COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

HOLYOKE DISTRICT COURT

DOCKET NUMBER: 2317CV0154

RANDY WESTBROOK,

Petitioner

v.

DAVID PRATT,

Chief, Holyoke Police Department, as

Licensing Authority,

Respondent

Decision on Petition for Judicial Review of Denial of License to Carry a Firearm

Summary of Decision

This is an appeal from the denial of a license to carry a firearm pursuant to G.L. c. 140, § 131. The law applicable to these matters has changed significantly in recent years as a result of a trilogy of decisions from the United States Supreme Court and statutory amendments enacted by the Massachusetts legislature. Constitutional balancing tests no longer control, and only reliable and credible information may be considered by a licensing authority and a reviewing court. Information concerning sealed criminal records is admissible. A licensing authority now must justify its regulation of the fundamental constitutional right to bear arms by demonstrating that it is consistent with the nation's historical tradition of firearm regulation. Any law that restrains this right must be narrow and objective and must provide definite standards that limit the discretion to be exercised by a licensing authority. G.L. c.140, § 131 is generally consistent with an historic tradition of denying firearms to dangerous persons, but its standard for determining whether an applicant is dangerous is not narrow and objective. It impairs an individual's right to bear arms for self-defense based on a determination that his or her past behavior "suggests" the individual "may" be dangerous if armed, giving the licensing authority an impermissible amount of discretion. For this reason, the decision to deny the plaintiff a license must be reversed.

Procedural History

The plaintiff, Randy Westbrook (Westbrook), applied for a license to carry a firearm (LTC) pursuant to G.L. c.140, § 131. The defendant, David Pratt, in his capacity as the Chief of the Holyoke Police Department (the Chief), reviewed the application and notified Westbrook in writing that his application had been denied. In his written notice of denial, the Chief stated that he had determined Westbrook was an "unsuitable person" for an LTC. He indicated this decision was:

> Based on Holyoke Police Department Arrest Report #10-600-AR in which you were charged with A&B Domestic and Aggravated A&B. The latter charge you accepted a CWOF on. Also, you accepted a CWOF on the charges of Conspiracy to Violate the Controlled Substances Act and Possession with the Intent to Distribute a Class B Substance in Northern Berkshire District Court.

Westbrook filed a complaint for judicial review pursuant to G.L. c.140, § 131(f). He asserts that, under the "traditional" Massachusetts standard of judicial review for LTC denials, the decision to deny him an LTC was unreasonable, arbitrary or capricious, an abuse of discretion and was not supported by substantial evidence. He maintains, however, that the traditional standard of judicial review of a licensing authority's denial of a firearm application is no longer applicable after the United State Supreme Court's decision in New York State Rifle & Pistol Association Assoc., Inc. v. Bruen, 597 U.S. 1 (2022). In addition, he contends that the "suitability" standard set out in G.L. c. 140, § 131 is impermissibly vague and overbroad and is therefore unconstitutional. (Westbrook gave the Attorney General notice of his constitutional challenge as required by Mass. R. Civ. P. 24(d). The Attorney General has not intervened.)

An evidentiary hearing was held on March 1, 2023. The Chief was the only witness. He testified that his decision was based on information contained in two police reports and in other police records he reviewed, and his 37 years of experience in law enforcement.

Westbrook objected to the introduction of the disposition of a criminal charge that was sealed pursuant to G.L. c. 276, § 100A. He objected to the introduction of and any reference to one of the police reports. He also objected to hearsay statements that gave rise to a criminal charge. Westbrook's objections were taken under advisement and the evidence was admitted de bene. For the following reasons, these objections are overruled.

Sealed Records

Pursuant to G.L. c. 276, § 100A individuals who have "a record of criminal court appearances and dispositions in the commonwealth on file with the office of the commissioner of probation" may "request that the commissioner seal the file." When these records are sealed by the

commissioner in his files, the clerks and probation officers of the courts in which the dispositions occurred are to "seal records of the same proceedings in their files." The statute, in pertinent part, also provides that "sealed records shall not operate to disqualify a person in any examination, appointment or application for public service ... nor shall such sealed records be admissible in evidence or used in any way in any court proceedings...." G.L. c. 276, §100A.

This section of the law, however, appears to conflict with G.L. c. 6, § 172. That statute provides that the Department of Criminal Justice Information Services (CJIS) is to maintain criminal offender record information in a database. G.L. c.6, § 172(a)(1) provides that "Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties. Licensing authorities, as defined in section 121 of chapter 140, may obtain all criminal offender record information, including sealed records, for the purpose of firearms licensing in accordance with sections 121 to 131P, inclusive, of chapter 140."

A sealed record provides a mechanism whereby a disposition is, in most instances, shielded from public view. Section 100A, however, does not have the same reach or effect as statutes governing expungement or a pardon. In the case of a pardon, for example, "all records relating to the offense for which the person received the pardon" are sealed and they, by statute, no longer disqualify a person from obtaining a license. G.L. c. 127, § 152. See DeLuca v. Chief of Police of Newton, 415 Mass. 155 (1993); Rzeznik v. Chief of Police of Southampton, 374 Mass. 475 (1978); Chief of Police of Shelburne v. Moyer, 16 Mass. App. Ct. 543 (1983). However, even when a person is pardoned after a conviction, the historical facts that underly the conviction may be considered if relevant to a government agency's decision on character and suitability. Commissioner of Metropolitan District Commission v. Director of Civil Service, 348 Mass. 184 (1964).

"A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001). Hypothetically, if an individual has been convicted of a felony, he or she would be statutorily disqualified from obtaining an LTC and the police chief would have to deny his or her application. To interpret Section 100A as prohibiting a police chief from introducing any evidence of the mandatory disqualifying event when his or her denial is challenged in court defies common sense and cannot be what the Legislature intended. Interpreting the relevant statutes in the manner suggested by Westbrook would achieve an illogical result.

A New Jersey appellate court considered somewhat similar circumstances when that state's expungement remedy appeared to conflict with a statute relating to firearm licensing. In that case, the plaintiff had the record of a psychiatric commitment expunged and later applied for a gun permit. The court ruled that the New Jersey expungement privilege was not absolute. It found that in the context of gun ownership, the legislature had crafted a strict regulatory scheme intended to protect society and individuals. The firearm permit application was deemed

to be a constructive waiver of the expungement privilege that allowed the trial court to inquire into and consider expunged evidence. In re Appeal of the Denial of M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. 148 (App. Div. 2023).

The New Jersey approach to the reconciliation of the two conflicting statutes may be appropriate here but is not required. As noted above, Section 100A only relates to the admissibility and use of sealed records of criminal appearances and criminal dispositions in the files of the commissioner of probation, court clerks and probation officers. In this case, neither party sought to introduce an actual probation record or a court record. Unlike the statutes governing pardons, Section 100A does not seal or proscribe the admission and consideration of any other documents, records or testimony from other sources.

Here, the Chief, in this capacity as the firearms licensing authority for the City of Holyoke, lawfully obtained sealed records and utilized them in the performance of his duty. For all the above reasons, Westbrook's objection is overruled, and the proffered evidence is admitted.

Hearsay

Westbrook also objects to what he asserts is unreliable hearsay contained in two police reports the Chief sought to introduce. One report, dated March 14, 2010, indicates that officers were dispatched to an apartment in Holyoke for a report of a domestic disturbance. They met the apartment resident and learned that the alleged victim was hiding in a bathroom. The police observed that the alleged victim's "right eye was swollen, partially closed and her eyelid was bulging out." She reported that Westbrook was her ex-boyfriend and that after an argument he had started shaking her "and then punched her several times in the face and the back of her head." She reported that she ran to her friend's apartment, and that Westbrook followed her there. The friend told the officers that she was able to lock Westbrook out of her apartment. The alleged victim also told the police she was nine months pregnant. Officers went to Westbrook's home and left word that they wished to speak with him. Later that evening Westbrook reported to police headquarters. He was subsequently charged with both domestic assault battery and assault and battery on a pregnant woman.

In his LTC application, which was introduced without objection, Westbrook stated (apparently incorrectly) that he had "pled Guilty" and had been convicted of "domestic violence." He also disclosed that he had been the subject of a 209A order "because of the domestic violence." According to an internal record that was considered by the Chief, on May 4, 2010, the first charge was nolle prosed and the second was continued without a finding. The Chief testified that the second charge was later dismissed after a period of probation. Westbrook objected only to the admissibility of this information. Its accuracy was not challenged.

The second report offered by the Chief was created by a Massachusetts State Police trooper. He reported that on April 4, 2014, he saw a van operating at high rate of speed above the posted limit and he followed it. He conducted a traffic stop. Westbrook was the front seat passenger in the van. The operator indicated he did not have a driver's license in his possession. The trooper

returned to his vehicle and performed a computer inquiry that revealed that the operator's license had been suspended. The trooper requested assistance and other members of the State Police arrived on the scene. The trooper directed the operator and Westbrook to exit the vehicle so that an inventory could be conducted before the vehicle was towed.

A trooper found two suboxone sublingual film strips in the floor center console of the van. He found a ripped corner of a plastic sandwich bag in the center console. It appeared to have white residual powder residue in it. Under the van's gas cap, a trooper found several plastic baggies holding a total of 17 smaller baggies containing a white substance the trooper believed was consistent with cocaine. The driver stated that the cocaine found in the gas cap belonged to him and that he did not want to get Westbrook in trouble. He claimed that all the cocaine was intended for his personal use that evening while he "partied with girls." Both Westbrook and the van driver were arrested and charged with possession with intent to distribute cocaine.

At the hearing in this case, the Chief testified that according to police records this charge was continued without a finding and later dismissed following probation. Once again, the accuracy of this assertion was not challenged.

In Chief of Police of the City of Worcester v. Holden, 470 Mass. 845 (2015), the Supreme Judicial Court dealt with similar circumstances. It found that "The hearsay evidence on which the chief relied was reliable and relevant, and it was the kind and quality of evidence on which judges often rely in probation revocation hearings." *Id.* at 863. Despite citing Commonwealth v. Durling, 407 Mass. 108 (1990), however, the Holden Court quoted Chief of Police of Shelburne v. Moyer, 16 Mass. App. Ct. 543 at 547 (1983), stating "'The full panoply of procedures usually available at a trial is not required in the review by a District Court in a case of this nature. The hearsay rule should not be applied to evidence proffered by a chief of police in support of the reasonableness of his denial. The test should be one of relevance.'" Holden at 863.

In Moyer, however, the Appeals Court had indicated that the Declaration of Rights of the Massachusetts Constitution does not protect the right to keep and bear arms and procedures for obtaining an LTC did not involve a property right. Moreover, in Moyer the Appeals Court relied on Lotto v. Commonwealth, 369 Mass. 775 (1976), a decision that involved the termination of a license to rent out boats in a state park, not a constitutional right.

Constitutionally speaking, the landscape has changed substantially since Lotto, Moyer and even Holden were decided. In District of Columbia v. Heller, 554 U.S. 570 (2008), the United States Supreme Court recognized that the Second Amendment protects an individual's right to keep and bear arms for self-defense. In McDonald v. City of Chicago, Ill.,561 U.S.742 (2010), the Supreme Court held that the Fourteenth Amendment makes this fundamental right fully applicable to the states. After Holden was decided, in Bruen the Supreme Court held that the Second Amendment to the United States Constitution protects the right of "ordinary, law-abiding citizens" to possess handguns in their homes and to carry them publicly for self-defense, without having to demonstrate any special need. Bruen at 1. Both Moyer and Holden were

decided when it was not clear that the right to possess a handgun outside of the home is constitutionally protected as a fundamental right applicable to the states.

Generally, as noted in In the Matter of G.P., 473 Mass. 112 (2015), (dealing with commitments under G.L. c. 123, § 35) the "flexible nature of due process" does not always require "strict adherence to the rules of evidence, so long as there is fairness in the proceeding." Id. at 122. "Allowing hearsay if it is credible preserves the 'due process touchstone of an accurate and reliable determination,' Durling, supra at 117-118, while accounting for practical considerations of § 35 hearings. But precisely because hearsay evidence may well play an extremely significant role in these hearings, the judge's obligation to ensure that any hearsay on which he or she relies is 'substantially reliable,' as required by rule 7(a), is critical, particularly in light of the clear and convincing evidence standard of proof required by rule 6(a)." Id.

Like a probation violation hearing or a civil commitment hearing, a hearing after the denial of an application for an LTC can present practical difficulties regarding the production of live testimony. This is particularly true with regard to allegations of prior criminal or violent behavior. The interests of the parties, however, call for a reliable, accurate evaluation. As noted in Durling, "when the government seeks to rely on evidence that is not subject to cross examination, the due process touchstone of an accurate and reliable determination still remains. The proper focus of inquiry in such situations is the reliability of the evidence presented." Id. at 117. Moreover, as Durling states, when hearsay is offered as the only evidence, the indicia of reliability should be substantial.

Indeed, the licensing statute now explicitly requires that a "determination of unsuitability shall be based on **reliable, articulable and credible information** that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety or a risk of danger to self or others." G.L. c. 140, §131 (d) (emphasis added).

Given the importance of the right that is at stake here, and given the plain language of the statute, a judge reviewing a police chief's denial of an LTC application based on unsuitability must determine whether the denial was based on reliable and credible information. Consistent with Darling and In the Matter of G.P., considering hearsay only if it is credible and reliable, preserves the due process touchstone of an accurate determination while accounting for practical considerations. When hearsay is the only evidence introduced to establish unsuitability, the reliability of the hearsay must be substantial. A lesser standard would be inconsistent with the basic principles of due process that are required to protect fundamental constitutional rights, including the right protected by the Second Amendment.

Applying these principles to the police reports in this case, the information set out above that is contained in the 2014 report is substantially reliable, credible hearsay and it is admissible. It is factually detailed and states primary facts, not mere conclusions or opinions. It sets out personal observations by officers that were recorded close in time to the reported events. For

the same reasons, the personal, first-hand observations recorded by the troopers in the 2010 report constitute substantially reliable, credible hearsay. They are also admissible.

As to the hearsay statements of the complaining witness that are contained in the 2010 report, they are also substantially reliable and credible when considered together with the documented observation of a recent injury to the victim and the fact that Westbrook subsequently admitted there were sufficient facts to warrant a finding of guilty.

No guilty finding entered, but a finding did enter, and a disposition was made. For this to occur, a court had to find that the facts stated by the prosecutor satisfied the essential elements of the alleged crime; were voluntarily admitted by the plaintiff; and were sufficient to warrant a finding of guilt. This allows an admission to sufficient facts to be treated as a guilty plea in many respects. Commonwealth v. Rossetti, 95 Mass. App. Ct. 552 (2019). In the words of the Supreme Judicial Court:

> Commentators and the established practice in the District Court indicate that a judge would not and should not accept an admission to sufficient facts unless that admission had a factual basis to support a finding of guilt of the crime charged. See E.B. Cypher, Criminal Practice and Procedure § 24:76 (4th ed. 2014). Indeed, it is illogical to conclude that a defendant could receive the disposition of a CWOF without first admitting to sufficient facts that satisfied the judge that he or she was guilty. See Mass. R. Crim. P. 28(b), 378 Mass. 898 (1979). See also Commonwealth v. Norrell, 423 Mass. 725, 727 n. 5, 673 N.E.2d 19 (1996). The reason an admission to sufficient facts triggers the same safeguards as a guilty plea is that a violation of the conditions of a CWOF may result in the immediate adjudication of guilt and imposition of sentence without requiring the Commonwealth to offer any further evidence of the underlying offense. See Commonwealth v. Tim T., 437 Mass. 592, 596–597, 773 N.E.2d 968 (2002). See also Commonwealth v. Mahadeo, 397 Mass. 314, 316, 491 N.E.2d 601 (1986). If a judge can enter a finding of guilty and impose sentence without taking any further evidence of the underlying offense after a violation of the conditions of a CWOF, it follows that an implicit determination has been made that the defendant "has violated or failed to comply with the law." Tirado v Board of Appeal on Motor Vehicle Liability Policies and Bonds, 472 Mass. 333, 339 (2015).

For all these reasons, I find the information relied upon by the Chief was substantially reliable and credible. The hearsay objections are overruled.

Judicial Review Before and After Bruen

Holden, cited above, appears to be the last time the Massachusetts Supreme Judicial Court broadly addressed the "suitable person" standard in G.L. c 140, § 131. In that decision, the Court found that the core of the Second Amendment is the right to possess firearms for use in defense of the home and that prohibitions on carrying concealed weapons outside of the home are presumptively lawful. It noted that the purpose of the LTC statute was to limit access to

deadly weapons by irresponsible persons and to keep firearms out of the hands of people who posed a palpable risk that they would not use a firearm responsibly. Using a balancing test, the Court found the law promoted important government interests and bore a substantial relationship to public health and safety. Consequently, it determined the statute passed constitutional muster under a rational basis analysis.

In view of the evidence, particularly the evidence supporting the charge of aggravated domestic assault battery, if Holden and earlier decisions dealing with LTC appeals still controlled, the decision to deny Westbrook an LTC would be upheld. Protecting the public from danger related to the misuse of firearms is an important government interest, and given the discretion formerly afforded to a police chief in Massachusetts, the Chief's decision was neither arbitrary nor capricious, and it was not an abuse of discretion. Several sections of the statute that were applicable to Holden, however, have been amended, and the United States Supreme Court has set out a completely different standard for evaluating firearms licensing. As noted above, the constitutional landscape has greatly changed. Historical analysis is now required.

Currently, when an individual applies for an LTC in Massachusetts, the licensing authority must determine whether the applicant is a "prohibited person," for example, a convicted felon or a person who falls into one of the other categorical exclusions that are specifically listed in G.L. c. 140, § 131(d)(i)-(x). If the applicant falls into one of these categories, he or she shall not be issued an LTC. Previously, a licensing authority could deny an application for an LTC "if, in a reasonable exercise of discretion," the authority determined the applicant was unsuitable to be issued an LTC. The quoted language regarding discretion has been deleted.

Even if the applicant is not a statutorily prohibited person, the licensing authority shall deny the applicant an LTC if the applicant is "unsuitable." Previously, the statute provided no definition of the term unsuitable. Now unsuitability means that there is "reliable, articulable and credible information that the applicant ... has exhibited or engaged in behavior that suggests that, if issued a license, the applicant ... may create a risk to public safety or a risk of danger to self or others." G.L. c. 140, § 131(d).

In Bruen, the Supreme Court stated that, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." Bruen at 24. This is because constitutional rights have the scope they were understood to have when they were adopted. The Court explicitly rejected the balancing test employed in Holden, and previous Massachusetts appellate decisions, in favor of an historical analysis that places the burden to justify regulation on the licensing authority.

Consequently, since Bruen, a judge considering an LTC appeal initially must decide two things. First, the judge must determine whether the text of the Second Amendment applies to the applicant and to his proposed conduct. If it does, then the judge must determine whether the licensing authority has proven that the suitability standard contained within the LTC statute "is

part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." Bruen at 18.

Historic Tradition and Dangerousness

As to the first issue, the United States Supreme Court explained in Heller that the Second Amendment's reference to the right of "the people" to bear arms refers to members of the entire political community. The right presumptively belongs to all Americans. In this case, Westbrook is not an automatically prohibited person and has Second Amendment rights. He seeks an LTC so that he may possess a firearm for self-defense outside of his home. The Second Amendment applies to his proposed conduct.

As to the more difficult second issue, the Chief has not identified anything that might support a determination that G.L. c. 140, § 131 falls within an historical tradition of regulating the right to keep and bear arms. Westbrook argues that there is no tradition of laws that would disarm an individual who has been charged but not convicted of a disqualifying offense. He also asserts that a generalized historic tradition of disarming individuals deemed dangerous does not satisfy the requirements of Bruen, and that the Massachusetts unsuitability provision is too subjective and is the equivalent of the law that was struck down in Bruen. He relies on a handful of decisions, including United States v. Quiroz, 629 F. Supp. 3rd 511 (W.D. Texas 2023) and United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023) in support of his position.

These decisions, however, do not give sufficient weight to the Supreme Court's admonition in Bruen that judges are not to place a "regulatory straitjacket" on government by requiring a "historical twin" for every present-day statute in order for the statute to be constitutional. Bruen at 30. It has been suggested that the historical analysis called for in Bruen is not even centered on a determination whether an individual has been convicted of a felony or has engaged in what any particular jurisdiction deems felonious conduct.

As stated in United States v. Harrison, 654 F. Supp. 3d 1191 (W.D. Oklahoma 2023):

> While our Nation's history and tradition does not support disarming a person merely because they have engaged in felonious conduct, it does support a different proposition: 'that the legislature may disarm those who have demonstrated a proclivity for violence' through past violent, forceful, or threatening conduct (or past attempts at such conduct). Or, to put it another way, 'the historical record' demonstrates 'that the public understanding of the scope of the Second Amendment was tethered to the principle that the Constitution permitted the dispossession of persons who demonstrated that they would present a danger to the public if armed'. Id. at 1210 (internal citations omitted).

This analysis is supported by detailed historical research. See Greenlee, Joseph G.S., The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms, Wyoming Law

Review. Vol. 20: No. 2, Article 7. In short, notwithstanding the decisions relied upon by Westbrook, when the Second Amendment was adopted, "the right to keep and bear arms was understood to exclude those who presented a danger to the public." Greenlee at 267.

The Determination of Suitability and Limitations on Discretion

In Holden, the Supreme Judicial Court stated that the Massachusetts suitability standard properly gave a police chief "'considerable latitude' or broad discretion in making a licensing decision.'" Holden at 854 (internal citations omitted). This is no longer permissible.

In Bruen, the New York firearm licensing statute in question included a provision that required an applicant to establish a "proper cause" for an LTC. (This term is used broadly here, as different jurisdictions use different terminology.) A proper cause was interpreted as a special need for self-defense that was distinguishable from that of the general community. After a lengthy historical analysis, the Supreme Court determined there was no historic tradition requiring a showing of special need before an individual could exercise the right to carry a firearm. The Court held that the Second Amendment did not allow government regulation that relies on a discretionary assessment of an individual's need or justification.

The Court, however, also stated that firearm licensing statutes may lawfully require applicants to undergo background checks or pass firearms safety courses, as requirements of this sort are objective and designed to ensure only that the people carrying firearms are in fact law-abiding and responsible citizens. Bruen, in fact, identifies 43 states where the Court determined LTCs are issued based on objective criteria. The Court stated that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' "shall-issue' licensing regimes, under which 'a general desire for self-defense is sufficient to obtain a (permit).'" Bruen at 30, n.9 (internal citations omitted). The Court also noted that these 43 jurisdictions "appear to contain only 'narrow, objective, and definite standards' guiding licensing officials, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), rather than requiring the 'appraisal of facts, the exercise of judgment, and the formation of an opinion,' *Cantwell v. Connecticut*, 310 U.S. 296, 305, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)—features that typify proper-cause standards like New York's." Bruen at 30, n.9.[1]

Massachusetts was not one of the 43 so-called "shall-issue" states identified by the Supreme Court, but the Court indicated that three states- Connecticut, Delaware, and Rhode Island- that have suitability requirements in their licensing statutes appear to operate as "shall-issue" jurisdictions. As stated above, the Massachusetts legislature has amended the LTC statute since Bruen was decided. Consequently, Bruen does not explicitly state whether the current Massachusetts standard for suitability makes Massachusetts a "shall-issue" jurisdiction like

[1] Much of Note 9 in Bruen is dicta, but carefully considered United States Supreme Court dicta is accorded great weight and is treated as authoritative.

Connecticut, Delaware and Rhode Island. Antonyuk v Chiumento, 89 F. 4th 271 (2023) is informative on this issue.

In Antonyuk, the Second Circuit Court of Appeals addressed a constitutional attack on New York's requirement of "good character," a suitability standard of sorts. The Court took note of Bruen's apparent endorsement of multiple state suitability provisions and its simultaneous criticism of laws that give officials discretion to deny licenses based on a perceived lack of need or suitability. It examined the licensing regimes in Connecticut, Delaware, and Rhode Island and a dozen other states that were referred to in Bruen as "shall-issue" jurisdictions. The Antonyuk Court found that these licensing regimes all have some type of a suitability determination that requires "the appraisal of facts, the exercise of judgment, and the formation of an opinion," Antonyuk at 324, citing Bruen at 30 n.9. More particularly, the Court stated that the New York "good character" provision and the licensing laws in Connecticut, Delaware and Rhode Island, and the dozen other statutes identified (and arguably approved) by the Supreme Court in Bruen, all give licensing authorities a "modicum of discretion" that is "embedded in the licensing schemes...." Id. at 326.

The Second Circuit Court of Appeals ultimately found that Bruen suggests that states cannot deny LTC applications based on a suitable need or purpose but may do so based on an applicant's previous conduct, or lack of the character, temperament, or reputation in the community necessary to be entrusted with a weapon. Therefore, statutes that authorize a licensing authority to make a determination of unsuitability because an individual is likely to use a firearm unlawfully; will likely present a danger to himself if armed; or suffers from a condition or infirmity that prevents the safe handling of a gun, would be supported by a historic tradition focused on danger to an applicant or others. In addition, if a licensing regime does not prevent ordinary, law-abiding citizens from carrying handguns; is focused only on disarming those who would present a danger if armed; and only gives the licensing authority the "modicum" of discretion needed to make this determination on danger, it would meet the requirements set out in Bruen.

Narrow, Objective Standards

Having discerned the broad parameters of permissible government regulation of Second Amendment rights, the final, critical issue to be decided here is whether G.L. c. 140, § 131 meets the requirements set out in Bruen or is, as Westbrook contends, too subjective and overly broad, affording a police chief too much discretion.

In considering this question, it is significant that the Supreme Court cited two important First Amendment decisions in Bruen, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) and Cantwell v. Connecticut, 310 U.S. 296 (1940). In Shuttlesworth, a city ordinance that gave a local commission the power to prohibit demonstrations on city streets was found unconstitutional. The Supreme Court found that the local government was improperly "guided by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'"

Shuttlesworth at 151 (internal citations omitted). The Court pointed out that many of its decisions hold that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." Id. at 150-151.

Cantwell v. Connecticut dealt with the First Amendment right to exercise one's freedom of religion in public areas. In that case, the state suggested that if a licensing officer acts arbitrarily, capriciously or even corruptly, the harm is not irreparable, as individuals have a judicial remedy available. The Supreme Court responded to this argument by noting that "A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the constitution as one providing for like restraint by administrative action." Cantwell at 306.

The inclusion of these two decisions in Bruen underscores the Supreme Courts' admonition that "The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." Bruen at 70, quoting McDonald, 561 U.S. at 780. It also underscores an argument that has been made by Westbrook, that a firearm licensing regime is not intended to be a two-step process involving both administrative action and judicial review.

In short, even if most reasonable people would agree that protecting individuals from a danger that is inherent in the possession of a firearm is a legitimate and important government interest, the government's regulation of Second Amendment rights, like the regulation of First Amendment rights, must incorporate constitutional protections and must do so from the start, that is, at the administrative hearing, not just upon further judicial review.

Like the LTC statute, Massachusetts laws concerning civil commitments, discussed above, and the various statutes identified by the Supreme Court in Bruen, are centered on how determinations concerning danger to self or others will be made. Other statutes, however, require a determination whether such danger is reasonably foreseeable or likely. By way of example, in Massachusetts, an order to disarm an individual on an emergency basis must be based on a finding that "the plaintiff demonstrates a substantial likelihood of immediate danger...". G.L. c. 209A, §3B. These laws, and indeed most statutes that regulate conduct and limit individual liberty, require the appraisal of facts and the consideration of probabilities and likelihood.

G.L. c. 140, § 131 differs in its scope and in the amount of discretion it allows. The definition of suitability in the current statute allows a government official to deny an individual the right to bear arms in public for self-defense not based on a probability or reasonably foreseeable circumstances, but on behavior that merely "suggests" to the chief of police that an applicant "may" create a risk to public safety. This language is both broad and vague, and I have found no

historical tradition for a statute that delimits the right to bear arms (or any other constitutional right for that matter) in such soft, indeed spongy terms.[2]

Statutory words and phrases must be construed "according to the common and approved usage of the language." G.L. c. 4, §6. Black's Law Dictionary has provided a definition of the word "suggestion." It states that "It is in the nature of a hint or insinuation and lacks the element of probability. Facts which merely suggest do not raise an inference of the existence of the fact suggested, and therefore a suggestion is much less than an inference or presumption." *Black's Law Dictionary*, 1285 (1979 5th Edition). Similarly, dictionaries list the words imply, hint, intimate and insinuate as synonyms for the word suggest. *The American Heritage Dictionary of The English Language, 1731 (*2000 4th Edition).

A law that gives a local official broad discretion to deny a First Amendment right to publicly protest government action or to express a religious belief in public based on a hint or an insinuation of danger to the public would not be tolerated. Likewise, a standard of unsuitability based on a hint, an intimation or an insinuation is not permissible because it allows the government to exercise more than a modicum of discretion, and more than that which is allowed in the licensing regimes identified favorably in Bruen. The amount of discretion the terms of G.L. c. 140, §131 impart in their common usage is simply inconsistent with historical tradition and the narrow, objective, definite standard that is required to survive scrutiny post-Bruen.

Conclusion

The United States Supreme Court has decided that there is a fundamental right to carry a handgun in public for self-defense. Laws that regulate Second Amendment rights must be consistent with historical precedent and may not give licensing authorities more than the minimal amount of discretion necessary to determine whether applicants would present a danger to themselves or others if armed. Judges may no longer decide Second Amendment challenges based on traditional balancing tests, and the government has the burden of demonstrating a historical tradition that supports its restriction on the right to carry a handgun. In this case, I find that, as a matter of law, there is an historical tradition in this country of denying firearms to individuals who have demonstrated they would likely be dangerous if armed. The Chief, however, has not demonstrated an historical tradition that would support a law like G.L. c. 140, §131 that is based not on probability or even reasonable inference, but on a

[2] 1 Some courts have concluded that there is a very broad historical tradition of prohibiting individuals who are members of groups that are simply perceived to pose a danger to public safety if armed from having guns. As proof they cite bans on gun ownership by African Americans, Native Americans, and Catholics. Although such prohibitions unfortunately did exist, it is now clear they were based on racism and bigotry. The suggestion that racist and bigoted laws, that we now recognize as wholly unconstitutional, should be considered in determining what the Second Amendment means is not instructive and is somewhat disconcerting.

suggestion, a hint, or an insinuation that there may be danger. The law is inconsistent with what the United States Supreme Court stated in Bruen concerning the rights protected by the Second and Fourteenth Amendments.

Order

For all the above reasons, the decision denying Westbrook an LTC must be reversed and the LTC is to issue. Westbrook's petition for fees and costs and any further relief is denied.

William P. Hadley, First Justice

Holyoke District Court

May 20, 2024