 15, 2022