

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

BRENT JOSEPH SCHMIDT,

Appellant,

v

File No. 09-27262-AA
HON. PHILIP E. RODGERS, JR.

GRAND TRAVERSE COUNTY SHERIFF'S
OFFICE, THOMAS J. BENSLEY SHERIFF,

Appellee.

Matthew C. Connolly (P66456)
Attorney for Appellant

Craig W. Elhart (P26369)
Attorney for Appellee

DECISION AND ORDER ON APPEAL

This is an appeal from the March 2, 2009 administrative decision by Grand Traverse County Sheriff Thomas J. Bensley denying Appellant Brent Joseph Schmidt's application for a permit to purchase a pistol.

On July 2, 2009, the Court issued a Briefing Schedule Order, giving the Appellee 14 days from the date of the order to file the certified record and another 28 days to file his brief on appeal and giving the Appellee Sheriff 42 days to file his brief. The briefs have been filed and neither party has requested oral argument. The Court will now decide this matter on the written briefs.

By letter dated March 2, 2009, Sheriff Bensley stated that he denied Appellant Schmidt's application for a permit because of his "background and criminal history." He elaborated as follows:

In February of 2008 you were involved in a dispute with a roommate. As a result of that dispute, a personal protection order was issued against you. I have reviewed the affidavit filed in regards to the issuance of that personal protection order and your actions by displaying a baseball bat in a threatening manner and possibly being under the influence of alcohol at the time leads me to believe that this could have turned into a very serious event. Also, I am concerned that on the

day after the personal protection order expired, you requested a permit to purchase a pistol. At this time I am not inclined to issue a permit to purchase a pistol as a result of this fairly recent incident and your display of somewhat violent and aggressive behavior.

This Court must follow the review methods prescribed in MCLA Const. Art 6, § 28 which provides in pertinent part:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

See, *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 199, 550 NW2d 867 (1996). This is not a case in which a hearing was required. Therefore, this Court must determine whether Sheriff Bensley's decision to deny Appellant Schmidt a permit was authorized by law.

In plain English, "authorized by law" means allowed, permitted, or empowered by law. *Black's Law Dictionary* (5th ed). A decision that "is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious," is a decision that is not authorized by law. *Brandon School Dist v Michigan Ed Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991).

The Supreme Court set forth the accepted definitions of "arbitrary" and "capricious" in *Goolsby v City of Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984):

Arbitrary is: "[Without] adequate determining principle * * * Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, * * * decisive but unreasoned."

Capricious is: "[Apt] to change suddenly; freakish; [or] whimsical." [*Id.*, quoting *United States v Carmack*, 329 U S 230, 243; 67 S Ct 252; 91 L Ed 209 (1946) and *Bundo v City of Walled Lake*, 395 Mich 679, 703 n 17; 238 NW2d 154 (1976).]

Finally, an abuse of discretion "occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the

exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Alken-Ziegler Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999), quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), and *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

The Michigan Constitution, Article I, Section 6 provides: “Every person has a right to keep and bear arms for the defense of himself and the state.” This right, however, is not absolute, *Kampf v Kampf*, 237 Mich App 377; 603 NW2d 295 (1999). Because of the state’s legitimate interest in limiting access to weapons peculiarly suited for criminal purposes, the right to bear arms, like all other rights, is subject to the reasonable exercise of the police power. *People v McFadden*, 31 Mich App 512, 516; 188 NW2d 141, 144 (1971), citing *People v Brown*, 253 Mich 537; 235 NW 245 (1931). Also, see *United States v Miller*, 307 US 174; 59 S Ct 816; 83 L Ed 1206 (1939), which approvingly cites *Brown, supra*.

MCLA 28.422 governs obtaining a license to purchase, carry, possess or transport a pistol. Pursuant to constitutional requirements, the applicable statute, MCL 28.422, enumerates explicit criteria to guide the application process. MCL 28.422(3)(a)-(i). The parties agree that the Appellant Schmidt met all of the qualifications for the issuance of a permit. The dispute between them arises under subpart (3) which provides, in pertinent part, as follows:

(3) The commissioner or chief of police of a city, township, or village police department that issues licenses to purchase, carry, possess, or transport pistols, or his or her duly authorized deputy, or **the sheriff or his or her duly authorized deputy**, in the parts of a county not included within a city, township, or village having an organized police department, in discharging the duty to issue licenses **shall with due speed and diligence issue licenses to purchase, carry, possess, or transport pistols to qualified applicants** residing within the city, village, township, or county, as applicable **unless he or she has probable cause to believe that the applicant would be a threat to himself or herself or to other individuals, or would commit an offense with the pistol that would violate a law of this or another state or of the United States. . . .** [Emphasis added.]

The question present here is whether Sheriff Bensley had “probable cause” to believe that, if issued a permit to purchase a pistol, Appellant Schmidt “would be a threat to himself . . . or to other individuals, or would commit an offense with the pistol . . .”

The Appellant contends that there was no probable cause to believe that he would be a danger to himself or others or that he would commit an offense with the pistol. He relies upon the fact that, other than the personal protection order referenced by Sheriff Bensley, he has no

criminal record or other history of violence and he has security clearance, as well as, weapons clearance for the work he does on an ammunition ship supporting United States Navy combat operations. He contests Sheriff Bensley's use of the unsubstantiated hearsay contained in the affidavit submitted by his ex-roommate in support of her application for a personal protection order more than a year ago.

MCL 600.2950 provides for the issuance of a personal protection order when there is reasonable cause to believe that a respondent would commit violent or threatening acts against a petitioner, including assault, attack, threaten to kill or injure, or engage in any other conduct that "imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." See, *Kampf v Kampf*, 237 Mich App 377, 385; 603 NW2d 295 (1999).

A personal protection order is an injunctive order. MCL 600.2950a(29)(c). The grant of an injunctive order "is within the sound discretion of the trial court." *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002); *Kern v Homestead Dev Co*, 232 Mich App 503, 509-510; 591 NW2d 369 (1998). A personal protection order may be issued ex parte where "it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will precipitate adverse action before a personal protection order can be issued." MCL 600.2950a(9); see also MCR 3.703(G) and MCR 3.705(A)(2). The petitioner bears the burden of establishing reasonable cause for issuance of a personal protection order, *Kampf, supra* at 385-386, and of establishing a justification for the continuance of a personal protection order at a hearing on the respondent's motion to terminate the personal protection order, *Pickering, supra* at 699. The trial court must consider the testimony, documents, and other evidence proffered and whether the respondent had previously engaged in the listed acts. MCL 600.2950(4). MCL 600.2950(13) gives a respondent the right to bring a motion to rescind a personal protection order within 14 days of being served with notice or receiving actual notice of the personal protection order, and MCL 600.2950(14) requires the court to schedule a hearing on the motion within 5 or 14 days.

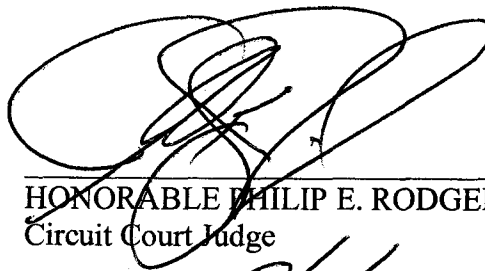
In this case, the Appellant Schmidt admits that there was a personal protection order issued against him in February of 2008, but he denies the allegations contained in the supporting affidavit. He claims that he failed to challenge the personal protection order in a timely manner and the personal protection order remained in effect and expired on its own

terms. There is no indication that the Appellant, at any time during the effective duration of the personal protection order, violated any of the terms or restrictions contained therein.

The statute under which the personal protection order was authorized, MCL 600.2950, does not provide for any continuing consequences or limitations on one's freedom once a personal protection order expires. In other words, once a personal protection order expires, it has no practical legal effect. See, the unpublished opinion in *Eckert v Eckert*, 2006 WL 707514, 1 (Mich App, 2006). Similarly, the affidavit filed in support of the personal protection order which was never challenged, should not have any lasting legal effect. To use the now stale facts asserted in that affidavit as probable cause to believe the applicant is a continuing danger and to deny the applicant a permit to purchase a pistol is, particularly under all of the circumstances of this case, unreasonable. An expired personal protection order and the unchallenged affidavit upon which it was based, without more, simply cannot provide "probable cause to believe that the applicant would be a threat to himself or herself or to other individuals, or would commit an offense with the pistol . . ." Therefore, the decision to deny Appellant Schmidt's application for a permit to purchase a pistol should be and hereby is reversed. Sheriff Bensley shall "with due speed and diligence issue [the Appellant a] license[] to purchase, carry, possess, or transport [a] pistol[]." MCL 28.422(3).

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes this case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

9/10/09