

NOTICE

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2018 IL App (4th) 170597-U

NO. 4-17-0597

FILED
May 1, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Ford County
DALE E. DENNY,)	No. 16MR51
Defendant-Appellant.)	
)	Honorable
)	Matthew Fitton,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Because the decision revoking petitioner’s firearm owner’s identification card was a final administrative decision, the circuit court had jurisdiction over petitioner’s reinstatement petition under section 11(a) of the Firearm Owner’s Identification Act (430 ILCS 65/11(a) (West 2016)).

(2) As the State concedes, the trial court improperly denied the petition to reinstate petitioner’s firearm owner’s identification card; the reckless-conduct offense to which petitioner pleaded guilty was not, as charged, a “misdemeanor crime of domestic violence” under federal law.

¶ 2 In September 2016, petitioner, Dale E. Denny, Jr., pleaded guilty to reckless conduct, a Class A misdemeanor (720 ILCS 5/12-5(a) (West 2016)), after using a cellular phone to solicit nude photos from a minor. Approximately one month later, the Illinois State Police, Firearms Services Bureau, notified petitioner his firearm owner’s identification (FOID) card had been revoked as he had been convicted of a “misdemeanor crime of domestic violence.”

¶ 3 In November 2016, petitioner filed a petition for the reinstatement of his FOID card. The circuit court denied the petition. Petitioner appeals, arguing the court erroneously denied his petition because he had not been convicted of a “misdemeanor crime of domestic violence,” as defined by the federal Gun Control Act (18 U.S.C. §922(g)(9) (2012)). The State concedes petitioner was not convicted of a misdemeanor crime of domestic violence, but argues the appeal must be dismissed because petitioner failed to exhaust administrative remedies before filing his petition in the circuit court. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 In March 2016, the State charged petitioner with the offense of unlawful grooming, a Class 4 felony (720 ILCS 5/11-25(a), (b) (West 2016)). Specifically, petitioner was charged with knowingly using a cellular phone to solicit nude photos from Jane Doe, a child.

¶ 6 In September 2016, petitioner pleaded guilty to reckless conduct, a Class A misdemeanor (720 ILCS 5/12-5(a) (West 2016)), for the same conduct. In so pleading, petitioner admitted his conduct in soliciting the photos and endangering Jane Doe’s safety. The amended information, to which petitioner pleaded guilty, states the following:

“On or about November 25, 2015, in Ford County, Illinois, defendant Dale E. Denny[,], Jr.[,] [c]ommitted the offense of Reckless Conduct (Class A Misdemeanor) in that defendant knowingly used a cellular phone to solicit Jane Doe, a child to commit the offense of Sexual Exploitation of a Child in violation of Section 11-9.1 of the Illinois Criminal Code [of 2012] in that he solicited nude photos from Jane Doe in such a manner to endanger

the safety of Jane Doe in violation of 720 ILCS 5/12-5(a).”

¶ 7 By letter dated October 26, 2016, the Illinois State Police (State Police), Firearms Services Bureau (Bureau), notified petitioner his FOID card had been revoked. According to the letter, the revocation was due to petitioner’s conviction “in any court of a misdemeanor crime of domestic violence.” The letter identifies the Ford County reckless-conduct conviction as the basis for the revocation: “RECKLESS CONDUCT-DOMESTIC 9/19/2016 Ford County, IL.” The notice appears on letterhead of the “ILLINOIS STATE POLICE,” “Division of Administration.” On the same letterhead is listed “Leo P. Schultz, *Director.*”

¶ 8 On the back of the letter, the Bureau included instructions on “How to Appeal” for “[p]ersons convicted in any court of a misdemeanor crime of domestic violence.” The letter states the following:

“To challenge the accuracy of the record used to determine your firearm eligibility[,] you may appeal to the [State Police]. To appeal to the [State Police,] you must submit a FOID Appeal Request, a Request for Investigation and Waiver of Liability[,] and all required documentation as listed in FOID Appeal Requirements instruction sheet. *** Please note that if you agree that you were convicted of the offense(s) noted above, the Director of the Illinois State Police is not able to grant relief on the specific federal firearms prohibitor at issue here. Therefore, the decision to deny your application based on the federal prohibition is a final administrative decision subject to the Administrative Review Law.

You may appeal the decision to deny your FOID application or revoke your card by filing a written petition in the circuit court of the county of your residence.”

¶ 9 In November 2016, petitioner filed his petition in the circuit court for reinstatement of his FOID card. Petitioner alleged the revocation of his FOID card was improper, as he was not convicted of a “misdemeanor crime of domestic violence” (18 U.S.C. § 922(g)(9) (2012)). Petitioner argued, to be prohibited by the Gun Control Act, the offense for which an individual was convicted must contain an element of “attempted use of physical force, or the threatened use of a deadly weapon.” Petitioner concluded the offense for which he was convicted, reckless conduct, did not contain that element. Petitioner further maintained his possession of a FOID card did not violate public policy.

¶ 10 Before the circuit court, the State did not dispute petitioner’s claim public policy would not be violated by his possession of a FOID card, but it argued section 922(g)(9) of the Gun Control Act required the revocation.

¶ 11 After a hearing, the circuit court denied the petition. The court found the offense committed by petitioner fell within the “misdemeanor crime of domestic violence” as defined by federal law. The court did so upon concluding the offense of reckless conduct contains an element that “cause[d] bodily harm to or endanger[ed] the safety of another person.” The court further found granting the petition would be contrary to the public interest.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 A. Subject-Matter Jurisdiction

¶ 15 Our review begins with the jurisdictional question of whether petitioner exhausted the administrative remedies before filing his petition in the circuit court. The State contends, because petitioner was not convicted of one of the enumerated offenses in section 10(a) of the FOID Act (430 ILCS 65/10(a) (West 2016)), petitioner was required to appeal first to the State Police director before seeking reinstatement from the circuit court. Because petitioner did not do so, according to the State, the circuit court lacked jurisdiction. In contrast, petitioner argues the decision of the State Police was final and the circuit court had jurisdiction under section 11(a) (430 ILCS 65/11(a) (West 2016)). Petitioner emphasizes the language in the State Police letter stating the decision was “a final administrative decision.” Petitioner further maintains, because of the domestic nature of the offense, the circuit court also had jurisdiction under section 10(a) (430 ILCS 65/10(a) (West 2016)). Our review of whether the circuit court properly exercised jurisdiction is *de novo*. See *Schlosser v. State*, 2012 IL App (3d) 110115, ¶ 18, 965 N.E.2d 430.

¶ 16 Two provisions of the FOID Act authorize judicial review of State Police decisions revoking a FOID card: section 10(a) and section 11(a). See *O’Neill v. Director of the Illinois Department of State Police*, 2015 IL App (3d) 140011, ¶¶ 17, 18, 28 N.E.3d 1020. Section 10(a) provides the process to appeal a FOID card revocation to the State Police director, unless the revocation is based on specific listed offenses for which circuit-court review may be sought:

“[W]henever [a FOID] Card is revoked or seized as provided for in Section 8 of this Act, the aggrieved party may appeal to the Director of State Police for a hearing upon such *** revocation or seizure, unless the *** revocation, or seizure was

based upon a forcible felony, stalking, aggravated stalking, domestic battery, ***, in which case the aggrieved party may petition the circuit court in writing in the county of his or her residence for a hearing upon such *** revocation ***.” 430 ILCS 65/10(a) (West 2014).

¶ 17 Section 11(a) expressly authorizes judicial review of “[a]ll final administrative decisions” of the State Police:

“All final administrative decisions of the Department under this Act, except final administrative decisions of the Director of State Police to deny a person’s application for relief under subsection (f) of Section 10 of this Act, shall be subject to judicial review under the provisions of the Administrative Review Law ***. The term ‘administrative decision’ is defined as in Section 3-101 of the Code of Civil Procedure.” 430 ILCS 65/11(a) (West 2016).

The Administrative Review Law applies to and governs “every action to review judicially a final decision of any administrative agency ***.” 735 ILCS 5/3-102 (West 2014). Section 3-101 defines “administrative decision” as “any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency.” 735 ILCS 5/3-101 (West 2014).

¶ 18 In the circumstances of this case, section 10(a) did not prohibit the circuit court

from exercising jurisdiction over the petition. This conclusion is not based on a determination petitioner's reckless-conduct conviction is for an enumerated offense, which would have allowed petitioner to seek reinstatement in the circuit court, but on the State Police's statement its revocation decision was "final." In its notice of the revocation, the State Police plainly stated its director would not grant relief: "Please note that if you agree that you were convicted of the offense(s) noted above, the Director of the Illinois State Police is not able to grant relief on the specific federal firearms prohibitor at issue here. Therefore, the decision to deny your application based on the federal prohibition is a final administrative decision subject to the Administrative Review Law." Petitioner agrees he was convicted of the listed offense. Thus, by its own words, the State Police's ruling finally determined petitioner's rights and terminated the proceedings before the State Police. This action effectively exhausted petitioner's administrative remedies. See *Behringer v. Page*, 204 Ill. 2d 363, 378, 789 N.E.2d 1216, 1226 (2003) ("A party will not be required to exhaust his or her administrative remedies when it would be patently useless to do so."). The petition for reinstatement was thus properly before the circuit court under section 11(a).

¶ 19 **B. The Impropriety of the Revocation**

¶ 20 Petitioner contends the State Police improperly revoked his FOID card based on the incorrect conclusion the Ford County offense was a "misdemeanor crime of domestic violence." Petitioner contends, because the reckless-conduct offense for which he was convicted did not include an element of the use or attempted use of physical force or the threatened use of a deadly weapon (see 18 U.S.C. § 921(a)(33)(A) (2012)), federal law does not prohibit his possession of a weapon and his FOID card was improperly revoked under section 8 of the FOID

Act. The State concedes the revocation was improper. We agree.

¶ 21 The FOID Act grants the State Police authority to grant and revoke FOID cards. See 430 ILCS 65/0.01 *et seq.* (West 2016). Under section 8 of the FOID Act, the State Police must revoke a FOID card once the agency determines state or federal law prohibits the cardholder “from acquiring or possessing firearms or firearm ammunition ***.” 430 ILCS 65/8(n) (West 2016).

¶ 22 Federal law prohibits an individual who has been convicted of a “misdemeanor crime of domestic violence” from possessing a firearm or firearm ammunition. 18 U.S.C. § 922(g)(9) (2012). A “misdemeanor crime of domestic violence” includes offenses that are misdemeanors under state law and have “an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by *** a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 921(a)(33)(A)(ii) (2012). The term force means any type of force necessary to sustain a conviction for common-law battery. *United States v. Castleman*, 574 U.S. ___, ___, 134 S. Ct. 1405, 1410 (2014). Petitioner concedes he was convicted of a misdemeanor and he cohabited with the victim.

¶ 23 The substantive issue in this case turns on whether petitioner’s Ford County conviction for misdemeanor reckless conduct is a conviction of a “misdemeanor crime of domestic violence” for which gun ownership is prohibited. Illinois law permits a conviction for misdemeanor reckless conduct when a person performs an act that “(1) cause[s] bodily harm to or endanger[s] the safety of another person; or (2) cause[s] great bodily harm or permanent disability or disfigurement to another person.” 720 ILCS 5/12-5(a) (West 2016). Because this

offense is a “divisible statute” with “elements in the alternative” (*Descamps v. United States*, 570 U.S. 254, 260-61 (2013)), we consult the indictment to which petitioner pleaded guilty to determine whether his conviction contained “the elements necessary to constitute the generic federal offense.” *United States v. Castleman*, 574 U.S. ___, ___, 134 S. Ct. 1405, 1414 (2014).

¶ 24 Here, the charging instruments show petitioner was initially charged with grooming and the amended charge to which he pleaded guilty was reckless conduct in using a cell phone to solicit nude photos from his step-daughter in a manner that endangered her safety. The elements of the charged offense did not include elements of force or the use of force. Petitioner was thus not charged with or convicted of using or attempting to use physical force or with threatening use of a weapon. Section 8, therefore, does not prohibit petitioner from possessing a FOID card.

¶ 25 We note petitioner also argues the circuit court improperly refused to reinstate his FOID card based on the finding petitioner’s possession of that card violated public policy (430 ILCS 65/10(c)(3) (West 2016)). Section 10(c)(3), however, does not, as petitioner’s argument suggests, allow a circuit court to deny a petition for reinstatement based on a finding such reinstatement would be contrary to public interest. Instead, section 10(c) authorizes a circuit court to allow relief to an individual previously prohibited by section 8 of the FOID Act from possessing a FOID card if it finds “granting relief would not be contrary to the public interest” and “to federal law.” 430 ILCS 65/10(c)(3), (4) (West 2016); see also *Walton v. Illinois State Police*, 2015 IL App (4th) 141055, ¶ 22, 39 N.E.3d 1095. Our decision petitioner is not prohibited by section 8 from possessing a FOID card renders any decision on section 10(c)(3) moot.

¶ 26

III. CONCLUSION

¶ 27 We reverse the circuit court's judgment and direct the State Police to reinstate petitioner's FOID card.

¶ 28 Reversed; cause remanded with directions.