

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1282-12T4

IN THE MATTER OF THE APPLICATION
FOR A NEW JERSEY FIREARM PURCHASER
IDENTIFICATION CARD AND A PERMIT
TO PURCHASE A HANDGUN BY
MICHAEL MCGOVERN.

Submitted January 13, 2014 – Decided April 28, 2014

Before Judges Ashrafi, St. John and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County.

Evan F. Nappen, attorney for appellant.

Gaetano T. Gregory, Acting Prosecutor,
Hudson County, attorney for respondent
(Nicole M. Ghezzar, Special Deputy Attorney
General/ Acting Assistant Prosecutor,
on the brief).

PER CURIAM

Michael McGovern appeals from an October 12, 2012 order of the Law Division denying his application pursuant to N.J.S.A. 2C:58-3(d) for licensing to purchase two handguns. Among other contentions, McGovern argues that the licensing authority made demands upon him that are not authorized by New Jersey's gun control laws, and that the Law Division relied on improper

considerations in denying his application. We reverse and remand for reconsideration of McGovern's application.

On October 4, 2011, McGovern applied to the Jersey City Police Department, Firearms Licensing Unit, for a New Jersey firearms purchaser identification card and permits to purchase two handguns (collectively "handgun permit"). McGovern completed and signed the State-mandated application form (S.T.S. 033 or "State Police application form") and a second State Police authorized form entitled Consent for Mental Health Records Search (S.P. 66). On S.T.S. 033, McGovern provided his full name and address, date and place of birth, driver's license number, physical description, affirmation of United States citizenship, occupation as an attorney, and employer information. He also answered a series of yes or no questions, indicating that: he has never been convicted of an act of domestic violence, he is not subject to a domestic violence order, he was never adjudicated a juvenile delinquent, he has never been convicted of a crime where he could have been sentenced to more than six months in jail, he does not suffer from a physical defect or illness, he is not an alcoholic, he is not dependent on narcotic drugs or other controlled substances, he has not had a gun permit refused or revoked in the past, and

he is not a member of any organization that advocates or approves force or violence against others.¹

In addition to the State Police forms, McGovern provided two completed Jersey City forms entitled "Endorsement and Reference Letter," which were executed by two individuals who know McGovern and attested to his good character. McGovern completed parts of and signed, but expressly declined to complete other parts of, a Jersey City Police Department form entitled "Firearms Applicant Questioner" [sic]. He also declined to complete and sign three other forms that the Jersey City Firearms Licensing Unit had provided to him as part of the application.

Instead, McGovern included with his application a two-page typed letter addressed to the Jersey City Police Chief explaining his objections to the additional Jersey City forms and his position on their legal impropriety. Along with his letter, McGovern attached a fifteen-page appendix and a copy of the United States Supreme Court's Second Amendment decision in

¹ McGovern did not provide his Social Security number on the form, and he also did not answer two questions pertaining to confinement or treatment for a mental condition, but the absence of those answers on S.T.S. 033 has not been raised as an issue in this case. The Hudson County Adjuster's Office confirmed on the mental health records form, S.P. 66, that it had no record of McGovern's admission, commitment, or treatment for a mental condition.

District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). By another letter to the Police Chief dated November 2, 2011, McGovern acknowledged that he was scheduled for an appointment to provide his fingerprints to the police department, and he again referenced his objections to the additional Jersey City forms.

Jersey City did not act on McGovern's handgun permit application within thirty days, as required by N.J.S.A. 2C:58-3(f). Rather, five months after McGovern filed his application, the Firearms Licensing Unit sent McGovern a form notice dated March 5, 2012, by which it requested additional information. The notice stated that his application was incomplete and that the police department's background check had determined McGovern had been arrested three times in Florida about ten or more years ago. According to McGovern, the arrests had occurred when he was a college undergraduate and did not result in convictions. They were for the following offenses under the laws of Florida:

November 11, 2000: petty theft, second degree misdemeanor; and resisting arrest/obstruction without violence, first degree misdemeanor;

March 3, 2001: failure to appear in court or pay fine for possession of alcoholic beverage, second degree misdemeanor; and

January 17, 2002: failure to appear in court for possession of alcoholic beverage under the age of 21, second degree misdemeanor.

The Jersey City notice of March 5, 2012, stated:

There are no final dispositions listed for these offenses. You will have to get certified dispositions from the Courts involved as to the outcome of these charges. This department also has a concern over your actions during the incidents. We are asking for a written explanation as to the incidents and why you should not be denied a firearms permit.

McGovern responded with a letter addressed to the Jersey City Law Department rather than to the Firearms Licensing Unit. The letter is not in our appellate record, but it was briefly mentioned in testimony before the Law Division leading to this appeal. Andrew Brusgard, a retired Jersey City Police captain whom Jersey City hired to conduct investigations for the Firearms Licensing Unit, testified that McGovern stated in the letter that he had documents showing the dispositions of his Florida arrests but he declined to provide them to Jersey City. McGovern testified that none of the arrests resulted in convictions, but he did not believe it was his obligation to do the work of the police department to establish that fact. He asserts he refused to provide the disposition documents as a matter of principle in pursuing his constitutional and statutory rights.

On March 20, 2012, the Police Chief of Jersey City disapproved McGovern's application, signing the disposition

portion of S.T.S. 033 to that effect. Reasons for the disapproval were checked off from a list: "criminal record, 3 arrest[s]," "public health and welfare," and "other – Good Repute." The Firearms Licensing Unit notified McGovern of the denial by a form notice dated April 2, 2012. The notice stated: "The background investigation revealed information that is a concern to this Department. The background check reveals that you were arrested three times in the State of Florida. This department also has a concern over your actions during these incidents."

McGovern requested a hearing before the Law Division pursuant to N.J.S.A. 2C:58-3(d) to review the denial of his application. The hearing was conducted on October 12, 2012.² McGovern subpoenaed the Jersey City Police Chief to testify at the hearing, but he did not attend. The only witness for Jersey City was Brusgard. It appeared through his testimony that he was the only Jersey City employee responsible for attending to McGovern's application.

McGovern appeared pro se at the hearing. The judge repeatedly declined to allow him to present evidence supporting his attempted legal argument that Jersey City had demanded

² Our record does not explain why the review hearing was not held within thirty days, as required by N.J.S.A. 2C:58-3(d).

unauthorized information as part of the application. The judge also would not allow McGovern to cross-examine Brusgard about his qualifications to determine who may receive a handgun permit or his knowledge of the law in that regard. The judge stated that the only purpose of the hearing was for McGovern to prove he was not disqualified under the N.J.S.A. 2C:58-3 for a handgun permit. The Assistant Prosecutor representing Jersey City also repeatedly objected to any attempt by McGovern to develop information pertinent to his legal positions and arguments.

Brusgard testified that he recommended disapproval of McGovern's application because of the three Florida arrests, for which McGovern refused to provide disposition documentation or explanations of the underlying facts. Although limited in presenting his arguments, McGovern established that Brusgard's investigation had not revealed any conviction based on the three Florida arrests or any other specific statutory disability for the issuance of a handgun permit. Nonetheless, Brusgard testified that McGovern had not demonstrated his "good repute within the community" because he had not been cooperative with the police department's investigation.

The judge denied McGovern's application. The judge referred to the three arrests and stated that the "lack of cooperation evidences Mr. McGovern's disregard for the welfare

of others as well as the legal system in general. Mr. McGovern's behavior signifies a certain threat to the public health, safety and welfare of the community. It provides a reflection of his character."

On appeal, McGovern argues: (1) Jersey City is expressly preempted by N.J.S.A. 2C:58-3 from demanding information from an applicant that is not required by that statute; (2) Jersey City and the court inappropriately shifted the burden of proof to McGovern to prove his entitlement to a handgun permit; (3) McGovern is not disqualified under any of the conditions set forth in N.J.S.A. 2C:58-3(c); (4) the Police Chief violated statutory provisions with respect to the issuance of handgun permits and thus engaged in official misconduct in violation of New Jersey's Code of Criminal Justice; and (5) some of the criteria and disqualifying conditions of N.J.S.A. 2C:58-3(c) are unconstitutionally vague and overbroad, and thus violate McGovern's Second Amendment right to bear arms and his federal constitutional right to due process. We find merit in McGovern's first two arguments and remand for reconsideration of his application.

The New Jersey Legislature established a set of gun control laws in N.J.S.A. 2C:58-1 to -19 that create a uniform system in this State of regulating firearm possession and licensing. Our

State Supreme Court has "referred to New Jersey's gun-control laws as a 'careful grid' of regulatory provisions." In re Preis, 118 N.J. 564, 568 (1990) (quoting State v. Ingram, 98 N.J. 489, 495 n.1 (1985)).

N.J.S.A. 2C:58-3(e) fixes the requirements for an application for a handgun permit. It states that the application "shall be in the form prescribed by the superintendent [of the State Police]," and it describes in detail the contents of the application.³ Subsection (f) of the

³ N.J.S.A. 2C:58-3(e) provides that:

Applications . . . shall set forth the name, residence, place of business, age, date of birth, occupation, sex and physical description, including distinguishing physical characteristics, if any, of the applicant, and shall state whether the applicant is a citizen, whether he is an alcoholic, habitual drunkard, drug dependent person as defined in section 2 of P.L. 1970, c. 226 (C. 24:21-2), whether he has ever been confined or committed to a mental institution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis, giving the name and location of the institution or hospital and the dates of such confinement or commitment, whether he has been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an inpatient or outpatient basis for any mental or psychiatric condition, giving the name and location of the doctor, psychiatrist, hospital or institution and the dates of such occurrence, whether he presently or ever has been a member of any organization which advocates or approves the commission of acts of force and violence to overthrow the Government of the United States or of this State, or which seeks to deny others

(continued)

statute provides that "the licensing authority . . . shall investigate . . . and, unless good cause for the denial thereof appears, shall grant the permit or the identification card."

N.J.S.A. 2C:58-3(f) (emphasis added). Thus, the statute does not give unbounded discretion to the police chief to grant or deny a handgun permit. Rather, it requires a showing of good cause to deny a permit.

Most significant for purposes of this appeal, the statute further dictates:

There shall be no conditions or requirements added to the form or content of the application, or required by the licensing authority for the issuance of a permit or identification card, other than those that are specifically set forth in this chapter.

[Ibid.]

(continued)

their rights under the Constitution of either the United States or the State of New Jersey, whether he has ever been convicted of a crime or disorderly persons offense, whether the person is subject to a restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," P.L. 1991, c. 261 (C. 2C:25-17 et seq.) prohibiting the person from possessing any firearm, and such other information as the superintendent shall deem necessary for the proper enforcement of this chapter. For the purpose of complying with this subsection, the applicant shall waive any statutory or other right of confidentiality relating to institutional confinement. The application shall be signed by the applicant and shall contain as references the names and addresses of two reputable citizens personally acquainted with him.

Jersey City's municipal forms are contrary to this statutory provision because they require substantially more information than required by N.J.S.A. 2C:58-3(e) and by the State Police application forms. One of the Jersey City forms, entitled "Firearms Applicant Questioner" [sic], inquires as to the applicant's "Auto Plate Number," "Previous Addresses," "Previous Employer," and "the names and ages of all people who reside in your household." Those items of information are not required by N.J.S.A. 2C:58-3(e) or S.T.S. 033.

The Jersey City form entitled "Firearms Permit Applicant Domestic Violence Disclosure Form" asks whether the applicant or any member of the applicant's household presently is or has ever been the subject of a domestic violence complaint or restraining order. The statute and State Police form only ask whether the applicant is currently subject to a restraining order, and whether the applicant has had a weapon seized because of domestic violence.

Another of the municipal forms, entitled "Authorization Waiver to Release Information," requests the applicant to "authorize the release of any and all information" to the police, and to "release all persons from any liability" that may result from furnishing that information. N.J.S.A. 2C:58-3(e) only requires an applicant to waive the right to confidentiality

"relating to institutional confinement." By requiring an applicant to provide a broader waiver, the Jersey City form sets a condition for the issuance of a handgun permit that is not required by the statute or the Superintendent of the State Police.

Yet another form, entitled "Information Firearms Permit Recipients," requires that the applicant acknowledge a series of legal statements pertaining to gun ownership and liability.⁴

Thus, much of the information requested by Jersey City is neither required by the State Police application forms nor by any of the provisions of N.J.S.A. 2C:58-3. Requiring that information is contrary to the directive of subsection (f) that the licensing municipality cannot impose conditions or requirements beyond those established by the Legislature or contained in the State Police Superintendent's application forms.

Because the statute is explicit in prohibiting other conditions and requirements for the issuance of handgun permits,

⁴ McGovern contends that many of the declaratory statements contained on the Jersey City Information form are inaccurate and unduly restrictive statements of the law pertaining to gun ownership. He contends the form impinges upon the Second Amendment rights of applicants. We need not decide whether the form states the law accurately or affects constitutional rights. Although McGovern declined to sign the form, Jersey City did not specify that fact as relevant to its denial of his application.

we do not need to conduct an analysis of the case law addressing State preemption of municipal ordinances and regulations. See, e.g., Overlook Terrace Mgmt. Corp. v. Rent Control Bd., 71 N.J. 451, 461-62 (1976); McGovern v. Borough of Harvey Cedars, 401 N.J. Super. 136, 148-49 (App. Div. 2008); C.I.C. Corp. v. Twp. of E. Brunswick, 266 N.J. Super. 1, 7-12 (App. Div. 1993), aff'd o.b., 135 N.J. 121 (1994). Jersey City was not authorized to expand the information McGovern was required to supply beyond that included in the statute and in the State Police application forms.

Jersey City argues that the information it sought is necessary to conduct an appropriate investigation and to determine whether an applicant meets the statutory criteria for issuance of a handgun permit. The police chief must evaluate an applicant "based upon the information disclosed by 'a good faith investigation.'" In re Application of Boyadjian, 362 N.J. Super. 463, 475 (App. Div.) (quoting Weston v. State, 60 N.J. 36, 43 (1972)), certif. denied, 178 N.J. 250 (2003). We do not conclude in this decision that Jersey City's inquiries were unreasonable or made in bad faith. However, the Legislature or the Superintendent of the State Police must authorize any requirement or condition for issuance of a handgun permit that goes beyond the terms of the statute and the State Police

application forms. Such requirements and conditions may not be added by individual municipalities or other licensing authorities.

We next consider whether the Jersey City Police Chief and the Law Division properly denied McGovern's application despite the use of unauthorized forms and inquiries.

N.J.S.A. 2C:58-3(c) establishes the substantive criteria for the issuance of a handgun permit. It states: "[n]o person of good character and good repute in the community in which he lives . . . shall be denied" a gun permit. The statute also lists eight categories of disqualification. As we stated previously, the police chief must grant a handgun permit unless good cause is shown for its denial. N.J.S.A. 2C:58-3(f).

An arrest that did not result in conviction is not one of the listed disqualifications. However, among the statutory disqualifications is "where the issuance would not be in the interest of the public health, safety or welfare." N.J.S.A. 2C:58-3(c)(5). In In re Osworth, 365 N.J. Super. 72 (App. Div. 2003), certif. denied, 179 N.J. 310 (2004), we considered the quoted subsection (5) disqualification and held that "[t]he dismissal of criminal charges does not prevent a court from considering the underlying facts in deciding whether a person is entitled to purchase a firearm." Id. at 78; see also In re

Return of Weapons to J.W.D., 149 N.J. 108, 110 (1997) (a court may determine, even after dismissal of a domestic violence complaint, that firearms may be forfeited by a defendant pursuant to N.J.S.A. 2C:58-3(c) and 2C:25-21(d)(3) because "the defendant poses a threat to public health, safety, or welfare."); State v. One Marlin Rifle, 319 N.J. Super. 359, 371 (App. Div. 1999) (same); State v. Cunningham, 186 N.J. Super. 502, 504-08 (App. Div. 1982) (State could refuse to return lawfully-purchased gun to defendant despite grand jury's no billing of charge that he shot his wife). Even in the absence of evidence that McGovern was convicted of any offenses as a result of his arrests in Florida, the New Jersey statute permits denial of his application if the underlying facts that led to those arrests demonstrate one of the eight listed categories of disqualification or his bad character or repute.

The precise issues before us, however, are whether McGovern had a duty to provide information and to prove that the Florida arrests do not disqualify his application, or whether Jersey City had the burden of proving the arrests were a valid basis for denying his application. The Law Division appeared to place the burden on McGovern to prove he was qualified.

In that regard, N.J.S.A. 2C:58-3(d) provides that "[t]he chief of police . . . shall upon application, issue to any

person qualified under the provisions of subsection c. of this section a [handgun permit]." The police chief may deny an application only where good cause appears for the denial. N.J.S.A. 2C:58-3(f).

In Osworth, supra, we explained the proper procedure in the Law Division under N.J.S.A. 2C:58-3(d) for review of the police chief's decision. Osworth, supra, 365 N.J. Super. at 77-78. We stated that the hearing in the Law Division is "de novo" and that the judge must independently determine whether the applicant is entitled to a handgun permit. Id. at 77. Citing Weston, supra, 60 N.J. at 46,⁵ we explained that the applicant must present his evidence and then the police chief, or the police chief's designee who conducted the investigation, must explain why the application was denied, and finally the applicant may attempt to rebut that explanation. Osworth, supra, 365 N.J. Super. at 78. Significantly, we held that the police chief has the burden of proving an applicant is not qualified to receive a handgun permit. Id. at 77 (citing Weston, supra, 60 N.J. at 46). Thus, we agree with McGovern

⁵ Weston, supra, 60 N.J. at 39, concerned earlier statutory provisions applicable to issuance of a handgun permit, N.J.S.A. 2A:151-32 to -35 (repealed). The predecessor statutes were not significantly different from N.J.S.A. 2C:58-3. See Weston, supra, 60 N.J. at 40-41.

that Jersey City had the ultimate burden of proving good cause for denying his application.

McGovern argues that Jersey City and the Law Division reversed the burden of proof and placed it upon him by requiring that he prove the dispositions and the facts pertinent to the Florida arrests. While the ultimate burden of proof is on the police chief, the statutory framework and our prior case law do not allow the applicant to sit silently in the face of legitimate and authorized inquiry from the licensing authority pertaining to the contents of his application and the information the police have developed during their investigation. The police must conduct an investigation, including through an examination of criminal arrest and conviction records. N.J.S.A. 2C:58-3(e). As we have stated, the facts pertinent to arrest records are relevant, even where no conviction results. Osworth, supra, 365 N.J. Super. at 78. Brusgard appropriately sought information from McGovern about the circumstances of the alleged offenses that led to McGovern's three Florida arrests.

In Weston, supra, 60 N.J. at 43-44, the Supreme Court contemplated that the applicant would be required to explain why potential objections or disabilities should not prevent the issuance of a handgun permit. It placed a duty upon the

licensing authority to provide an "opportunity . . . to the applicant . . . to offer any pertinent explanation or information for the purpose of meeting the objections being raised." Ibid. The statutory process both permits and requires further inquiry by the licensing authority and cooperation by the applicant in providing relevant information within the scope of N.J.S.A. 2C:58-3(e).

There was no shifting of the burden of proof in Jersey City's request for additional information regarding the Florida arrests. Cf. Konigsberg v. State Bar of Calif., 366 U.S. 36, 55, 81 S. Ct. 997, 1009, 6 L. Ed. 2d 105, 119 (1961) ("Requiring a defendant in a civil proceeding to testify or to submit to discovery has never been thought to shift the burden of proof to him."). McGovern did not have a right to decline requests from the Firearms Licensing Unit for information within the scope of the statute.⁶

On the other hand, in its de novo review, the Law Division may have attributed disqualifying characteristics to McGovern

⁶ Because Jersey City was authorized to make inquiry within the scope of N.J.S.A. 2C:58-3(e), it could do so by written questions and forms. We do not hold in this opinion that all supplemental municipal forms are unauthorized by N.J.S.A. 2C:58-3(f), only those forms and questions that go beyond the items of information authorized by subsection (e), the State Police application forms, or judicial authority interpreting the law.

because he sought to vindicate his constitutional and statutory rights against unauthorized requirements and conditions placed upon his application. The court found his "lack of cooperation" proved that he presented a "threat to the public health, safety and welfare of the community" and reflected poorly on "his character." We find no evidence of such a threat and bad character in McGovern's expression of legal positions and arguments based on his understanding of constitutional and legal rights.⁷

We conclude that a remand is necessary for reconsideration of McGovern's application with the proper burden of proof placed on Jersey City to prove he is not qualified – in other words, that good cause exists for denial of his application – and without regard to McGovern's lack of cooperation as to his application except with respect to the Florida arrests.

⁷ Although not mentioned by the trial judge in his ruling, the Assistant Prosecutor attempted to cast McGovern in a bad light because he had surreptitiously recorded a conversation with Brusgard, and Jersey City's brief on appeal again makes such an argument. McGovern did not violate the law by recording a conversation in which he was a participant. See N.J.S.A. 2A:156A-4(d); Hornberger v. ABC, Inc., 351 N.J. Super. 577, 627 (App. Div. 2002). The police and prosecutor can hardly attribute bad character to one who engages in surreptitious recording of his own conversations since it is a frequent investigative technique the police themselves use under our State laws. See, e.g., State ex rel. J.D.H., 171 N.J. 475, 477-78, 482 (2002).

McGovern also challenges the constitutionality of N.J.S.A. 2C:58-3(c) on the ground that the statute violates the due process rights of handgun permit applicants because parts of it are unduly vague and overbroad. He argues that the language of the statute referring to the applicant's "good character and good repute," and also the language disqualifying an applicant under subsection (c)(5) because of "the interest of the public health, safety or welfare" unconstitutionally grant unbridled discretion to the police chief to deny an application.

The New Jersey Supreme Court rejected a similar constitutional argument in Burton v. Sills, 53 N.J. 86, 90-91 (1968), appeal dismissed, 394 U.S. 812, 89 S. Ct. 1486, 22 L. Ed. 2d 748 (1969), which addressed New Jersey's predecessor gun control statutes. See also Siccardi v. State, 59 N.J. 545, 555 (1971) (confirming the holding of Burton with respect to "the public health, safety or welfare"). McGovern argues that the United States Supreme Court effectively overruled Burton when it held in Heller, supra, 554 U.S. at 592-95, 128 S. Ct. at 2797-99, 171 L. Ed. 2d at 657-59, that the Second Amendment protects an individual's right to possess a handgun, and in McDonald v. City of Chicago, 561 U.S. ___, ___, 130 S. Ct. 3020, 3026, 177 L. Ed. 2d 894, 903 (2010), that the Second Amendment right of

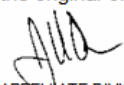
individuals is applicable to the states under the due process clause of the Fourteenth Amendment.

We have previously stated that Heller did not address a "void for vagueness" constitutional argument and therefore did not affect Burton's rejection of that argument. In re Dubov, 410 N.J. Super. 190, 196 (App. Div. 2009). We are bound by the holding of Burton. We leave it for our Supreme Court to determine at an appropriate time whether the United States Supreme Court's Second Amendment decisions affect our State's gun control laws on due process grounds.

Finally, we find insufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), in McGovern's argument that the Jersey City Police Chief is guilty of criminal misconduct for failing to follow the requirements of N.J.S.A. 2C:58-3 and to issue a handgun permit to him.

The October 12, 2012 order of the Law Division denying McGovern's application for a gun permit is reversed, and the matter is remanded for reconsideration by the police chief and the Law Division, if necessary, of McGovern's application in conformity with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION