2016 IL App (4th) 150660-U

NO. 4-15-0660

FILED
September 1, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JOSEPH FRED HARRELSON,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Jersey County
DEPARTMENT OF STATE POLICE; LEO P. SCHMITZ; Director; and THE CONCEALED CARRY LICENSING REVIEW BOARD,	)	No. 14MR40
Defendants-Appellees.	)	Honorable
	)	Eric S. Pistorius,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The Concealed Carry Licensing Review Board did not err in denying plaintiff's application for a license to carry a concealed weapon.

¶ 2 In May 2014, the Illinois State Police (State Police) informed plaintiff, Joseph Fred Harrelson, his application for a license to carry a concealed weapon had been denied. On June 9, 2014, Harrelson filed his first petition for judicial review of the administrative decision. On November 21, 2014, the circuit court remanded the case back to the Concealed Carry Licensing Review Board (Board). On December 30, 2014, the Board again denied Harrelson's application. On January 13, 2015, Harrelson filed his first amended petition for judicial review of the administrative decision. On June 10, 2015, the court ruled the Board's decision was appropriate. Harrelson filed a motion to reconsider, which the court denied. Harrelson appeals, making the following arguments: (1) the Board erred in denying his application for a concealed

carry license based on inadmissible hearsay without a hearing; (2) the licensing requirements and the standard of proof required to deny his application violate his due process rights; (3) the Firearm Concealed Carry Act's dangerous standard is vague; and (4) the evidence supported granting his concealed carry license. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In a letter dated May 12, 2014, the State Police informed Harrelson the Board had determined by a preponderance of the evidence he posed a danger to himself or others and posed a threat to public safety and, therefore, was not eligible for a concealed carry license. As a result, the State Police informed Harrelson his application was denied.

¶ 5 On June 9, 2014, Harrelson filed a petition for judicial review of the Board's decision to deny his application for a license to carry a concealed weapon. On October 20, 2014, the State Police filed a motion to remand the case to the Board for further proceedings consistent with a newly enacted provision of the Illinois Administrative Code (20 Ill. Adm. Code 1231.230), which provides applicants an opportunity to submit additional information if a law enforcement agency submits an objection which appears sustainable on its face. On November 21, 2014, the circuit court entered an agreed order, remanding the case to the Board so Harrelson could respond to the objection of the Jersey County Sheriff's Office (Sheriff).

¶ 6 The Sheriff's objection included information regarding Harrelson's affiliation with the "Sadistic Souls OMG" motorcycle gang and a domestic violence incident involving Harrelson from December 4, 2011. An incident report noted B.G., a 10-year-old female, called 9-1-1, alleging her mother's boyfriend, Harrelson, was beating her mother, Tracy Greer.

¶ 7 According to Deputy Kevin Ayres' incident report, he and Deputy Josh Tonsor responded to the call. Upon entering the house, Deputy Ayres observed Harrelson and Greer

arguing in the living room. The deputies separated Harrelson and Greer. Harrelson told Deputy Ayres he brought medicine to the house for the dogs. Harrelson also said he told Greer he wanted to speak with her daughter, K.G., about something K.G. posted on Facebook. Greer said no. Harrelson said he and Greer started arguing. Their argument turned physical. Harrelson admitted Greer told him to leave the house multiple times, and he refused. Harrelson said he pushed Greer into a closet and choked her. He let go of Greer when her kids started pulling him off her. Harrelson told Greer he wanted to take the dogs, but Greer told him to leave. Harrelson then reached for a dog, and Greer pushed him out the door. Harrelson said he then reentered the residence, and Greer punched him in the face. Harrelson then pushed Greer. Greer fell and her head went through the drywall.

¶ 8 Deputy Ayres also spoke with Greer. Greer's version of the incident was consistent with Harrelson's statement. Greer told Deputy Ayres she did not want to press charges because she did not want to upset her daughters further. Deputy Ayres told Greer Harrelson should be arrested because of the violent nature of the incident. Deputy Ayres advised Greer he would be sending his report to the State's Attorney and charges could still be filed against Harrelson. Later that evening, Greer called Deputy Ayres and stated she wanted to press charges against Harrelson. Harrelson was later arrested for criminal trespass to property, criminal damage to property, and domestic battery.

¶ 9 In a letter dated December 4, 2014, the Board informed Harrelson the Sheriff submitted an objection to Harrelson's application for a concealed carry license. The letter informed Harrelson of the basis for the objection. In addition, the letter informed Harrelson he had 15 days "to submit any relevant evidence to the Board for its consideration before a final administrative decision is rendered regarding [his] application."

¶ 10 In response to the Sheriff's objection, Harrelson submitted his own affidavit and an affidavit from Greer. Harrelson's affidavit acknowledged he was in a verbal argument with Greer on December 4, 2011, but he denied the argument became physical. He denied choking Greer and noted he was never prosecuted for domestic battery or criminal trespass. Harrelson stated he pleaded guilty to criminal damage to property for damaging a wall. He also acknowledged being in a motorcycle club, which he did not name. He denied this club was involved in illegal activity and said the club "improves its community through charitable works." His affidavit makes no mention of the "Sadistic Souls OMG" motorcycle gang.

¶ 11 In Greer's affidavit, she stated she supported Harrelson receiving his concealed carry license. She stated Harrelson was a nonviolent person with whom she would entrust her 15- and 13-year-old children. Greer said she and Harrelson were involved in a verbal argument on December 4, 2011, but she denied the argument became physical. She denied Harrelson choked her until she lost consciousness or committed any other acts of violence against her. She acknowledged police officers were called to the dispute but stated Harrelson was not prosecuted for any violent actions toward her. According to her affidavit, "Nothing pertaining to the events which took place on December 4, 2011[,] should keep Mr. Harrelson from receiving his Conceal and Carry License."

¶ 12 On December 30, 2014, the State Police, via letter, again notified Harrelson his application for a concealed carry license had been denied. The letter stated the Board had determined Harrelson was a danger to himself, others, or posed a threat to public safety.

¶ 13 On January 13, 2015, Harrelson filed a motion for leave to file an amended petition in the circuit court. Harrelson's motion stated the Board rejected his application after the court remanded the case in November 2014. The court allowed Harrelson to file an amended

petition. His amended petition did not raise any constitutional concerns with regard to the administrative proceedings.

¶ 14 On March 4, 2015, Harrelson filed a memorandum in support of his petition. According to the petition, "This Court now has the opportunity to review the administrative decision, and if this Court deems Petitioner is not a danger to himself, others, or public safety, this Court may reverse the administrative agency." His argument later states:

> "This case centers upon whether the evidence before the [Board], by a preponderance of the evidence, leads to the conclusion that Petitioner, Joseph Harrelson, is a danger to himself, others, or public safety. Before the [Board] were four pieces of evidence: a single Incident Report, the hierarchy of an alleged motorcycle gang, and two affidavits. No testimony was taken by the [Board]. No proceeding was had. No transcript of a proceeding was filed. Even though only four pieces of evidence were before the [Board, it] concluded that Petitioner was a danger to himself or others or public safety. It is unclear from the [Board's] Order whether Petitioner poses a danger to himself or others or public safety or all three because the [Board] failed to elaborate which conclusion [it] reached."

Harrelson argued the evidence included in the Sheriff's objection was inadmissible hearsay. In addition, Harrelson argued he had a valid Firearm Owner's Identification (FOID) card. Harrelson made no constitutional arguments in his memorandum.

¶ 15 On June 10, 2015, the circuit court heard arguments and denied Harrelson's petition.

¶ 16 On June 29, 2015, Harrelson filed a motion to reconsider, raising for the first time many of the constitutional issues he raises on appeal. In the alternative, Harrelson asked the circuit court to make its order more definite and certain. The court denied Harrelson's motion to reconsider.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 We first address whether Harrelson forfeited the constitutional issues he argues on appeal by failing to raise these issues before the Board. Our supreme court has stated:

> "It is quite established that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time before the circuit court on administrative review. [Citations.] The rule of procedural default in judicial proceedings applies to administrative determinations, so as to preclude judicial review of issues that were not raised in the administrative proceedings. *** Additionally, raising an issue for the first time in the circuit court on administrative review is insufficient. The rule of procedural default specifically requires raising an issue before the administrative tribunal rendering a decision from which an appeal is taken to the courts. Given that in administrative review cases the circuit courts act as the first-tier courts of review, the reason and logic behind that requirement are

clear." *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 212-13, 886 N.E.2d 1011, 1019 (2008).

Even though administrative agencies lack the authority to declare statutes unconstitutional, or to even question a statute's validity, the rule of procedural default covers a litigant's right to question the validity or constitutionality of a statute. *Cinkus*, 228 Ill. 2d at 214, 886 N.E.2d at 1020. Our supreme court has stated: "[T]his court has repeatedly advised that a party in an administrative proceeding should assert a constitutional challenge on the record before the administrative tribunal, because administrative review is confined to the evidence offered before the agency." *Cinkus*, 228 Ill. 2d at 214, 886 N.E.2d at 1020.

¶ 20 Harrelson cites our supreme court's decision in *Arvia v. Madigan*, 209 Ill. 2d 520, 527, 809 N.E.2d 88, 94 (2004), for the proposition the supreme court has never adopted a "bright-line rule 'requiring' a party to raise all constitutional issues before the agency." However, while constitutional arguments not raised before the administrative agency are sometimes permitted, this is an exception to the general rule. In *Arvia*, the supreme court found it significant the issue the plaintiff raised for the first time in the circuit court involved the facial constitutionality of a law, which the supreme court noted "does not require fact-finding by the agency or application of the agency's particular expertise." *Arvia*, 209 Ill. 2d at 528, 809 N.E.2d at 94.

¶ 21 However, the situation in the case *sub judice* is easily distinguishable from *Arvia*. In *Arvia*, the plaintiff sought a declaration in the trial court the law in question violated the equal protection rights of drivers under the age of 21. *Arvia*, 209 Ill. 2d at 524, 809 N.E.2d at 92. In this case, not only did Harrelson not raise any constitutional issues during the administrative process, he also did not raise any constitutional issues in the circuit court before his petition to

set aside the Board's decision was denied. Harrelson first raised these issues in his motion to reconsider.

¶ 22 We find no merit in Harrelson's argument the circuit court prevented him from raising any constitutional issues. Unsolicited, the court stated at the hearing on Harrelson's amended petition: "Wait, wait. If you're gonna [*sic*] go on and ask me to find this unconstitutional, I'm not gonna [*sic*] do it cause [*sic*]." This statement was both ill-advised and unnecessary. The record gives no indication Harrelson had any intention of raising any constitutional issues. Harrelson had not made any constitutional claims in either his amended petition or his memorandum of law. We find Harrelson failed to preserve the constitutional arguments he attempts to raise on appeal, and we will not consider them.

¶ 23 We note the Seventh Circuit in *Berron v. Illinois Concealed Carry Licensing Review Board*, No. 15-2404 (7th Cir. June 17, 2016), recently addressed some of the same constitutional issues raised by Harrelson. We need not decide whether we agree with the Seventh Circuit for purposes of this appeal. However, we note the Seventh Circuit's holdings for their potential future guidance to other courts confronting these issues. As for any alleged redundancy between the requirements to receive a FOID card and a concealed carry license, the Seventh Circuit stated, "the different degrees of danger posed by possessing a weapon at home (the basic license) and carrying a loaded weapon in public (the concealed carry license) justify different systems." *Berron*, at 7-8. The Seventh Circuit noted the possibility circumstances could have changed after the issuance of a FOID card. According to the Seventh Circuit: "Illinois is entitled to check an applicant's record of convictions, and any concerns about his mental health, close to the date the applicant proposes to go armed on the streets." *Berron*, at 8.

¶ 24 In addition, the Seventh Circuit held the preponderance of the evidence standard provided by statute to deny a conceal carry license was not unconstitutional. *Berron*, at 8. The Seventh Circuit noted:

> "As a matter of administrative law, the proponent of a position bears the burden of showing entitlement by a preponderance of the evidence. [Citation.] Plaintiffs are the applicants for licenses, so they bear the burden of showing entitlement. To be more precise, a state may assign applicants that burden without transgressing the Constitution. Illinois is a little more generous, placing the burden on the state to show why an application should be denied. 430 ILCS 66/20(g)." *Berron*, at 8.

The Seventh Circuit noted the preponderance of the evidence standard is the norm in civil litigation and applies to many kinds of disputes, including property and licensing disputes. The Seventh Circuit saw no reason why the second amendment would change the preponderance of the evidence standard. *Berron*, at 9.

¶ 25 We next turn to Harrelson's argument the Board should not have considered the information submitted by the Sheriff, which included the incident report and the information involving Harrelson's affiliation with a motorcycle gang called the "Sadistic Souls OMG." According to Harrelson, this information was hearsay and should not have been relied upon by the Board.

¶ 26 Defendants argue Harrelson forfeited any objection he had regarding this evidence because he did not raise the issue during the administrative proceedings. We agree. This court has stated hearsay evidence admitted without objection may be considered by the

administrative body and by courts on review. *Slocum v. Board of Trustees of the State Universities Retirement System*, 2013 IL App (4th) 130182, ¶ 37, 1 N.E.3d 102.

¶ 27 Regardless of forfeiture, the Board did not err in considering this evidence. Section 15(a) of the Firearm Concealed Carry Act (430 ILCS 66/15(a) (West 2014)) states:

> "Any law enforcement agency may submit an objection to a license applicant based upon a reasonable suspicion that the applicant is a danger to himself or herself or others, or a threat to public safety. The objection *** *must include any information relevant to the objection*." (Emphasis added.)

The information Harrelson complains about—both the incident report and his association with a motorcycle gang called the "Sadistic Souls OMG"—is relevant to an objection Harrelson should not be allowed to carry a concealed weapon.

¶ 28 Section 20(e) of the Firearm Concealed Carry Act (430 ILCS 66/20(e) (West 2014)) states:

> "In considering an objection of a law enforcement agency or the Department, the Board *shall review the materials received with the objection from the law enforcement agency or the Department*. By a vote of at least 4 commissioners, the Board may request additional information from the law enforcement agency, Department, or the applicant, or the testimony of the law enforcement agency, Department, or the applicant. *** The Board may only consider information submitted by the Department, a law enforcement agency, or the applicant. The

> Board shall review each objection and determine by a majority of commissioners whether an applicant is eligible for a license." (Emphasis added.)

In other words, the statute directs the objecting law enforcement agency to submit all "relevant" information and directs the Board to consider all the materials submitted. The General Assembly made clear the Board was required to review all relevant evidence provided with an objection from law enforcement regardless of its admissibility in a court of law.

¶ 29 This is important because Rule 802 of the Illinois Rules of Evidence provides hearsay is admissible if provided for by statute. Ill. R. Evid. 802 (eff. Jan. 1, 2011). Sections 15(a) and 20(e) allow the Board to consider any relevant information, which could include hearsay evidence. 430 ILCS 66/15(a), 20(e) (West 2014). We also note the Board would be free to consider this information pursuant to section 10-40(a) of the Illinois Administrative Procedure Act (5 ILCS 100/10-40(a) (West 2014)), which states:

> "The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form."

¶ 30 We note the incident report showed both Harrelson and Greer separately provided the same version of events to police immediately after the incident in question. As a result, the incident report in this case is the type of evidence that would be commonly relied upon by reasonably prudent men in the conduct of their affairs and therefore is admissible pursuant to section 10-40(a) of the Administrative Procedure Act (5 ILCS 100/10-40(a) (West 2014)). In addition, Harrelson's alleged affiliation with a motorcycle gang called the "Sadistic Souls OMG" is also relevant to determining whether he should be allowed to carry a concealed weapon.

¶ 31 Finally, we address Harrelson's argument the evidence does not support the Board's decision to deny his application for a concealed carry permit. We note we review the decision of the administrative body, not the circuit court. *Lindsey v. Board of Education of the City of Chicago*, 354 Ill. App. 3d 971, 978, 819 N.E.2d 1161, 1167 (2004). We review purely factual findings using a manifest weight of the evidence standard. *Walk v. Department of Children & Family Services*, 399 Ill. App. 3d 1174, 1186, 926 N.E.2d 773, 784 (2010). The Board in this case did not make any specific factual findings for us to review.

¶ 32 In this case, we are faced with a mixed question of law and fact. A mixed question concerns the legal effect of a given set of facts. *Cinkus*, 228 Ill. 2d at 211, 886 N.E.2d at 1018. We will only disturb a mixed question of law and fact if the decision was clearly erroneous. We will only find a decision clearly erroneous if we are left with a definite and firm conviction a mistake has been made. *Cinkus*, 228 Ill. 2d at 211, 886 N.E.2d at 1018.

¶ 33 The Board's decision to deny Harrelson a concealed carry license was not clearly erroneous because a preponderance of the evidence supported the Board's denial. Although the Board did not make a specific factual finding with regard to the conflicting accounts of the December 4, 2011, domestic incident, it is clear the Board found the consistent statements of

Harrelson and Greer given to the police immediately after the event to be a more accurate account of the events that evening than the affidavits supplied by Harrelson and Greer years later. Further, we note Harrelson did plead guilty to criminal damage to property as a result of the domestic incident.

¶ 34 We also note Harrelson's affidavit does not state he is not a member of the "Sadistic Souls OMG" motorcycle gang or that the "Sadistic Souls OMG" motorcycle gang improves its community through charitable work. His affidavit only states he is a member of a motorcycle club that does not engage in illegal activity and improves its community through charitable works. We note Harrelson could easily belong to both the "Sadistic Souls OMG" and another motorcycle club.

¶ 35 Based on the record in this case, we cannot say the Board's decision to deny Harrelson a concealed carry license was clearly erroneous. The record clearly supported a finding Harrelson posed a danger to others and a threat to public safety.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the Board's denial of Harrelson's application for a license to carry a concealed firearm.

¶ 38 Affirmed.