IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTIRICT OF ILLINOIS
EASTERN DIVISION

SHAWN GOWDER, Plaintiff, v. CITY OF CHICAGO, a municipal corporation, the CITY OF CHICAGO DEPARTMENT OF ADMINISTRATIVE HEARINGS, MUNICIPAL HEARINGS DIVISION, SCOTT V. BRUNER, Director of the City of Chicago Department of Administrative Hearings, the CITY OF CHICAGO DEPARTMENT OF POLICE, and JODY P. WEIS, Superintendent of the City of Chicago Department of Police, Defendants.	)	No. 11-cv-1304 Judge Der-Yeghiayan

PLAINTIFF'S REPLY IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Shawn Gowder, by and through his attorney, Stephen A. Kolodziej of the law firm of Brenner, Ford, Monroe & Scott, Ltd., states for his Reply in Support of his Motion for Judgment on the Pleadings [Doc. # 26] as follows:

I. Administrative Review Claim

The defendants first argue that the DOAH correctly interpreted the word "use" in MCC § 8-20-110 to include the meaning "carry" or "possess." This is so, defendants argue, because the word "use" cannot be isolated from its context, and that context clearly indicates that the Chicago City Council intended the word "use" to denote not only the active employment or discharge of a firearm, but also the mere carrying or possessing of a firearm.

Defendants are wrong, for the very first sentence of § 8-20-110 states that "it is unlawful for any person to *carry* or *possess* a firearm without a CFP" (emphasis supplied). Contrary to

defendants' assertion, therefore, the context of § 8-20-110 clearly indicates that the City Council knew how to employ the terms "carry" and "possess" when it meant them. The Council, however, did not draft Section 8-20-110(b)(3) to prohibit the issuance of a CFP based on a conviction for unlawfully carrying or possessing a firearm, but only for an unlawful use of a firearm. The City Council employed these three separate words in the same section of the ordinance, yet did not define the word "use" to include the meaning of "carry" or "possess." The context of § 8-20-110 therefore supports the exact opposite conclusion of that urged by defendants: The meaning of the term "use" is not the same as the distinct terms "carry" or "possess" employed by the City Council. Had the City Council intended to prohibit the issuance of a CFP to a person convicted of unlawfully "carrying" or "possessing" a firearm, it could easily have written § 8-20-110 to say so. Instead, the City Council chose to limit the prohibition on the issuance of a CFP to persons convicted of an unlawful "use," which has a commonly understood meaning of actively employing or operating a firearm, and must be so construed. *See Bailey v. United States*, 516 U.S. 137, 145 (1995).

Defendants attempt to distinguish *Bailey* on the grounds that the statute at issue there distinguished between "use" and "carry" in the same sentence, whereas § 8-20-110 "does not distinguish between convictions for 'use *or* carry' or 'use *or* possession.'" Defendants' Response [Doc. # 30] at 7 (emphasis in original). Defendants further argue that the ordinance is different from the statute in *Bailey* because the terms "carry" and "possess" are used "in different sections of the provision" from the term "use." *Id.* at 7, n.3.

This is a distinction without a difference. The fact that the word "use" is not employed in the same sentence of § 8-20-110 as the word "carry" or "possess" does not *ipso facto* establish that the City Council intended the term "use" to encompass the unusual meanings "carry" and

"possess" in addition to the commonly understood meaning of active employment as held in *Bailey*. To the contrary, the fact that all three of these words are used in the same section of the ordinance indicates that they were not considered identical by the City Council. Had the City Council understood "use" to include the meanings "carry" and "possess," then there is no reason for it to have employed the distinct terms "carry" and "possess" in § 8-20-110. And if the City Council "had intended to deprive 'use' of its active connotations, it could have simply substituted a more appropriate term – 'possession' – to cover the conduct it wished to reach." *Bailey*, 516 U.S. at 148.

Moreover, the City Council devoted the first four pages of MCC Chapter 8-20 to setting forth detailed definitions of various terms used throughout the chapter, including specific definitions for such commonly understood words as "home." *See* MCC § 8-20-010. Thus, the City Council clearly knew how to define words and phrases to expand, limit or clarify their commonly understood legal meanings when it wished to do so, yet it chose not to define the term "use." In view of the telling absence of a definition of "use," and the employment of the separate and distinct terms "carry," "possess" and "use" in § 8-20-110, the defendants' contextual argument for the DOAH's construction of the term "use" fails.

Defendants next argue that because § 8-20-110 refers to convictions by a court in "any jurisdiction of the unlawful use of a firearm," it is illogical to conclude that the term "use" was intended to have the ordinary, commonly understood legal meaning recognized in *Bailey*. Asserting that the indefinite article "any" has an expansive meaning, defendants conclude that "use of 'any' before 'jurisdiction' here connotes [the] City Council's intent to include all convictions for unlawful use in all jurisdictions." Defendants' Response at 8. This argument makes no sense, for it begs the very question of what the word "use" commonly means in all

jurisdictions. *Bailey* unequivocally answers that question: "use" means active employment or discharge. Moreover, the fact that the ordinance refers to "any jurisdiction" rather than to just Illinois, yet does not define either the term "use" or the phrase "unlawful use of a weapon that is a firearm," indicates that the term "use" was intended to have its commonly understood meaning of active employment or discharge, not the uncommon and unusual meaning given to it in the Illinois statute, 720 ILCS 5/24-1(a)(10).

The language "in any jurisdiction" eschews a parochial approach that would adopt unusual linguistic word usage from a particular jurisdiction that is not followed in jurisdictions generally. Otherwise, the absurd result would occur that a person with a conviction for unlawful carrying or possession of a firearm in a jurisdiction which does not define such as "use" of a firearm would qualify for a CFP, while a person convicted of the very same offense in Illinois, because it uses the label "use" to include carrying or possession, would not qualify. Defendants fail to address this absurd result.

In essence, the defendants argue exactly what the administrative law judge ruled: that because the Illinois criminal statute defines the offense of "unlawful use of a weapon" to include the mere carrying or possession of a firearm in a public place, the undefined phrase "unlawful use of a weapon" as used in § 8-20-110(b)(3)(iii) must be construed to include carrying or possession of a firearm. The flaw in this reasoning is that it violates the canon of constitutional avoidance, because it raises the serious constitutional question of whether the ordinance violates plaintiff's fundamental Second Amendment right to possess a firearm in his home for self defense, as recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

Even assuming the defendants' proffered interpretation of § 8-20-110 is reasonable, then the ordinance is susceptible to more than one reasonable interpretation. That being the case, the canon of constitutional avoidance requires the Court to choose the construction of the ordinance that avoids raising substantial doubts as to its constitutionality. *Clark v. Martinez*, 543 U.S. 371, 385 (2005); *Villegas v. Board of Fire & Police Comms.*, 167 Ill. 2d 108, 124, 656 N.E.2d 1074 (1995).

Defendants themselves recognize that the canon of constitutional avoidance applies when a statute is subject to more than one reasonable interpretation, yet they argue the canon does not apply here: "Plaintiff claims that the Court should accept his interpretation merely to avoid even *addressing* his constitutional claims. Simply because Plaintiff has brought constitutional challenges, however, does not mean that these claims have merit and, indeed, Defendants vigorously dispute them." Defendants' Response at 10 (emphasis in original). This argument also makes no sense: Defendants claim that the Court should not avoid addressing plaintiff's constitutional claims, because defendants dispute the merits of those claims. This turns the canon of constitutional avoidance on its ear. The whole point of the canon is to avoid the necessity of addressing constitutional claims – however vigorously disputed by the defendants -- whenever possible, for "courts must if they can interpret statutes to avoid constitutional problems." *Gray-Bey v. United States*, 201 F.3d 866, 869 (7th Cir. 2000). If the Court construes § 8-20-110 as plaintiff urges and as *Bailey* requires, and concludes that a misdemeanor conviction for merely carrying or possessing a firearm in public does not constitute a conviction for an unlawful "use" of a weapon, then the Court will never have to engage in a constitutional analysis and rule upon the merits of plaintiff's constitutional claims. If the Court rules that the DOAH's construction of the ordinance was erroneous, and reverses the denial of plaintiff's CFP

application, then plaintiff's constitutional claims will be moot, and the canon of constitutional avoidance will have functioned precisely as it is supposed to.

Defendants' contextual argument is unavailing. If anything, the context of § 8-20-110 indicates that the City Council intended the word "use" to have a distinct and different meaning from the words "carry" and "possess." At most, the phrase "unlawful use of a weapon" in § 8-20-110 is ambiguous, and the canon of constitutional avoidance therefore requires the Court – as it required the DOAH – to construe the phrase in a manner that avoids raising the constitutional question whether the ordinance violates the plaintiff's fundamental Second Amendment right to keep and bear arms. The DOAH's interpretation of § 8-20-110(b)(3)(iii) was therefore erroneous, and must be reversed. The Court should enter judgment on the pleadings for plaintiff on Count I of plaintiff's complaint, and reverse the decision of the Department of Administrative Hearings.

II. Constitutional Claims

Even if the canon of constitutional avoidance did not require the Court to reverse the DOAH's ruling, that ruling cannot stand because § 8-20-110(b)(3)(iii) violates the Second and Fourteenth Amendments by categorically prohibiting persons convicted of a misdemeanor offense of "an unlawful use of a weapon" – regardless of what that offense consists of – from exercising their fundamental right to keep and bear arms.

Defendants argue that plaintiff's facial challenge to § 8-20-110 is not really a "true" facial challenge, but rather "challenges § 8-20-110(b)(3)(iii) only so far as DOAH *actually applied it* to Plaintiff's type of conviction." Defendants' Response at 11 (emphasis in original). That is not accurate. Plaintiff's constitutional challenge to § 8-20-110(b)(3)(iii) is actually a partial-invalidity challenge, because plaintiff does not claim that the section, *as written*, is

facially unconstitutional in all of its potential applications. Rather, plaintiff claims that the language of § 8-20-110(b)(3)(iii) *as construed and applied by the DOAH,* is facially unconstitutional to the extent that it creates a categorical ban on the possession of handguns by misdemeanants, including the plaintiff.

The nature of plaintiff's constitutional claim is demonstrated by the relief plaintiff seeks. Plaintiff does not seek to enjoin the application § 8-20-110(b)(3)(iii) in its entirety, but rather only to the extent that it prohibits issuance of a CFP to persons convicted of the misdemeanor offense of an unlawful carrying or possession of a weapon. This partial invalidation necessarily would result in a declaration that the ordinance cannot be applied to plaintiff to deny his CFP application. *See Commodity Trend Service, Inc. v. Commodity Futures Trading Commission,* 149 F.3d 679, 688 n.4 (7th Cir. 1998) ("If the challenged statute is capable of partial invalidation, and if the plaintiff's conduct comprises the heart of the statute's 'substantial' relative unconstitutionality, then a facial overbreadth challenge to the statute might result in a partial invalidation that closely resembles the declaratory relief in the as-applied challenge"). Plaintiff does not challenge § 8-20-110(b)(3)(iii) to the extent it is construed only to apply to felony convictions for unlawful use of a weapon.[1]

The Supreme Court has recognized that even though a statute may not be facially invalid in all of its potential applications, it may nonetheless be partially unconstitutional insofar as it is construed and applied in a manner that impermissibly infringes constitutional rights. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502-503 (1985), and cases cited therein. In such cases, "[t]he statute may forthwith be declared invalid to the extent that it reaches too far,

[1] Indeed, a person convicted of a felony in any jurisdiction cannot obtain an Illinois Firearm Owners Identification Card (FOID), 430 ILCS 65/4, and § 8-20-110(b)(2) requires a CFP applicant to have a valid Illinois FOID.

but otherwise left intact." *Id.* at 504. Such relief is particularly appropriate where the statute contains a severability clause. *Id.* at 506. It is precisely such relief that plaintiff seeks through his constitutional challenge to § 8-20-110(b)(3)(iii). MCC Chapter 8-20 contains a severability clause, § 8-20-290, and the fact that plaintiff has not claimed that § 8-20-110(b)(3)(iii) is facially invalid as written in all of its applications does not foreclose the Court from declaring that section of the ordinance, as construed by the DOAH, "invalid to the extent that it reaches too far." *Brockett*, 472 U.S. at 504.

Citing *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), defendants next argue that misdemeanor convictions can constitutionally disqualify a person from exercising their Second Amendment rights. Defendants' Response at 12. *Skoien*, however, addressed only the constitutionality of the federal ban on persons convicted of the misdemeanor crime of domestic violence from possessing firearms under 18 U.S.C. § 922(g)(9)[2]. And whereas *Skoien* addressed a ban on possession of firearms by persons convicted of a crime of violence, the present case involves only the mere possession or carrying of a firearm, which is not a violent crime. *See Stinson v. United States*, 508 U.S. 36, 47 (1993); *United States v. Archer*, 531 F.3d 1347, 1351 (11th Cir. 2008). *Skoien* does not stand for the proposition that any misdemeanor conviction can support a categorical ban on the possession of firearms, nor does it support the defendants' claim that a person convicted of a misdemeanor for merely possessing or carrying a firearm in public can be deprived of his fundamental Second Amendment right to keep and bear arms.

Moreover, unlike Chapter 8-20 of the Municipal Code of Chicago, the federal statute at

[2] "The belief underpinning § 922(g)(9) is that people who have been convicted of violence once – toward a spouse, child or domestic partner, no less – are likely to use violence again." *Skoien*, 614 F.3d at 642.

issue in *Skoien* specifically and narrowly defined the elements of the type of misdemeanor to which the firearms ban applied. *See* 18 U.S.C. § 921(a)(33). Here, the vagueness of MCC § 8-20-110(b)(3)(iii) is what led to this lawsuit in the first instance. The Chicago City Council did not see fit to define the offense of "unlawful use of a weapon that is a firearm" or the term "use," and did not limit the scope of § 8-20-110(b)(3)(iii) to felony convictions.

Defendants also cite *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010), and *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010), but those cases are easily distinguishable and lend no support to defendants' position. *Williams* addressed the categorical ban on felons possessing firearms under 18 U.S.C. § 922(g)(1), and plaintiff here has not been convicted of a felony and does not challenge that ban. *Yancey* involved the disqualification of persons who are unlawful users of or addicted to any controlled substance to possess a firearm under 18 U.S.C. § 922(g)(3). In upholding the constitutionality of that prohibition, the court specifically noted that it was limited solely to current addicts or abusers of controlled substances, and did not impose a lifetime ban: "unlike those who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user like Yancey could regain his right to possess a firearm simply by ending his drug abuse." *Yancey*, 621 F.3d at 686. In the present case, the ban at issue does not pertain to unlawful controlled substance abuse, and it is a lifetime ban: anyone who is convicted of a misdemeanor merely for carrying or possessing a firearm in public is forever barred from exercising his fundamental Second Amendment rights under the construction given to the ordinance by defendants. Finally, defendants cite the Seventh Circuit's recent decision in *Ezell v. City of Chicago*, --- F.3d ---, 2011 WL 2623511 (7th Cir. 2011). *Ezell* addressed Chicago's now-repealed firearm training range ban in the context of a preliminary injunction ruling. The Court of Appeals held that the District Court erred in denying the

plaintiffs' request for a preliminary injunction, and significantly, noted the probable unconstitutionality of that ban because range training is a specific requirement under 8-20-110 for obtaining a CFP. *Ezell*, 2011 WL 2623511 at p. 17.

None of the foregoing cases addressed the question presented here, and none of them stand for the proposition that persons convicted of a misdemeanor for merely carrying or possessing a firearm in public can be forever stripped of their Second Amendment right to keep and bear arms.

Defendants argue that they must be allowed to develop and submit an evidentiary record, "which may include relevant legislative history, expert reports and studies, and relevant facts regarding Plaintiff's conviction and history." Defendants' Response at 14. This argument is without merit. It is undisputed that the interpretation given to § 8-20-110(b)(3)(iii) by the DOAH deprives persons convicted of a misdemeanor for merely possessing or carrying a firearm in public – including plaintiff – of their fundamental Second Amendment right to keep and bear arms in the City of Chicago, even though they are not disqualified from owning and possessing firearms under federal or Illinois law. It is further undisputed that the plaintiff's misdemeanor conviction for carrying/possessing a firearm in public was the sole basis for the denial of his CFP application. As set forth above, although plaintiff's facial challenge to 8-20-110(b)(3)(iii) does not seek to invalidate that section in its entirety for all of its conceivable applications, it does challenge the facial validity of the ordinance insofar as it is an impermissible categorical ban on the Second Amendment rights of misdemeanants, who are not otherwise disqualified under federal or Illinois law from owning a firearm.[3] No extrinsic evidence or case-specific fact-finding is required for the Court to determine the constitutionality of such a ban. *See Heller*, 554

[3] Plaintiff here is absolutely qualified to own and possess firearms anywhere in the State of Illinois. He has a valid Illinois FOID, which was submitted as part of his CFP application.

U.S. at 634-35. Plaintiff's as-applied challenge is simply the necessary corollary of his facial challenge: if the ordinance as construed by the DOAH is a facially invalid categorical ban on misdemeanants' Second Amendment rights, then the application of that ban to deny plaintiff's CFP application was also necessarily unconstitutional. Because plaintiff's as-applied challenge is dependent on and inextricably intertwined with his partial-invalidity facial challenge, resolution of plaintiff's constitutional claims does not turn on case-specific facts or require the presentation of extrinsic evidence.

As for defendants' invitation to delve into "expert" studies and reports to determine if the constitutional right is really worth it: "In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing. . . ." *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3047 (2010), *citing District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. at 2820-2821 (2008). Further, defendants have not asserted any important governmental interest served by their construction of § 8-20-110(b)(3)(iii) in their answer to plaintiff's complaint, nor have they identified or articulated any such interest in their response to plaintiff's motion for which discovery or additional evidence is either required or warranted. Defendants argue that because plaintiff was originally charged with and convicted of a felony which was vacated and reduced to a misdemeanor, they should be allowed to engage in a fishing expedition regarding "what conduct Plaintiff actually engaged in" and "other information surrounding Plaintiff's criminal past." Yet none of this information was deemed relevant by the defendants when they denied plaintiff's CFP application; the only fact that mattered to them was the mere fact of his misdemeanor conviction for carrying/possessing a firearm in public. Defendants are now clearly seeking to engage in a *post hoc* fishing expedition to attempt to justify the DOAH's ruling, and the Court should reject such an after-the-fact

attempt to bootstrap new evidence into the case at this stage. *See Reynolds v. Jamison*, 488 F.3d 756, 762 (7th Cir. 2007) (In a § 1983 claim, the Court may properly deny discovery where the material facts are not in dispute and discovery would not lead to any triable issue); *Lyon v. Dept. of Children & Family Services*, 807 N.E.2d 423, 430 (Ill. 2004) ("Courts cannot consider evidence outside of the record of the administrative appeal").

Finally, in footnote number five, at page 15 of their Response, defendants assert that *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 509, 470 N.E.2d 266 (1984), held that Article I, § 22 of the Illinois Constitution does not protect a fundamental right. However, defendants ignore the Illinois Supreme Court's explicit statement in *Kalodimos* that a ban on all firearms that an individual citizen might use would not be permissible under Art. I, § 22. *Kalodimos*, 103 Ill. 2d at 498, 470 N.E.2d at 273. MCC § 8-20-110(b)(3)(iii), as construed and applied by the DOAH, constitutes a complete ban on the possession of all firearms by an Illinois citizen residing in Chicago, for the ordinance requires all persons to have a valid CFP in order to lawfully possess a firearm in the City of Chicago. For the same reasons that § 8-20-110(b)(3)(iii) violates the Second and Fourteenth Amendments to the U.S. Constitution, therefore, it also violates Art. I, § 22 of the Illinois Constitution.

Conclusion

The City of Chicago has denied plaintiff his fundamental right to keep and bear arms by requiring him to obtain a Chicago Firearm Permit in order to lawfully possess firearms within the city limits, yet denying his application for a CFP based solely upon the fact that plaintiff has a prior misdemeanor conviction for carrying/possessing a firearm in public. Neither federal nor Illinois law disqualifies plaintiff from possessing a firearm for such a misdemeanor conviction. Plaintiff has a valid Illinois Firearm Owners Identification Card, and he is constitutionally

entitled to possess firearms in the City of Chicago. The Department of Administrative hearings erroneously interpreted MCC § 8-20-110(b)(3)(iii) to bar the issuance of a CFP to plaintiff, and this erroneous interpretation violated plaintiff's constitutional rights.

For the reasons stated and based upon the authorities cited herein and in plaintiff's motion for judgment on the pleadings and memorandum of law in support thereof, the Court should grant defendant judgment on the pleadings.

WHEREFORE, plaintiff Shawn Gowder prays that the Court enter judgment on the pleadings in his favor and against defendants, and enter an order granting the following relief:

1) Finding and declaring that MCC § 8-20-110(b)(3)(iii) does not bar the issuance of a Chicago Firearm Permit based upon a misdemeanor conviction for carrying or possessing a handgun in a public place;
2) Reversing the decision of the City of Chicago Department of Administrative Hearings and ordering the City of Chicago Department of Police to issue plaintiff a Chicago Firearm Permit;
3) In the event the Court determines that the DOAH's interpretation of MCC § 8-20-110(b)(3)(iii) was not erroneous, finding and declaring that this section of the ordinance, as construed by the DOAH and applied to plaintiff, violates the fundamental right to keep and bear arms under the Second and Fourteenth Amendments to the U.S. Constitution and Article I, § 22 of the Illinois Constitution, and enjoining the defendants from denying any applicant's application for a Chicago Firearm Permit on the grounds of a misdemeanor conviction for merely carrying or possessing a firearm in public;

4) Awarding plaintiff his reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

5) Granting such other and further relief as the Court deems equitable and appropriate.

Respectfully submitted,

s/ Stephen A. Kolodziej____

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CERTIFICATE OF SERVICE

I, Stephen A. Kolodziej, an attorney, certify that on August 15, 2011, service of the foregoing document is being made in accordance with the General Order on Electronic Case Filing section XI to the following:

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