

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

COPY

MATTHEW GILLETTE)

)

VS.)

CASE NO: 2009/P-1842

)

DEAN ESSERMAN)

HEARD BEFORE ASSOCIATE JUSTICE MICHAEL A. SILVERSTEIN ON:

MONDAY, JUNE 8, 2009

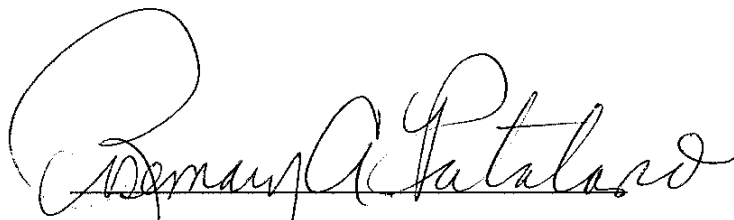
APPEARANCES :

JEFFREY PINE, ESQUIRE.....FOR THE PLAINTIFF

STEPHEN RYAN, ESQUIRE.....FOR THE DEFENDANT

C E R T I F I C A T I O N

I, Rosemary A. Patalano, hereby certify that the succeeding pages, 1 through 10, inclusive, are a true and accurate transcript of my stenographic notes.



ROSEMARY A. PATALANO, RPR
Certified Official Court Reporter

1 MONDAY, JUNE 8, 2009

2 AFTERNOON SESSION

3 THE COURT: We have two matters this afternoon,
4 first of which will be a bench decision in the case of
5 Matthew Gillette versus Dean Esserman, 09/P-1842.

6 Counsel in that matter please identify yourselves
7 for the record.

8 MR. PINE: Yes. Jeffrey Pine for plaintiff, Matthew
9 Gillette.

10 MR. RYAN: Stephen Ryan for the defendant, Dean
11 Esserman.

12 THE COURT: Gentlemen, this matter is before the
13 Court for decision with respect to plaintiff's petition
14 seeking the issuance of a writ of mandamus or comparable
15 alternative relief requiring the chief of police of the
16 city of Providence to accept plaintiff's application
17 pursuant to the provisions of the Firearms Act,
18 so-called; with specific reference to the provisions of
19 Title 11, Chapter 47, Section 11(a) of the General Laws.

20 The underlying facts giving rise to the petition
21 essentially are as follows:

22 The plaintiff herein is a resident of the city of
23 Providence. He is in excess of twenty-one years of age.
24 And in fact, he is a graduate student and an assistant at
25 Brown University. He possesses a permit issued by the

1 Attorney General of this state pursuant to the provisions
2 of the Firearms Act. Specifically, the provisions of
3 Title 11, Chapter 47, Section 18 of our General Laws.

4 That section essentially provides under appropriate
5 circumstances upon application for the Attorney General,
6 and I will read the specific provision in a moment;
7 specifically provides that:

8 "The attorney general may --"

9 Underscore the word "may."

10 "-- issue a license or permit to any person
11 twenty-one years of age or over to carry a pistol or a
12 revolver, whether concealed or not, upon his or her
13 person upon a proper showing of need..."

14 Subject to certain other statutory provisions which
15 at the moment are not of significance.

16 The Court heard testimony from the applicant or the
17 license holder under that Attorney General's license,
18 which was issued sometime ago.

19 The Court notes, inter alia, although no one
20 referenced this fact, that the particular permit issued
21 by the Attorney General contains a limitation. That
22 limitation is found on the face of the license and is the
23 final page of Exhibit 1 full. That limitation provides a
24 restriction limiting the license in the following
25 language, quote: "Range Only." Apparently, the license

1 is limited to target shooting on a target range.

2 The Court to some extent, gentlemen, is perplexed at
3 that limitation, because the Court notes that under the
4 attached statutory scheme of the Firearms Act,
5 Section 10 contains a specific provision essentially
6 indicating that if it's for target shooting at an
7 authorized range, a recognized range, there is no need
8 for a license at all.

9 But, be that as it may. And that was not briefed
10 and was not argued. No reference was made that -- made
11 to that in argument or in the memos provided to the
12 Court.

13 The petitioner here indicated that it was his desire
14 to obtain a license from the City of Providence.

15 In addition to testimony from him, the Court also
16 heard testimony from Lieutenant Michael Correia, a
17 twenty-two year veteran of the Providence Police
18 Department, who is in charge of the Narcotics and
19 Organized Crime Bureau of the Providence Police
20 Department and has overall responsibility for license
21 enforcement.

22 Lieutenant Correia testified that from and after the
23 time that he first joined the Providence Police
24 Department to now, and that spans, as I said, some
25 twenty-two years, it has been the unwritten policy and/or

1 practice of the City of Providence and its police chief
2 not to entertain firearms permits.

3 The Court notes that Exhibit 2 introduced during the
4 course of the abbreviated hearing before the Court is a
5 letter from the city solicitor or assistant city
6 solicitor, who is here in court today. That letter,
7 which is a full exhibit, basically sets forth in the
8 letter to Mr. Gillette that the City doesn't believe that
9 it has the authority to issue gun permits because it
10 doesn't have a licensing authority as the City understood
11 that term in the general statutes of the state.

12 Again, something the Court doesn't quite understand,
13 because it is clear under the statutory scheme that
14 Section 11(a) as I referred to it before, provides,
15 quote:

16 "The licensing authorities of any city or town
17 shall, upon application of any person twenty-one years of
18 age or over having a bona fide residence...issue a
19 license or permit to the person to carry concealed upon
20 his or her person a pistol or revolver anywhere (sic)
21 within the state."

22 A very significant word precedes the term "upon
23 application of any person twenty-one years of age." That
24 word is the mandatory word "shall."

25 The city solicitor in Exhibit 2 suggests that the

1 City doesn't have a licensing authority; and accordingly,
2 is not bound by the provisions of that Section 11(a) of
3 the General Laws.

4 However, part of the Firearms Act is a definitional
5 section. It is 11-47-2. And in Subparagraph(5) of that
6 statute appears the following quote:

7 "'Licensing authorities' means the board of police
8 commissioners of a city or town where the board has been
9 instituted, the chief of police or superintendent of
10 police of other cities and towns..."

11 There seems to be no question but that the City of
12 Providence does not have a board of police commissioners.
13 What it clearly has is a chief of police, who by
14 definition for the purpose of the Firearms Act is the
15 licensing authority.

16 The City besides denying that it is subject to the
17 provisions of that provision because of its claim that it
18 does not have an a licensing authority further takes the
19 position that essentially the petitioner here already
20 possessed of a license issued by the Attorney General has
21 obtained the relief to which he claims to be entitled;
22 and therefore, a writ of mandamus here should not issue.

23 There is, of course, no question but that the
24 issuance of a writ of mandamus is an exceptional writ.
25 Our cases spell out the circumstances under which

1 mandamus is an appropriate remedy.

2 The Court notes that a fairly recent determination
3 by our Supreme Court, although the same iteration appears
4 elsewhere, is found in the Supreme Court decision in --
5 at the beginning of the year 2007, New England
6 Development, LLC v. Noel Berg, where the court said,
7 quote, at Page 368, the decision is at 913 A.2d 363:

8 "A writ of mandamus is an extreme remedy that will
9 be issued only when: (1) the petitioner has a clear legal
10 right to the relief sought, (2) the respondent has a
11 ministerial duty to perform the requested act without
12 discretion to refuse, and (3) the petitioner has no
13 adequate remedy at law."

14 Addressing seriatim the three elements, the Court
15 here finds that one, the petitioner here has a clear
16 legal right to the relief sought. That requires some
17 examination of what is the relief that this petitioner at
18 this juncture seeks. It is not the issuance of a permit
19 by the City of Providence pursuant to 11-47-11(a). It is
20 simply that he:

21 One. Be permitted to file an application with the
22 City; that is to say, with defendant, Chief Esserman; and

23 Two. That Chief Esserman review that application
24 consistent with the provisions of the statute that I've
25 mentioned.

1 As indicated above, the city police department, the
2 chief, take the position that it is not bound or they are
3 not bound by the provisions of this section for the
4 reasons I have indicated. The Court finds to the
5 contrary.

6 Two. The respondent; that is to say, Chief
7 Esserman, has a ministerial duty to perform the requested
8 act without discretion to refuse. Again, the Court now
9 speaks not of the issuance of this permit, but rather the
10 ministerial duty to accept an application and to review
11 it.

12 It is not for this Court at this time once the
13 application is in hand to tell the chief what decision he
14 should make. That is not within the purview of the
15 application or petition pending before the Court.

16 The final element, according to our Supreme Court,
17 is the Court must find that the petitioner has no
18 adequate remedy at law. Adequate remedy at law is
19 variously described.

20 There are suggestions that relief other than
21 mandamus here might be sought. Plaintiff petitioner
22 might seek a declaratory judgment. He might seek some
23 equitable form of relief. He might seek certiorari from
24 the Supreme Court under certain circumstances. Already
25 having a license, he may reapply to the City -- I mean,

1 to the licensing authority that issued his license; that
2 is to say, the Attorney General. And from, if that's
3 what it were, a declination by that authority to issue a
4 new license, then consistent with other decisions of
5 this -- of our Supreme Court seek cert from them.

6 This Court is told by the City that my former
7 colleague, Judge Fortunato, in deciding a case from
8 Smithfield, erred when he found in the case of
9 Archer v. McGarry in 2002 that the section that I have
10 referred to, 11(a), was applicable; where the policy of
11 the Town of Smithfield appeared to be precisely what it
12 is in the City of Providence at this time; that his
13 reasoning was faulty; and that he reached the wrong
14 conclusion in granting mandamus.

15 The Court has on the bench that decision. The Court
16 does not believe that Judge Fortunato was in error in
17 connection with his reasoning. Is there a difference
18 between the facts in that case and the facts in the case
19 at bar? Yes. The difference is that here, petitioner
20 already is equipped with a license. His testimony was
21 such that he wanted a license for more than simply target
22 shooting.

23 The Court went out of its way to indicate in the
24 early part of this decision that there is a limitation on
25 the license issued by the Attorney General. Seems to the

1 Court, particularly based on the section that I referred
2 to, Section 10 of the Firearms Act, that license is not
3 even required, if all you're doing is transporting to and
4 from a range. That, in essence, this applicant doesn't
5 really have a license as contemplated by 18 or by 11(a).
6 He may not be entitled to it. That is for Colonel
7 Esserman -- Chief Esserman to determine based on the
8 application that this Court will order that he receive
9 and review.

10 Order may enter. And that concludes the Court's
11 decision.

12 MR. PINE: Thank you, Your Honor.

13 THE COURT: Thank you, gentlemen.

14 MR. PINE: Your Honor, would the Court consider as
15 part of a post hearing application an application on the
16 part of plaintiff for attorney's fees or costs associated
17 with the prosecution of this claim?

18 THE COURT: Your petition for relief sought that,
19 Mr. Pine. You may file an appropriate application for
20 it, and I will take it under advisement.

21 MR. RYAN: We will respond to it, Judge. Thank you,
22 Judge.

23 Are you on some kind of a time scenario for the City
24 to implement the policy and the application?

25 THE COURT: How long do you think?

1 MR. RYAN: I don't think it's something that if it
2 was submit today and get an application --

3 I really don't want to copy something that's already
4 been created.

5 THE COURT: Why don't you gentlemen confer. And if
6 you can agree on something, fine. If you can't agree,
7 come back and we'll --

8 MR. RYAN: That's fine.

9 THE COURT: -- address it.

10 Thank you, gentlemen.

11 (Decision concluded)

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