Office of Legislative Research

Research Report

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OLR BACKGROUNDER: SUMMARY OF SUITABILITY ISSUE IN KUCK V. DANAHER

WHAT THE COURT SAID:

"Connecticut courts have made clear that the purpose of imposing a suitability requirement is to ensure that persons who potentially would pose a danger to the public if entrusted with a handgun do not receive a permit" (822 F. Supp. 2d 109, p. 128).

"[It] is impossible for the legislature to conceive in advance each and every circumstance in which a person could pose an unacceptable danger to the public if entrusted with a firearm" (id. at p. 129)

"[t]his Court does not believe it to be possible for Connecticut to discharge its duty to protect the public unless DPS and also the [Firearms] Board on appeal is afforded circumscribed discretion to determine whether a particular applicant seeking a pistol permit would pose a danger to the public if entrusted with a firearm" (id. at p. 129).

ISSUE

Does a state law requiring a person to be found suitable for a gun permit violate the 2nd Amendment? Is the law unconstitutionally vague? This report summarizes these issues discussed in *Kuck v. Danaher* et al. (822 F. Supp. 2d 109, D. Conn. (2011)).

BACKGROUND

In *Kuck v. Danaher,* a federal district court considered whether a state law requiring that a person be found suitable to hold a permit to carry handguns violates an individual's right to carry and bear arms under the 2nd Amendment.

The case involved (1) M. Peter Kuck, whose application to renew his gun permit was denied when he refused to submit a passport or birth certificate as part of the renewal application, and (2) James Goldberg, whose gun permit was revoked as a result of his arrest for 2nd degree breach of the peace. Both men were deemed unsuitable to hold a permit, which is required to carry handguns in Connecticut.

At the time of the lawsuit, the law enumerated 10 categories of people, including illegal aliens, who were automatically ineligible to hold a gun permit. The law additionally requires the permitting agency to find that an applicant is a suitable person to hold a permit, but it does not define the term "suitable."

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Both plaintiffs alleged that the determination that they were not suitable to hold a gun permit violated their 2nd Amendment right to keep and bear arms.

The court said the agency did not violate Kuck's 2nd Amendment rights because when Kuck refused to produce a passport or birth certificate, he failed to show that he was not an illegal alien, which is one of the classes of people prohibited from holding a gun permit. Thus, the agency's determination of Kuck's unsuitability was based on one of the specific disqualifiers enumerated in the challenged statute. According to the court, *Heller* held that reasonable prohibitions on firearm possession are permissible under the 2nd Amendment and implied that withholding a permit to someone who does not establish his or her qualification is permissible (*District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008)).

The court applied intermediate scrutiny to the challenged statute and held that the statute (1) is substantially related to Connecticut's compelling interest in protecting the public from people who could potentially pose a danger if entrusted with a firearm and (2) affords the Department of Public Safety (DPS) (now the Department of Emergency Services and Public Protection (DESPP)) discretion to determine whether a permit denial or revocation in particular circumstances not expressly enumerated in statute is warranted. The discretion is subject to review by the Firearms Board to determine whether, based upon all of the facts, there was "just and proper cause" for the denial or revocation, as well as the Superior Court. In dismissing Goldberg's claim, the court said the law allows a person to carry a pistol in his or her own dwelling or business place without a permit. Therefore, the agency did not violate Goldberg's "core right of self-defense within his home" when it revoked his gun permit after his arrest for breach of peace.

The court also held that the challenged statute is not unconstitutionally vague, facially. Nor is it void for vagueness as applied to either defendant. Regarding Kuck, the court said the requirement that a permit applicant not be an illegal alien is expressly enumerated in the statute. Therefore, persons of ordinary intelligence would understand that their permit would be denied if they did not produce documentation demonstrating United States citizenship. As for Goldberg, the court said persons of ordinary intelligence would understand that their permit would be subject to revocation if they engage in conduct that indicates that they may pose a danger to the public if allowed to carry a firearm in public. The court said that "an arrest for conduct involving one's firearm could certainly be indicative of [a] person's potential danger to the public, and preventing danger to the public is the core purpose of the statute" (id. at p. 135).

PERTINENT GUN PERMIT LAW

Issuance of Gun Permit

With certain exceptions (not pertinent here), anyone wanting to carry a handgun (pistol or revolver) in Connecticut must obtain a gun permit. Out-of-state residents apply directly to the commissioner. Connecticut residents apply to the local permit-issuing official (usually the police chief), who issues a temporary, 60-day state permit. The official forwards the application to the DESPP commissioner who issues a five-year state permit (CGS § 29–28 et seq.).

Grounds for Denying Permit. A gun permit applicant must satisfy training requirements on handgun safety and use. In addition, at the time of the lawsuit, the law prohibited issuing a permit to anyone:

1. convicted as a serious juvenile offender;
2. discharged from custody within the preceding 20 years after a finding of not guilty by reason of mental disease or defect;
3. confined in a mental hospital within the preceding 12 months by a probate court order;
4. subject to a restraining or protective order issued by a court in a case involving the use, attempted use, or threatened use of physical force against another person;
5. subject to a firearms seizure order;
6. prohibited by federal law from shipping, transporting, possessing, or receiving firearms;
7. under age 21;
8. who is an illegal alien; or
9. convicted of a felony or enumerated misdemeanors (CGS § 29–28(b)).

Suitability. In addition to the above disqualifiers, the official issuing a gun permit must determine that the applicant intends to use the firearm for a lawful purpose and is a "suitable person" to receive a permit (CGS § 29-28(b)). The statute does not define the term "suitable" and does not specify standards or guidelines for making the suitability determination.

Permit Revocation and Suspension

The commissioner may revoke or suspend a gun permit for cause and must revoke it (1) if the permittee is convicted of a felony or any of the disqualifying

misdemeanors or (2) upon the occurrence of any event that would have made an applicant ineligible for a permit (CGS § 29-32(b)).

Anyone aggrieved by a permit revocation or limitation may appeal to the Firearms Board, which must inquire into and determine the facts de novo (i.e., as if it were considering the question for the first time). Unless the board finds that the revocation or limitation was for just and proper cause, it must order the permit to be issued, renewed, or restored, or the limitation removed or modified, as applicable (CGS § 29–32b(b)). The board's decision may be appealed to the Superior Court.

THE 2ND AMENDMENT ISSUE

The 2nd Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed" (U.S. Const. amend II).

In *Heller,* the U.S. Supreme Court held that the 2nd Amendment protects the individual right to keep and bear arms for self-defense (*Heller,* 554 U.S. at 595). Two years later, the Supreme Court in *McDonald* held that the individual's right to keep and bear arms is incorporated in and applicable to the states through the 14th Amendment's Due Process clause (*McDonald v. City of Chicago*, 561 U.S. 742 (2010)).

Goldberg claimed that DPS violated his right to bear arms under the 2nd Amendment by revoking his permit based upon a determination that he was not suitable to hold a permit because of his arrest for 2nd degree breach of the peace.

STANDARD OF REVIEW

Applying the intermediate scrutiny standard of review used by most district courts in determining the constitutionality of firearm regulations, the court concluded that the challenged statute was not unconstitutional.

To pass intermediate scrutiny, a law must be substantially related to serving an important government interest.

Goldberg argued that the statute is unconstitutional because it grants the agency "unfettered discretion" to deny and revoke permits on suitability grounds. He said that the 10 disqualifiers specifically listed in the statute ensure that only law-abiding citizens competent to carry handguns will be issued a permit, and the legislature may expand the list if it determines that there are others who should be added to the list. Thus, he argued that the suitability requirement is not reasonably

related to the state's interest in protecting the public from people who would pose a danger if entrusted with a firearm.

The court said the Connecticut Supreme Court had already recognized Goldberg's approach as unworkable with regard to a liquor licensing statute that required a suitability determination as to whether a person not within the enumerated classes was unfit to receive a liquor license (*Smith's Appeal from County Commissioners,* 65 Conn. 135, 138 (1894)). In that case, the Supreme Court said:

> A person is "suitable" who by reason of his character—his reputation in the community, his previous conduct as a licensee—is shown to be suited or adapted to the orderly conduct of [an activity] which the law regards as so dangerous to public welfare that its transaction by any other than a carefully selected person duly licensed is made a criminal offense. It is patent that the adaptability of any person to such [an activity] depends upon facts and circumstances that may be indicated but cannot be fully defined by law, whose probative force will differ in different cases, and must in each case depend largely upon the sound judgment of the selecting tribunal (*Kuck* at p. 128, quoting *Smith's Appeal*).

The district court, in Kuck, said that although the term "suitable" [as used in the gun permit statute] is not statutorily defined, "Connecticut courts have made clear that the purpose of imposing a suitability requirement is to ensure that persons who potentially would pose a danger to the public if entrusted with a handgun do not receive a permit" (id at p. 128). The court said it:

> does not believe it to be possible for Connecticut to discharge its duty to protect the public. . .[absent] circumscribed discretion to determine whether a particular applicant seeking a pistol permit would pose a danger to the public if entrusted with a firearm. The suitability requirement is the statutory mechanism which provides DPS and also the Board with the necessary discretion. . . .As a review of Connecticut cases in which pistol permits have been revoked reveals, it is impossible for the legislature to conceive in advance each and every circumstance in which a person could pose an unacceptable danger to the public if entrusted with a firearm (id. at p. 129).

Furthermore, the court said the agency's discretion to deny or revoke a gun permit is not unlimited. This is because of a legal principle that "mandates that where a general term follows an enumeration of terms with specific

meaning, the general term is expected to apply to matters similar to the specifically enumerated terms" (id. at p. 129). And denial or revocation decisions are subject to de novo review by the Firearms Board to determine whether, based upon all of the facts, there was "just and proper cause" for the denial or revocation. In addition, board decisions are appealable to the Superior Court (id. at p. 129).

For these reasons, the court held that the statute is substantially related to the state's compelling interest in protecting the public from people who could potentially pose a danger if entrusted with a firearm, and DPS did not violate Goldberg's 2nd Amendment right to bear arms.

VAGUENESS CHALLENGE

Facial Challenge

According to the court:

> There are innumerable factual circumstances in which invocation of the suitability standard to revoke a person's pistol permit on the basis that he poses a danger to the public, even though he does not fall within one of the express statutory grounds for revocation would be constitutionally valid. For instance, it could not possibly be unconstitutional for the state to revoke a person's pistol permit after he develops incurable dementia, is diagnosed with paranoid schizophrenia and makes threats to harm others, repeatedly shoots himself, or has an alcohol or drug addiction and repeatedly engages in reckless activity with his firearm while intoxicated (id. at p. 132).

The court said the statute "circumscribes the discretion of DPS and the Firearms Board and gives citizens adequate notice of who is and who is not eligible for a gun permit" (id. at p. 133). It therefore protects against the potential for arbitrary and discriminatory enforcement.

The court also said that although the statute implicates a constitutional right, it does not believe revocation of a permit to carry a weapon outside of the home "is as severe as the deprivation of liberty occasioned by an arrest and incarceration" (id. at p. 133). Furthermore, the court added the term "suitable" has a clear definition under Connecticut law. It has long been established that a person is not "suitable" to carry a firearm if he lacks "the essential character of temperament necessary to be entrusted with a [lethal] weapon and thus is potentially dangerous to the public (id. at p. 133).

Thus, the court concluded that the statute is not vague on its face.

As Applied Challenge

The court also held that the statute is not vague under the Due Process clause, in that it provides clear standards to (1) give "a person of ordinary intelligence notice of what type of conduct is prohibited and (2) eliminate the risk of arbitrary enforcement (id. at p. 134).

With regard to the first issue, the court said a person of ordinary intelligence would understand that his or her permit would be subject to revocation if he or she engaged in conduct that may pose a danger to the public if allowed to carry a firearm in public. The court cited the statute under which someone could be arrested for breach of peace (CGS § 53a-181) and said that if an individual had engaged in conduct specified in the statute

> [w]hile carrying a firearm, particularly an unconcealed firearm, a person of ordinary intelligence would understand that his gun permit would be subject to revocation based upon the enumerated bases for disqualification for the issuance of a permit. . . .Consequently, Goldberg would have notice that if he committed an offense involving a firearm such as breach of peace in the second degree that his gun permit would be subject to revocation (id. at p. 135).

With regard to discriminatory enforcement, the court wrote:

> The statute provides sufficient guidance to DPS in the circumstances of this case to eliminate the risk of arbitrary enforcement in its enumerated qualifications. The nature of the state interest at issue requires that DPS have the flexibility to determine on a case-by-case basis whether a particular applicant would pose a danger to the public if entrusted with a firearm. However the Board's discretion is adequately circumscribed by the enumerated factors for determination of an applicant's qualifications. The factors which would make a person unsuitable are many and evanescent. Further, the statue has built-in procedural mechanisms to ensure that pistol permits are not revoked absent just cause (id. at p. 135).

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