2015 IL App (2d) 141221-U
No. 2-14-1221
Order filed November 24, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STEPHEN R. MCLEAN,	)	Appeal from the Circuit Court
	)	of De Kalb County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-MR-253
	)	
THE DE KALB COUNTY STATE'S	)	
ATTORNEY'S OFFICE,	)	
	)	
Defendant.	)	Honorable
	)	William P. Brady,
(Department of State Police, Appellant).	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in denying appellant's petition to intervene as of right. Reversed and remanded.

¶ 2 On June 18, 2010, appellant, the Illinois Department of State Police (Department), denied appellee's, Stephen R. McLean's, application for a firearm owner's identification (FOID) card. The basis for the denial was that, in 1991, McLean was convicted of "battery, as a result of an incident involving domestic violence." Three years later, in November 2013, McLean filed a

petition in the circuit court pursuant to section 10 of the Firearm Owners Identification Card Act (FOID Act) (430 ILCS 65/10 (West 2012) (as amended by Pub. Act 97-1131, § 15 (eff. Jan. 1, 2013))), seeking an order directing the Department to issue him a FOID card. At the hearing on the petition, the De Kalb County State's Attorney's office appeared on behalf of the People of the State of Illinois. On March 21, 2014, the trial court granted McLean's petition. On July 11, 2014, the Department petitioned to intervene as of right pursuant to section 2-408 of the Code of Civil Procedure (Code) (732 ILCS 5/2-408 (West 2012)). After a hearing, the court denied the petition. The Department appeals. For the following reasons, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 A. Relevant Legal Authority

¶ 5 As will be explained later in this disposition, we will not, in this appeal, directly rule on the trial court's March 21, 2014, decision to order the Department to issue the FOID card. However, to better understand the parties' arguments with respect to intervention, we think it helpful to set forth upfront the legal authority concerning both the FOID card decision and intervention as of right.

¶ 6 With respect to the FOID card, we note first that the FOID Act provides that the Department has authority to deny an application for a FOID card if the applicant is "a person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute *or by federal law*." (Emphasis added.) 430 ILCS 65/8(n) (West 2008). A petitioner subject to a firearm prohibition may, in certain circumstances, petition the circuit court for relief; in doing so, the petitioner "shall serve" a copy of the petition on the relevant State's Attorney, who may object to the petition and present evidence. 430 ILCS 65/10(a)-(b) (eff. Jan. 1, 2013) (the section does *not* require service upon the Department). At a hearing on the petition, the

court shall consider certain factors to determine whether substantial justice has been done. 430 ILCS 55/10(b) (eff. Jan. 1, 2013). If the court determines that substantial justice has not been done, it shall order the Department to issue a FOID Card: "However, the court shall *not* issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm *under federal law*." (Emphasis added.) *Id*. Further, although the court may grant relief to a petitioner if it finds certain circumstances apply, the court must first find that "granting relief would not be contrary to *federal law*." (Emphasis added). 430 ILCS 65/10(c)(4) (eff. Jan. 1, 2013).[1]

¶ 7 The federal Gun Control Act, in turn, provides that it is unlawful for any person who has been convicted in any court of a "misdemeanor crime of domestic violence" to possess or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(g)(9) (2008). For purposes of the Gun Control Act, a

[1] Subsections (b) and (c)(4) were added by the General Assembly, effective January 1, 2013 (430 ILCS 65/10(b), (c)(4) (eff. Jan. 1, 2013)), and the effect was to limit the relief that could be granted to a petitioner by the circuit court. For example, prior to the amendments, even where the denial of the FOID card was based on a federal prohibition, the circuit court could override that prohibition if it found certain circumstances existed: (1) no conviction or time served for a forcible felony within the last 20 years; (2) considering the criminal history, petitioner was not likely to act in a manner dangerous to public safety; and (3) granting relief would not be contrary to the public's interest. 430 ILCS 65/10(c)(1)-(3) (West 2010). The 2013 amendments, however, added subsections (b) and (c)(4), such that the court must, before granting relief, *also* determine that doing so would not be contrary to federal law. See *Frederick*, 2015 IL App (2d) 140540, ¶ 5.

"misdemeanor crime of domestic violence" is an offense that: (1) is a misdemeanor; and (2) "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent or guardian ***." 18 U.S.C. § 921(a)(33)(A) (West 2008). The Supreme Court has held that, for an offense to qualify as a crime of domestic violence, only the first part of the definition (*i.e.*, the use or attempted use of physical force) must be a required element; the second part of the definition (*i.e.*, the domestic relationship) need *not* be a required element of the offense. *United States v. Hayes*, 555 U.S. 415, 426 (2009); see also *O'Neill v. Director of the Illinois Department of State Police*, 2015 IL App (3d) 140011, ¶ 24; *People v. Frederick*, 2015 IL App (2d) 140540, ¶ 29.[2] Accordingly, a battery conviction may qualify as a "misdemeanor crime of domestic violence," so long as the State demonstrates that the required domestic relationship was present. *Hayes*, 555 U.S. at 426; *Franklin*, 2015 IL App (2d) 140540, ¶ 29.

[2] In addition to principles of statutory construction, the Court explained that its interpretation was supported by practical considerations; namely, that Congress's manifest purpose in enacting section 922(g)(9) was to address firearms and domestic strife, yet, at the time of enactment, only two-thirds of the States had criminal statutes that specifically proscribed domestic violence, routinely prosecuting domestic abusers under assault or battery laws. Thus, if section 922(g)(9) encompassed convictions only for "domestic battery," it "would have been 'a dead letter' in some two-thirds of the States from the very moment of its enactment." *Hayes*, 555 U.S. at 427. The Court held that Congress did not intend such a limited result and, instead, intended section 922(g)(9) to extend to persons convicted "under a generic use-of-force statute (one that does not designate a domestic relationship as an element of an offense)." *Id.* at 426-27; see also, *Frederick*, 2015 IL App (2d) 140540, ¶ 30.

¶ 8 Having summarized the relevant authority concerning the issuance of the FOID card, we turn to intervention as of right. Section 2-408(a)(2) of the Code provides that, "upon timely application, anyone *shall* be permitted *as of right* to intervene in an action" when "the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." (Emphasis added.) 735 ILCS 5/2-408(a)(2) (West 2012). Generally, intervention is designed to expedite litigation by including all individuals and entities involved in the same controversy or cause of action to avoid a multiplicity of actions. *Bishop v. Village of Brookfield*, 99 Ill. App. 3d 483, 487 (1981). The statute setting forth the requirements for intervention is to be liberally construed. *Maiter v. Chicago Board of Education*, 82 Ill. 2d 373, 381 (1980). Courts have noted generally that intervention is typically committed to the sound discretion of the trial court. *City of Chicago v. John Hancock Mutual Life Insurance Co*., 127 Ill. App. 3d 140, 143 (1984). However, when intervention as a matter of right is asserted (as opposed to permissive intervention under section 2-408(b) (735 ILCS 5/2-408(b) (West 2012)), the trial court's discretion is *limited* to determining: (1) the timeliness of the petition; (2) inadequacy of representation; and (3) whether the movant will or may be bound by an order in the underlying action. See 735 ILCS 5/2-408(a)(2) (West 2010); see also *John Hancock*, 127 Ill. App. 3d at 144.[3] Having provided the

[3] "[I]ntervention as of right should be distinguished from permissive intervention insofar as the exercise of discretion is concerned. *** With respect to intervention as of right, ***[w]e believe that the trial court's discretion is limited to determining timeliness, inadequacy of representation and sufficiency of interest; once these threshold requirements have been met, the plain meaning of the statute directs that the petition be granted." *John Hancock*, 127 Ill. App. 3d at 144.

relevant legal context, we turn now to the events in this case.

¶ 9 B. Trial Court Hearing on McLean's Petition

¶ 10 In January, 1991, a complaint was filed against McLean for the offense of "domestic battery," specifically alleging that he committed a "battery" against his wife, Cyndi A. McLean, who lived with him and was pregnant, when he "pushed, choked and kicked" her, causing her bodily harm.[4] McLean ultimately pleaded guilty to battery for "shoving" his wife, and he was sentenced to 12 months of probation (and ordered to do family aggression counseling, according to the trial court's comments upon taking judicial notice of the file).

¶ 11 On June 18, 2010, the Department denied McLean's application for a FOID card on the basis that, in 1991, he had been convicted of "battery, as a result of an incident involving domestic violence." According to the letter denying the application, McLean was ineligible for a FOID card, because federal law prohibited a person convicted of a misdemeanor crime of domestic violence from possessing or receiving a firearm or ammunition.

¶ 12 Three years later, in November 2013, McLean filed a petition in the circuit court pursuant to section 10(a) of the FOID Act, seeking an order directing the Department to issue him a FOID card. On January 15, 2014, the trial court held a hearing on the petition. McLean was represented by counsel and an assistant State's Attorney appeared on behalf of the People of the State of Illinois. Two witnesses testified: McLean and his current wife. McLean testified that he has not been convicted of any offense since the 1991 battery conviction, 23 years prior. On cross-examination, McLean agreed that, in 1989, he was arrested for battery and disorderly conduct and was placed on supervision. Further, in 2009, he was arrested for resisting a police

[4] This complaint appears in the record as an exhibit attached to the Department's petition to intervene.

officer, but was found not guilty of the charge. Kimberly McLean, McLean's current wife, testified that she had been married to McLean for 15 years and had never been afraid of him. McLean had not hit, pushed, or threatened her.

¶ 13 Counsel and the court discussed whether McLean had exhausted his administrative remedies. Thereafter, in response to the court's questions as to her presence, the assistant State's Attorney explained that the FOID Act required that the State be provided with an opportunity to object to McLean's petition and, further, that the State did object because "they're not in compliance with the four elements" found in section 10(c) of the FOID Act. Further, in relevant part, the assistant State's Attorney argued that: (1) in case No. 91 CM 56, McLean had been charged with domestic battery, and that, although the conviction ultimately entered was for battery, the case nevertheless involved a domestic relationship; and (2) therefore, the battery conviction satisfied the federal standard for a crime of domestic violence.

¶ 14 Significant discussion ensued concerning whether, even if McLean's battery conviction qualified as a crime of domestic violence under federal law, the court could nevertheless grant him relief under section 10(c) of the FOID Act. McLean's counsel represented that the supreme court's decision in *Coram v. State of Illinois*, 2013 IL 113867 (2013), held that there was no intent under federal law to create a perpetual ban on firearm ownership and that the court could still grant McLean relief under section 10(c) of the FOID Act. The assistant State's Attorney disagreed, noting that four of the justices in *Coram* had commented that, post-2013, the circuit court no longer has authority to grant relief if doing so would be contrary to federal law.[5]

[5] This court, as well as the Third, Fourth, and Fifth Districts, have all agreed with the assistant State's Attorney's position that, under the current version of the FOID Act, it appears that a circuit court may not grant relief when the petitioner is barred under federal law from

However, when the court asked the assistant State's Attorney whether she read the statute such that, whenever there has been a conviction for domestic violence, the person convicted should never be allowed to get a FOID card, she responded "No, Judge." (Providing examples, such as a pardon from the Governor, obtaining expungement, etc.)

¶ 15 Ultimately, the assistant State's Attorney argued to the court that McLean's petition should be denied because issuing the FOID card would be contrary to public interest (*i.e.*, section 10(c)(3) of the FOID Act) and, further, that the 2013 amendments to section 10 of the FOID Act prohibited the court from ordering the Department to issue a FOID card, where doing so would be contrary to federal law (sections 10(b) and 10(c)(4) of the FOID Act).

¶ 16 On March 21, 2014, the court granted McLean's petition. In announcing its decision, the court did not make any findings pursuant to section 10(c)(1)-(3) of the FOID Act. Rather, it found that McLean's battery conviction did not qualify as a crime of domestic violence. The court stated that the definition of a "crime of domestic violence" required that the domestic relationship be an element of the offense. Here, the court reasoned, a domestic relationship was not a required element of battery. Therefore, the court concluded that McLean was not convicted of a crime of domestic violence as defined by federal law, was not prohibited by federal law from possessing a weapon, that the Department could not deny his FOID card application on that basis and, therefore, that substantial justice had not been done. The court noted that it made no findings concerning rehabilitation, passage of time, threat to society, etc. Accordingly, the court

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obtaining or possessing a firearm. See *Odle v. Department of State Police*, 2015 IL App (5th) 140274, ¶ 33; *Walton v. Illinois State Police*, 2015 IL App (4th) 141055, ¶¶ 23-25; *O'Neill v. Director of the Illinois Department of State Police*, 2015 IL App (3d) 140011, ¶¶ 27, 31; *Frederick*, 2015 IL App (2d) 140540, ¶ 34.

ordered the Department to issue McLean a FOID card. The assistant State's Attorney asked questions to clarify the ruling, and the court told her to draft the order, noting that it would be her "problem" and "this is something that I'm sure the [S]tate [P]olice—," to which the assistant State's Attorney commented, "We'll be back in 60 days or so my guess." McLean's counsel commented, "I'm sure it will be back."

¶ 17 The State's Attorney's office did not file a motion to reconsider. Further, it did not appeal within 30 days of the March 21, 2014, order.

¶ 18 C. Petition to Intervene as of Right

¶ 19 On July 11, 2014, the Department, via the Attorney General, petitioned the circuit court to intervene as of right pursuant to section 2-408 of the Code (732 ILCS 5/2-408 (West 2012)). In the petition, the Department asserted that it was not a party to the underlying action and had not received notice of McLean's circuit court petition. Therefore, because it was not aware of the litigation until after the March 21, 2014, hearing, and after the Court had issued its order, the Department asserted that the petition to intervene was timely. Further, the Department noted that it was seeking intervention less than four months after entry of the order.

¶ 20 The Department next asserted that intervention was proper under the Code because the court had ordered it to issue McLean a FOID card and, therefore, it was bound by the order. Further, the Department argued that the representation of its interests by the State's Attorney's office "was and is inadequate," as those terms are used for purposes of intervention as of right. Specifically, the Department asserted that its interests are different than those of the State's Attorney's office because: (1) the Department is responsible for implementing the FOID Act in Illinois; (2) it (not the State's Attorney) will be bound by the court's order; and (3) as a consequence of its responsibility and statutory authority to administer the FOID Act, the

Department has additional resources and expertise to bring to proceedings brought under the FOID Act. Finally, the Department asserted that, if permitted to intervene, it intended to file a petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)), and it attached a copy of the proposed section 2-1401 petition to the petition to intervene. (In sum, that petition argued that the court's order was void because: (1) McLean had failed to exhaust administrative remedies and, therefore, the court lacked jurisdiction to rule; and (2) the court could not order the FOID card to be issued where doing so violated federal law).

¶ 21 McLean responded that the State's Attorney's representation of the State's Police's interest was adequate. He alleged that the assistant State's Attorney vigorously and competently defended the State's position at the hearing, which, according to McLean, was the same as the Department's position. McLean denied that there exists a difference in interests between the Department and the State's Attorney's office. McLean further denied that the Department was "bound" by the order simply because it had to issue the FOID card, and he generally denied that the petition to intervene was timely.

¶ 22 In reply, the Department again asserted that, because of its responsibility to implement the FOID Act and its expertise in litigating cases brought under the FOID Act, its interests differ from those of the State's Attorney. Further, it asserted that, although McLean claimed that the State's Attorney's position was the same as that of the Department, he had not provided evidence showing that to be the case. The Department further asserted that the FOID Act was amended in 2013, such that a circuit court may not grant relief when to do so would be contrary to federal law. As such, the Department argued, because McLean's 1991 battery conviction qualifies as a misdemeanor crime of domestic violence under section 922(g) of the Gun Control Act, and McLean filed his circuit court petition after the 2013 amendments, the court's order granting the

petition was contrary to federal law. Finally, the Department reiterated that the petition was timely.

¶ 23 On November 3, 2014, the court held a hearing on the petition to intervene. Although served with notice of the petition, there was no representative present from the State's Attorney's office. In support of intervention, the Department noted that, although the assistant State's Attorney had raised the "federal prohibitor" argument, the Department disagreed with the court's ruling on that issue. Further, the Department also wished to make an alternative argument that McLean failed to fully exhaust his administrative remedies. The Department informed the court that, if permitted to intervene, it would make those arguments as part of the section 2-1401 petition. McLean's counsel noted that exhaustion of remedies had already been discussed at the first hearing, but that, in any event, the assistant State's Attorney had provided vigorous representation at the earlier stage and, therefore, intervention should be denied.

¶ 24 Without providing any bases for its ruling, the court denied the petition to intervene. Nevertheless, the written order denied the petition to intervene "for reasons stated by the court on the record." Further, the court granted the Department 28 days to either issue the FOID card or file a notice of appeal. The Department appeals.

¶ 25 II. ANALYSIS

¶ 26 We first define the scope of our review. In its notice of appeal, the Department asserts that it appeals two orders, one of which is the March 21, 2014, order, wherein the trial court granted McLean's petition for relief and ordered the Department to issue the FOID card. The Department lacks standing to appeal that order. It was not a party to the proceedings when that order was entered, and the order was not directly appealed by any party within 30 days. As such, the only mechanism for challenging the March 21, 2014, order would be through a section 2-

1401 petition. See *Hanson v. De Kalb County State's Attorney's Office*, 391 Ill. App. 2d 902, 906 (2009) (noting that section 2-1401 is the only vehicle by which a civil litigant can attack a final judgment more that 30 days after its entry). In *Hanson*, the Department filed a "motion to vacate" more than 30 days after the court ordered it to issue a FOID card. A panel of this court held that the motion to vacate should have been treated as a section 2-1401 petition, and it noted that the parties did not dispute that the Department would have standing to appeal the ruling on its own section 2-1401 petition. *Hanson*, 391 Ill. App. 3d at 906-07. Here, in contrast, the Department did not file a motion to vacate or a section 2-1401 petition. Rather, it attached to the petition to intervene a section 2-1401 petition, asserting that, *if* permitted to intervene, it would file the attached 2-1401 petition. Of course, as the court denied the petition to intervene, the section 2-1401 petition was never filed or ruled upon. As such, even though the Department asserts on appeal that it has non-party standing to petition for section 2-1401 relief, it never did so.

¶ 27 The Department argues that we can, in any event, review the proposed section 2-1401 petition and rule on it because it involves a question of law. We disagree. The court in *Hanson* held that, although the motion to vacate should have been treated as a section 2-1401 petition, it was not considered as such by the trial court and that the distinction mattered because, although a party opposing a motion may file a response, a party opposing a section 2-1401 petition has the additional option of filing a motion to dismiss. *Id.* at 912. We must be careful not to "deprive the other party of the opportunity to file a considered responsive pleading or motion to dismiss." *Id.* Here, McLean responded only to the petition to intervene. He did not respond to or have an opportunity to move to dismiss the proposed section 2-1401 petition, and, again, the trial court never directly ruled on the merits of the section 2-1401 petition. Thus, we will not do so here.

¶ 28 Accordingly, the only order properly before us is the trial court's denial of the Department's petition to intervene as of right. As mentioned earlier in this decision, we review for an abuse of discretion a trial court's ruling on a petition to intervene as a matter of right, although that discretion is limited to determining timeliness, inadequacy of representation, and whether the petitioner will be bound by an order or judgment in the underlying action. See 735 ILCS 5/2-408(a)(2) (West 2010); see also *John Hancock*, 127 Ill. App. 3d at 144. Because the intervention statute is to be liberally construed, the court *must* allow intervention if the statute's requirements are satisfied. *John Hancock*, 127 Ill. App. 3d at 144.

¶ 29 Here, the trial court did not provide reasons for denying the petition to intervene; however, it does not appear that timeliness or the fact that the Department would be bound by the order were particularly controversial factors. Indeed, neither factor was raised or argued at the hearing on the petition.

¶ 30 As to timeliness, in his response to the petition to intervene, McLean generically "denied" that the petition to intervene was timely. However, he agreed that he lacked sufficient knowledge to deny that, prior to the March 2014 order, the Department received no notice of the circuit court action. While the Department is not *entitled* to notice under the FOID Act, its lack of knowledge of the proceedings is nevertheless relevant to assessing whether it sought to intervene in a timely manner. Intervention after judgment may be allowed, where the party seeking to intervene was unaware of the original action until after judgment was filed. See, *e.g.*, *Schwecter v. Schwecter*, 138 Ill. App. 3d 602, 605 (1985). Further, the Department petitioned to intervene approximately 3½ months after receiving notice of the March 2014 order. This does not strike us as patently untimely. Indeed, later interventions have been found not untimely. See, *e.g.*, *Redmond v. Devine*, 152 Ill. App. 3d 68, 75 (1987) (intervention allowed where

intervenor learned of judgment 10 months after it was rendered, then moved to intervene 10 months after that (*i.e.*, 20 months after judgment)); *cf.*, *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 243 Ill. App. 3d 544, 548 (1993) (petition to intervene filed three years after entry of judgment untimely). Moreover, we note that, here, the commentary by the trial court, McLean's counsel, and assistant's State's Attorney at the end of the March 2014 hearing—that the Department might be back in 60 days or so—suggests that the possibility of intervention and a few months of delay was not unanticipated. Thus, while we emphasize that we are sensitive to the need for finality in decisions, we simply need not decide here the outer bounds of when a petition to intervene is too remote to qualify as timely. As the trial court here did not even specify that it found the petition untimely, and the subject was not debated at hearing, we consider the timeliness requirement satisfied.

¶ 31 Nor do we find compelling an argument that the Department was not bound by the order, so as to lack a sufficiency of interest for intervention. A party seeking to intervene as of right need not have a direct interest in the pending suit, it need only have an interest greater than that of the general public. *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 58 (2002). On appeal, McLean argues that the Department lacks sufficient interest to intervene, but he ultimately concedes that "there is no dispute" that the Department is bound by the trial court's March 21, 2014, order, and, therefore, that "[t]he analysis under section 2-408(a)(2) must then focus on whether the [Department's] interests were adequately represented in the trial court." We agree.

¶ 32 "Adequacy of representation is a complex matter, not subject to hard and fast rules; rather, courts consider a variety of factors including the extent to which the interests of the applicant and of existing parties converge or diverge, the commonality of legal and factual

positions, the practical abilities of existing parties in terms of resources and expertise, and the vigor with which existing parties represent the applicant's interests." *John Hancock,* 127 Ill. App. 3d at 144. The Department argues that its responsibility to administer and defend the FOID Act with consistency provides it with unique interests divergent from those of the State's Attorney's office. Further, the Department notes that it has resources and expertise to bring to FOID Act litigation. In addition, it argues on appeal (although it did not raise this *specific* argument below), that the State's Attorney's office did not, in this case, represent the interests of the Department with vigor because it did not challenge or appeal the trial court's ruling. For the following reasons, we agree.

¶ 33 Here, the State's Attorney's representation was, ultimately, inadequate. Under the facts of this case, the State's Attorney's office did not represent the interests of the Department with vigor throughout the entire course of the proceedings. Without question, the assistant State's Attorney raised relevant arguments at the hearing, many of which overlapped with the Department's position. Nevertheless, in this case, it is not the representation at hearing that lacked vigor but, rather, it is the lack of action *after* the court announced the particular basis for its March 21, 2014, order, that reflects that the Department's interests were not adequately represented.

¶ 34 The trial court concluded that the battery conviction did not meet the federal definition of a misdemeanor crime of domestic violence because a battery offense does not require as an element that there exist a domestic relationship. This was clear legal error. The Supreme Court in *Hayes* held directly otherwise: to qualify as a crime of domestic violence under the Gun Control Act, the offense need *not* require as an element of the offense the domestic relationship. *Hayes*, 555 U.S. at 426. Therefore, the domestic relationship needs to be established only

factually, and the announced rationale for the court's order was clearly wrong. McLean's battery conviction concerned force used on his wife in their home; it met the federal definition of a misdemeanor crime of domestic violence.

¶ 35 *Hayes* was decided in 2009, and was not new law when the court rendered its decision. The court's ruling involved no discretion or fact finding, but was a straightforward misapplication of existing law. Nevertheless, and although versed in the concept that a battery committed in the context of a domestic relationship qualifies as a crime of domestic violence under federal law, the assistant State's Attorney did not voice an objection, move the court to reconsider, or file a notice of appeal when the trial court ruled directly contrary to existing law on this point. There was no challenge whatsoever to the legality of the court's ruling. Further, the commentary between the court and the assistant State's Attorney—that the Department will likely be back in 60 days or so—suggests to us an implicit resignation to the order, and that any future action would, essentially, be the Department's responsibility. Moreover, despite notice, no one from the State's Attorney's office even appeared at the hearing on the petition to intervene. In our view, given the express erroneous ruling of the court, the State's Attorney's effective concession that the ruling would either stand or be dealt with by the Attorney General does not reflect vigorous representation of the Department's interest in uniform and legally sound administration and defense of the FOID Act.

¶ 36 We note that whether representation may be inadequate also concerns whether the interests of the Department and State's Attorney's office are mutual or diverge. McLean argues that they are mutual, or at least not different in any meaningful way, because the Department and State's Attorney's office had nearly identical legal and factual positions, practical abilities, and resources. If that is true, then it is puzzling that the State's Attorney was content to allow the

erroneous ruling to stand unchallenged. While it may certainly choose to do so when its interests alone are concerned, we cannot agree that, *under these particular circumstances*, failing to do so constitutes adequate representation of the Department's interests. As it happens, the State's Attorney's decision to step away and wash its hands of the matter suggests to us that, in truth, the interests between the parties do, to some extent, diverge.

¶ 37 McLean's reliance on *Braglia v. McHenry County State's Attorney's Office*, 371 Ill. App. 3d 790 (2007), for his assertion that the interests of the State's Attorney's office do not diverge from those of the Department is, in context, misplaced. *Braglia* did not concern an intervention analysis; rather, the court there was asked to consider whether the Department qualified as a necessary party under the FOID Act such that a judgment rendered in its absence was void for lack of personal jurisdiction over it. The court concluded that the Department was not a necessary party and it was not necessary to obtain jurisdiction over it, as the FOID Act did not require the petition to either name the Department as a respondent or to be served upon the Department, and the Department's actions in denying the FOID card were ministerial, as opposed to quasi-judicial. *Braglia*, 371 Ill. App. 3d at 795. In response to the Department's argument that allowing it to participate in the judicial hearing advanced the FOID Act's goal of promoting public safety, the court commented:

> "We see no reason why, in general, the Department is any better suited than the State's Attorney to represent the public's interests in these matters. Certainly, the State's Attorney has access to a FOID-card applicant's criminal record. Indeed, in cases involving certain types of criminal convictions, the State's Attorney may very well be more familiar with the relevant circumstances bearing on considerations of public safety." *Braglia*, 371 Ill. App. 3d at 795.

Therefore, the court's comments rejected only the notion that, because it is allegedly better suited to represent the public's interests, the Department must be considered a necessary party for jurisdictional purposes. Those comments should not be read as holding that, in all cases, the Department lacks sufficient interest to *intervene*.[6]

¶ 38 We are not the first court to permit intervention under circumstances similar to those here. See *O'Neill*, 2015 IL App (3d) 140011, at ¶¶ 2, 11, 24, 31 (trial court allowed Department to intervene *and* reversed the denial of the section 2-1401 petition, where the battery involving domestic violence was sufficient to satisfy the federal definition of crime of domestic violence and court could not order a FOID card issued if contrary to federal law); see also, *Walton*, 2015 IL App (4th) 141055, ¶¶ 23-25 (Department's participation in the proceedings apparently *unchallenged*; court reversed the trial court's order where the battery involving domestic violence rendered the order in violation of federal law). However, we wish to emphasize that we

[6] Indeed, in *Braglia*, the court also appeared to acknowledge that, where (as here) the Department believes that the trial court's order exceeds its statutory authority, it may have non-party standing to appeal. *Id.* at 796; see also *People v. Pine*, 129 Ill. 2d 88 (1989) (concerning non-party standing of a State official to appeal proceedings to which he or she was not a party when he or she has an interest that would be prejudiced by the judgment or would benefit from reversal); *In re Detention of Hayes*, 321 Ill. App. 3d 178 (2001) (concerning a State department's non-party standing to appeal proceedings to which it was not a party where it believed the order exceeded the trial court's statutory authority). While we are not concerned with necessary parties or non-party standing here, they support the Department's overall position that, even if not a necessary party, a State department charged with implementation of statewide programs has an interest that must be adequately represented.

are not holding that a failure by the State's Attorney's office to file posttrial motions or an appeal *always* reflects inadequate representation; only that it *may*, depending on the case. Similarly, we do not hold or even imply that the Department must *always* be permitted to intervene, simply because its interests may diverge from those of the State's Attorney. Again, it still must, under the facts of a given case, satisfy the other requirements for intervention, including timeliness. Rather, here, considering only the statutory factors (*John Hancock*, 127 Ill. App. 3d at 144), we conclude that the Department satisfied the three factors relevant to section 2-408(a)(2) of the Code, and that the trial court abused its discretion in denying the Department intervention as of right.

¶ 39 Finally, we note that, at oral argument, McLean's counsel conceded that the court's finding that the battery did not qualify as a crime of domestic violence was, under *Hayes*, erroneous. We must, however, reject McLean's argument that the error is meaningless because the pre-2013 version of the FOID Act applies here and the court could, under that version, grant relief upon finding that: (1) McLean had received no conviction or time served for a forcible felony within the last 20 years; (2) considering McLean's criminal history, he was not likely to act in a manner dangerous to public safety; and (3) granting relief would not be contrary to the public's interest. 430 ILCS 65/10(c)(1)-(3) (West 2010).

¶ 40 First, even if the trial court could override the federal prohibition, it did not do so here. Rather, it found there *was no* federal prohibition. The trial court never made any of the findings in sections 10(c)(1)-(3), noting that it need not do so because it found the conviction did not qualify as a misdemeanor crime of domestic violence and, therefore, the Department could not deny the FOID card on that basis. As noted above, this conclusion was erroneous.

¶ 41 Second, we do not agree with McLean that the pre-2013 version of the Act applies here.

This court's comment in *Frederick*, that, ordinarily, the law in effect at the time of the challenged administrative decision governs, does not alter our conclusion here. *Frederick*, 2015 IL App (2d) 140540, ¶ 23. In *Frederick*, two administrative decisions were relevant: the issuance of the FOID card (2011) and the revocation of it (2013). *Id.* ¶ 22. The *Frederick* court determined that the 2013 version of the Act applied to the case before it because the revocation decision was the one challenged. *Id.* ¶ 22. As this determination was all that was necessary to decide the issue before it, the court declined to consider the Department's forfeited argument that the 2013 amendments may be broadly applied to *any* case pending after their effective date, even if the Department's action was taken prior thereto. *Id.* ¶ 23 n. 2. Nevertheless, the court clarified that "nothing in this opinion should be read as rejecting a broader application of the 2013 amendments." *Id.*

¶ 42 Accordingly, McLean is incorrect that applying the post-2013 version of the Act here would run afoul of this court's holding in *Frederick*. Indeed, although the Department denied McLean's FOID application in 2010, before the amendments, McLean filed his petition for relief in the circuit court in 2013, and the court rendered its ruling in 2014, both after the Act's amendments were effective. Thus, as the Department notes, the circuit court case did not even exist until after the amendments took effect. We further note that applying the 2013 amendments here does not impair a vested right and has no retroactive effect on McLean or his ability to obtain a FOID card because, under either version of the Act, federal law prohibited McLean from receiving a FOID card; the 2013 amendments altered only whether the trial court could override that prohibition. *Id*. ¶¶ 24-26; see also *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 23. And, as noted above, caselaw currently holds that a circuit court may *not* do so. See *Odle*, 2015 IL App (5th) 140274, ¶ 33; *Walton*, 2015 IL

App (4th) 141055, ¶¶ 23-25; *O'Neill*, 2015 IL App (3d) 140011, ¶¶ 27, 31; *Frederick*, 2015 IL App (2d) 140540, ¶ 34.

¶ 43 Given our resolution of the issues raised herein and the current state of the law, we have considered the Department's argument that, for purposes of judicial economy, we may use our authority under Illinois Supreme Court Rule 366 (eff. Feb. 1, 1994) to simply reverse this case outright, rather than remand it. Nevertheless, we conclude that to do so here would be akin to improperly ruling on the Department's section 2-1401 petition, which was never filed, never fully briefed, never directly ruled upon by the trial court and, therefore, is not properly before us. See *Hanson*, 391 Ill. App. 3d at 912. Accordingly, we reverse and remand this cause for proceedings consistent with this decision.

¶ 44 III. CONCLUSION

¶ 45 For the foregoing reasons, we reverse the judgment of the circuit court of De Kalb County and remand for further proceedings consistent with this order.

¶ 46 Reversed and remanded.