

To Be Argued By:
Dana Salazar, Esq.
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New York Supreme Court
Appellate Division - Third Department

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In the Matter of the Application of

IRVING GERARD,

Petitioner,

-against-

HON. RICHARD M. KOWEEK, as Columbia County Court Judge,

Respondent.

For a Judgment Pursuant to Article 78 of the CPLR

PETITIONER'S BRIEF

Case No.: 518078

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QUESTION PRESENTED

Whether the lifetime revocation of firearms license privileges referred to in Penal Law § 400.00 (1) (e) applies only to a person who has had a license revoked pursuant to the provisions of section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act. The County Court erroneously held that Penal Law § 400.00 (1) (e) extends the class of excludable applicants so broadly so as to include those individuals whose licenses were revoked for any reason, and not solely under one of the two enumerated statutes.

STATEMENT OF FACTS

Petitioner was a prior holder of pistol, dealer in firearms and gunsmith licenses in Columbia County [6, 18].¹ In 2002, Petitioner's licenses were suspended following allegations that he made comments about the use of a firearm to fellow graduate students [6, 18]. Subsequently, at a hearing that same year seeking to restore his pistol license, Petitioner testified that, during a particular "heated" work group meeting, he was upset and told members of his group that "you didn't think this upset me, but in reality, I was, you know, one step away from Smith & Wesson time" [6-7, 19]. *Gerard v Czajka*, 307 AD2d 633 (3d Dept 2003).

By Decision and Order dated January 7, 2003, the Hon. Paul Czajka found that Petitioner showed "extraordinarily poor judgment" in making the statements and concluded that there was "good cause for the permanent revocation of [petitioner's] licenses" [7, 17]. By Judgment entered July 24, 2003, this Court confirmed the revocation, concluding that "[the] decision to revoke petitioner's three firearms licenses

¹ All page references are to the Petitioner's Appendix.

was [not] an abuse of discretion or arbitrary and capricious” [19-20]. *Gerard*, 307 AD2d at 634.

In May 2013, Petitioner requested a decision from Judge Koweeck as to whether he was eligible to re-apply for a pistol permit given his prior revocation [7, 22-25]. Judge Koweeck responded that Petitioner was “free to submit a new application” subject to his “reading of Section 400.00 of the Penal Law, and controlling precedents pertaining thereto” [7, 21]. Petitioner subsequently submitted an application for a pistol permit, along with a cover letter dated July 2013 [7, 26-29].

By letter dated August 26, 2013, Judge Koweeck felt “compelled” to deny Petitioner’s application based on the “plain meaning” of N.Y. Penal Law § 400.00(1)(e) (“the determination”) [30-31]. Petitioner now challenges the determination pursuant to CPLR Article 78 [4-105].

ARGUMENT

Point I: Petitioner is Entitled to Re-Apply For a Pistol Permit

The determination should be annulled. It is based on a misinterpretation of N.Y. Penal Law § 400.00(1)(e). This is evidenced by the language of the statute, the legislative history, and decisions of other judges interpreting the statute in a contrary manner.

The New York Penal Law Section 400.00(1) lists exceptions to individuals who are eligible for licenses to carry, possess, repair and dispose of firearms. Subsection (e) states that no license shall be issued or renewed except for an applicant “who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to the provisions of section 530.14 of the criminal procedure law or section eight hundred

forty-two-a of the family court act” (emphasis added). This exception, however, is limited to the two sections enumerated, and is inapplicable to Petitioner, who has never had his license revoked or suspended or an ineligibility order issued pursuant to the provisions of section 530.14 of the N.Y. Criminal Procedure Law or section 842-a of the N.Y. Family Court Act.

A. The Plain Meaning of the Statute Allows Re-Application

It is hornbook law that a statute is to be interpreted by its plain meaning. *See* N.Y. Statutes §94. This is particularly true with respect to penal statutes, which “are to be strictly or narrowly construed,” N.Y. Statutes § 271(a), and “cannot be enlarged, so as to make penal what is not plainly written in the statute itself.” N.Y. Statutes § 276. Moreover, “[a] test as to whether words of a statute are sufficient and clear as to what is prohibited is whether a reasonable man subject to the statute would be informed of the nature of the offense prohibited and that which is required of him.” N.Y. Statutes § 271(d).

Here, an interpretation of the statute that would preclude issuance of a license to all individuals who had their licenses revoked would do exactly what is prohibited: it would extend the application of the exclusion beyond the two statutes enumerated and include what is not within the plain language of the statute. A reasonable person reading N.Y. Penal Law 400.00 would conclude that only revocations pursuant to the two enumerated statutes would preclude issuance of a license. Similarly, a reasonable person would expect that if the reference to revocation were to include revocations for all reasons, it would either (1) say so clearly and unequivocally or (2) separate the two provisions into two subsections, with the first excluding people who had had their

licenses revoked, and the second excluding those who had their licenses suspended or subject to an ineligibility order under the two enumerated statutes. The statute, however, does neither. Instead, it excludes only those individuals who have had their licenses revoked under the two enumerated statutes. Neither statute formed the basis for the revocation of Petitioner's licenses by Judge Czajka [143-326].

B. The Legislative History Supports the Plain Meaning

The legislative history also confirms Petitioner's position. The subject language at issue was first added in 1996. At that time, Penal Law § 400.00 (1), as amended by chapter 498 of the laws of 1993, was amended (L. 1996, c. 644) to read as follows:

"No license shall be issued or renewed except for an applicant (a) of good moral character; (b) who has not been convicted anywhere of a felony or a serious offense; (c) who has stated whether he has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; [A] (D) WHO HAS NOT HAD A LICENSE REVOKED OR WHO IS NOT UNDER A SUSPENSION OR INELIGIBILITY ORDER ISSUED PURSUANT TO THE PROVISIONS OF SECTION 530.14 OF THE CRIMINAL PROCEDURE LAW OR SECTION EIGHT HUNDRED FORTY-TWO-A OF THE FAMILY COURT ACT; <A] and [D] (d) <D] [A] (E) <A] concerning whom no good cause exists for the denial of the license" [37-38] (amendments emphasized).

In addition, N.Y. Penal Law § 400.00(11), concerning revocation, was also amended at that same time as follows:

"License: revocation [A] AND SUSPENSION <A]. The conviction of a licensee anywhere of a felony or serious offense shall operate as a revocation of the license. [A] A LICENSE MAY BE REVOKED OR SUSPENDED AS PROVIDED FOR IN SECTION 530.14 OF THE CRIMINAL PROCEDURE LAW OR SECTION EIGHT HUNDRED FORTY-TWO-A OF THE FAMILY COURT ACT. <A]...." [38] (amendments emphasized).

At this time, the Legislature also amended the criminal procedure law by adding section 530.14 [32-37], titled “Suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms pursuant to section 400.00 of the penal law and ineligibility for such a license; order to surrender firearms” (emphasis added).

The subject bill jacket further provides that the amendments were intended “to amend the criminal procedure law, the family court act and the penal law, in relation to the suspension or revocation of a license to carry, possess, repair and dispose of firearms for the protection of certain crime victims” [42] (emphasis added).

The letters contained within the bill jacket discuss domestic violence and the need to prevent a “batterer [from retaining] a firearm license, as well as the weapon itself, upon the issuance of an order of protection, or a violation thereof” [45, 42-92]. Not one letter in the bill jacket suggests that the amendment was intended to apply beyond the provisions enumerated concerning orders of protection and domestic violence [42-92].

C. Case Law Supports the Plain Meaning

Further, Petitioner’s position is also supported by case law. The Hon. Herman Cahn, for example, concluded that the subject provision “does not ... make any prior revocation of a pistol permit for any reason whatsoever an automatic bar to the issuance of a permit, but, rather only makes such a bar mandatory where the prior revocation was due to the issuance of a temporary or permanent order of protection pursuant to Criminal Procedure Law § 530.14 or Family Court Act § 842-a.” *Matter of Fauntleroy v Kelly*, 4 Misc 3d 1014[A] (Sup Ct, New York County 2004). According to Judge Cahn, “[i]t is clear that the lifetime revocation of firearms license privileges referred to in Penal Law § 400.00 (1) (e) applies only to a person who has had a license revoked because of the

issuance of a temporary or permanent order of protection to protect against acts of domestic violence” (*id.*). Similarly, in May 2013, the Hon. W. Patrick Falvey also held that the petitioner was not automatically ineligible for a pistol license based on his prior revocation. *Matter of Loesch*, 39 Misc 3d 1230[A] (County Court, Yates County 2013).

In fact, there is no case law authority for the proposition that subsection (1)(e) of Penal Law 400.00 extends the class of excludable applicants so broadly so as to include those individuals whose licenses were revoked for any reason, and not solely under one of the two enumerated statutes. One Third Department case does discuss reinstatement of a license revoked pursuant to subsection (1)(e), but does not answer the question at hand. *see Matter of Seymour v Nichols*, 21 AD3d 1234 (3d Dept 2005). In the *Seymour* case, the petitioner did not argue that subsection (1)(e) was inapplicable; rather, he argued that the automatic bar was unconstitutional. *see id.* at 1234. In addition, the Second Department, in discussing the standard of review applied with respect to pistol license cases, noted that “[w]here a licensee challenges a determination, made after a hearing, to revoke his or her pistol license, or to deny reinstatement of a permit previously revoked, we review only ‘whether a rational basis exists for the licensing authority’s determination, or whether the determination is arbitrary or capricious.’” *Matter of Martino v Nassau County Police Dept.*, 66 AD3d 781, 781 (2d Dept 2009) (emphasis added). This case contemplates that reinstatement is within the discretion of the presiding judge. Indeed, further evidence that individuals with prior revocations may seek judicial reinstatement can be found within one of the very enumerated statutes within subsection (e) of N.Y. Penal Law 400.00. The first enumerated statute, N.Y. Criminal Procedure Law § 530.14(6)(d) sets forth procedures to be followed after “an

order of revocation, suspension, ineligibility or surrender is modified or vacated,” which contemplates that an order of revocation can be vacated, thereby reinstating the previously revoked license. N.Y. CPL § 530.14 (6) (d) (emphasis added); *see also Fauntleroy*, 4 Misc 3d at 1014[A]; *Loesch*, 39 Misc 3d at 1230[A].

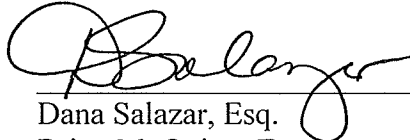
Accordingly, given that the determination rests on an erroneous interpretation of the law, the determination should be annulled and the matter should be remitted for further proceedings.

CONCLUSION

As explained above, the determination rests on an error of law. Accordingly, the determination should be annulled and the matter remitted for further proceedings.

Dated: February 19, 2014
Albany, New York

TABNER, RYAN AND KENIRY, LLP

A handwritten signature in black ink, appearing to read "D. Salazar", is written over a horizontal line.

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