2012 IL App (3d) 110135-U

Order filed December 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THOMAS CULOTTA,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-11-0135
	)	Circuit No. 03–MR–830
ILLINOIS DEPARTMENT OF STATE POLICE,	)	
	)	Honorable Bobbi N. Petrungaro,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The ISP director correctly denied plaintiff's request for a FOID card. The admission of police reports during an administrative hearing did not result in prejudicial error and the statutes warranting a denial of plaintiff's FOID card are constitutional.

¶ 2 In 1999, the Illinois State Police (ISP) refused to restore plaintiff's Firearm Owner's Identification (FOID) card following plaintiff's 1994 convictions for four counts of aggravated assault. The administrative law judge (ALJ) rejected plaintiff's contention that the aggravated assault charges did not fall under the federal Gun Control Act's definition of "misdemeanor

crimes of domestic violence" and determined federal statutes prohibited plaintiff from possessing a FOID card. The director of ISP adopted the ALJ's findings and recommendation to deny plaintiff's request for a FOID card. Thereafter, plaintiff filed a complaint for administrative review in the circuit court asking the court to reverse the decision of the ISP director. The circuit court denied plaintiff's request. We affirm.

¶ 3 BACKGROUND

¶ 4 On June 7, 1999, the FOID Program Manager of ISP notified plaintiff by letter that his FOID Card would be revoked based on his previous 1994 aggravated assault convictions. On October 26, 1999, plaintiff's attorney challenged the revocation of plaintiff's FOID card by letter alleging the 1994 aggravated assault convictions were misdemeanors rather than felonies. ISP responded, on April 18, 2000, that the active order of protection against plaintiff also made plaintiff ineligible to receive a FOID card.

¶ 5 On May 16, 2000, plaintiff's attorney obtained an order vacating all previous and existing orders of protection issued against plaintiff, including an order of protection issued by the court in 1996. On May 25, 2000, plaintiff's attorney sent a copy of this order to ISP, together with a letter demanding that ISP issue a FOID card to plaintiff since there were no pending orders of protection in effect.

¶ 6 Larry A. Grubb, the FOID Program Manager of ISP, responded to plaintiff's counsel by letter, dated June 22, 2000, explaining that an amendment to the federal Gun Control Act made it unlawful for any person to possess any firearm or ammunition if that person was convicted of a "misdemeanor crime with an element of domestic violence." After exchanging additional letters, Grubb sent a final letter to plaintiff verifying that ISP would not issue a FOID card to plaintiff.

¶ 7 Plaintiff's attorney filed a complaint for administrative review with ISP. An administrative hearing took place on August 20, 2003.[1] During the administrative hearing, Greg Lueken, the FOID review supervisor for ISP, testified that section 8(n) of the Illinois Firearm Owners Identification Act (FOID Act) (430 ILCS 65/8(n) (West 2002)) and the relevant federal statutes, sections 921(a)(33)(A) and 922(g)(9) of Title 18 of the Gun Control Act of 1968 (18 U.S.C. 921(a)(33)(A); 922(g)(9)), supported the revocation of plaintiff's FOID card. Lueken explained that plaintiff was convicted, on February 2, 1994, of four counts of misdemeanor aggravated assault resulting from acts of domestic violence.

¶ 8 It was undisputed that, on February 2, 1994, plaintiff was convicted of four counts of aggravated assault and sentenced to two years probation, based on the incident on October 23, 1993. However, two other misdemeanor domestic battery charges were "stricken on leave" pursuant to a plea agreement.

¶ 9 In addition, the parties presented a joint stipulation as evidence, along with plaintiff's hearsay objection to pages 5-12 of police reports subject to the joint stipulation. The ALJ overruled plaintiff's objection, finding pages 5-12 of the police reports were relevant and "should be considered since these pages form the basis for the decision of the Illinois State Police regarding [plaintiff's] FOID card and qualify for admission into evidence as a business record exception to the evidential hearsay rule."

---

[1] There is no transcript of the administrative hearing in the appellate record, but the ALJ order describes facts presented at the hearing. Plaintiff's brief raises the issue that ISP and the State should have transcribed the hearing and filed it and, without this transcript, his rights were violated. ISP's brief contends that plaintiff did not order or request the preparation of the transcript. Nothing in the trial court record indicates that plaintiff requested the transcript as part of discovery or that ISP did not record the administrative hearing as required.

¶ 10 The police reports, admitted over plaintiff's objection, revealed the following information: On October 23, 1993, plaintiff was angry and highly intoxicated when he went to his bedroom in the family home and returned to the kitchen with a .38 caliber handgun while his wife and three children were present in the kitchen. Plaintiff alternately pointed the handgun at his own head, his wife, and his three children while he repeatedly asked his wife, "Is this what you want?" Plaintiff threw his daughter to the ground and against a wall. He punched his wife in the arms and pushed her against a wall. After plaintiff fell asleep, his wife discovered the gun was loaded with ammunition and plaintiff's wife reported the incident to the police the following day. Plaintiff's wife gave the police permission to remove ten firearms and ammunition from the house. When police arrested plaintiff, he admitted he had a loaded handgun in his possession during the incident, but said one cylinder was empty.

¶ 11 Plaintiff testified before the ALJ. Plaintiff denied pushing his wife and told the ALJ that he was not intoxicated during the incident. He stated that he and his wife had a "domestic discussion," on October 23, 1993, but there was "no domestic battery because there was no battery." Plaintiff agreed his family members were present when he pointed a .38 caliber handgun at his own head and at the ceiling, but he denied pointing the gun at his wife and children. Plaintiff stated he did not think the gun was loaded because he "always kept the cylinder empty." Plaintiff also said a "restraining order" was entered, after this incident, to prevent him from being at his home. Plaintiff testified that he possessed a FOID card for years prior to the incident and that he wanted to have a FOID card again so he could go hunting with friends.

¶ 12 The ALJ recommended denial of the FOID card after making factual determinations

based on the evidence and considering the relevant state and federal statutes. 430 ILCS 65/8(n) (West 2002);18 U.S.C. §922(g)(9);18 U.S.C. §921(a)(33)(A). Larry G. Trent, the director of ISP, adopted the ALJ's recommendations, on October 20, 2003, and denied plaintiff's petition to restore his FOID card.

¶ 13 On November 24, 2003, plaintiff filed a complaint for administrative review with the Will County circuit court seeking judicial review of the ISP Director's 2003 administrative decision affirming the revocation of his FOID card. Plaintiff requested the trial court to reverse the October 20, 2003, findings and decision. In addition, in his amended brief filed with the circuit court, plaintiff challenged the constitutionality of section 8(n) of the FOID Act (430 ILCS 65/8(n) (West 2002)) claiming the "convoluted language of the [f]ederal statutes and their voluminous case citations which underpin the test of the Illinois FOID Act," was "unconstitutionally vague," unenforceable, and violated his constitutional rights to bear arms, due process and equal protection. 18 U.S.C. 922(g)(9); 921(a)(33)(A), (B),(C); 921(a)(20); 922(g)(1).

¶ 14 The circuit court issued its written order, on July 22, 2010, quoting the relevant portion of section 3-110 of the Administration Review Act, which provided, "The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct...no new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court." 735 ILCS 5/3-110 (West 2010). In the written order, the trial judge found that the ISP director complied with the Illinois FOID Act which authorized the director of ISP to deny a FOID card if the applicant is prohibited from possessing a firearm under Illinois or federal law. 430 ILCS 65/8(n)

(West 2010). The court noted plaintiff admitted, during the administrative hearing, that he pointed a .38 caliber pistol to his head and the ceiling on October 23, 1993, while his family members were present at the family home. The trial court found plaintiff's actions and resulting convictions clearly fell under Title 18 of the federal statutes dealing with misdemeanor crimes of domestic violence. 18 U.S.C. §§ 921(a)(33)(A); 922(g)(9).

¶ 15 The trial court's order addressed plaintiff's argument that the ALJ erroneously admitted pages 5-12 of the police reports based on the hearsay rule. The trial court found, even though the objectionable pages should not have been considered by the ALJ due to hearsay, plaintiff's admissions alone presented sufficient competent evidence to support the administrative decision, without the information contained in the reports. Additionally, the trial court rejected plaintiff's challenge to the constitutionality of section 922(g)(9) of Title 18 (18 U.S.C. § 922(g)(9)), after relying on several federal cases upholding the constitutionality of the statute. *U.S. v. Skoien*, 614 F. 3d 638 (7th Cir. 2010); *U.S. v. Hemmings*, 258 F. 3d 587 (7th Cir. 2001); *U.S. v. Lewitzke*, 176 F. 3d 1022 (7th Cir. 1999).

¶ 16 Consequently, the trial court affirmed the administrative decision concluding the ALJ's findings were not against the manifest weight of the evidence, and the director of ISP did not abuse his discretion in denying plaintiff's petition to restore his FOID card. Plaintiff filed a motion to reconsider the court's ruling claiming that the court did not rule on his constitutionality challenge to section 8(n) of the Illinois FOID Act (430 ILCS 65/8(n) (West 2010)), but only addressed the constitutionality of the federal laws upon which ISP based its denial of issuing a FOID card to plaintiff. The trial court denied plaintiff's motion to reconsider on January 20, 2011. Plaintiff filed a timely notice of appeal.

¶ 17 **ANALYSIS**

¶ 18 On appeal, plaintiff raises three challenges to the circuit court's decision. First, plaintiff claims the ALJ should not have admitted or considered portions of the 1993 police reports. Second, plaintiff alleges his 1994 convictions for aggravated assault do not qualify as a "misdemeanor crime of domestic violence" for purposes of the federal statute. Additionally, plaintiff challenges the constitutionality of section 8(n) of the Illinois FOID Act (430 ILCS 65/8(n) (West 2010)), as well as the federal statute.

¶ 19 We address the evidentiary considerations first. Generally, hearsay evidence is not admissible in an administrative proceeding unless it falls within one of the recognized exceptions to the rule. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 94 (1992); *Morelli v. Ward*, 315 Ill. App. 3d 492, 497 (2000). For purposes of evaluating this issue, we agree the ALJ should not have considered the hearsay contained in the police reports as substantive evidence.

¶ 20 Nonetheless, the Administrative Review Act provides that "[t]echnical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her." 735 ILCS 5/3-111(b) (West 2002). The case law also provides that the improper admission of hearsay testimony does not create prejudicial error where there is other evidence sufficient to support the administrative decision. *Abrahamson*, 153 Ill. 2d at 94; *Morelli*, 315 Ill. App. 3d at 497.

¶ 21 In this case, as noted by the ALJ and circuit court, plaintiff's own testimony provided

competent "other evidence," exclusive of the contents of the police reports, to support the ALJ's and ISP director's conclusion that plaintiff committed a "misdemeanor crime of domestic violence" by threatening the use or attempted use of a deadly weapon while in the presence of multiple family members on October 23, 1993. Therefore, we conclude that the admission of the police reports, by the ALJ, did not result in a prejudicial evidentiary error because plaintiff's own version of the events supported the finding that the plaintiff used or threatened the use of a deadly weapon in the presence of family members in October 1993.

¶ 22 It is well established that courts may not interfere with the factual findings of the administrative agency, unless the agency's authority is exercised in an arbitrary or capricious manner or the administrative findings are against the manifest weight of the evidence. *Murdy v. Edgar*, 103 Ill. 2d 384, 391 (1984). A reviewing court may not substitute its judgment for that of the administrative agency and, if the record contains evidence to support the agency's decision, it should be affirmed. *Abrahamson*, 153 Ill. 2d at 88. *Id.*

¶ 23 Ultimately, this court reviews the ISP director's decision regarding the issuance, revocation, or denial to restore a FOID card under the abuse of discretion standard. *Hiland v. Trent*, 373 Ill. App. 3d 582, 584 (2007). An abuse of discretion exists when a decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it. *Id.* at 584-85.

¶ 24 The plain language of the federal law prohibits the possession of a firearm following any conviction for a misdemeanor crime of violence. 18 U.S.C. § 922(g)(9). The federal statutory scheme defines a "misdemeanor crime of domestic violence" as an offense that is a misdemeanor and includes, as an element of the offense, the use or attempted use of physical force, or the

threatened use of a deadly weapon, committed by a current or former spouse or guardian of the victim. 18 U.S.C. § 921(a)(33)(A). Clearly, physical contact or the infliction of injuries to a family member is not required for conduct to qualify as an act of domestic violence according to the definition for purposes of the federal statute. Therefore, the ISP director correctly found plaintiff's misdemeanor convictions fell under the federal statute, the record contains sufficient evidence to support his decision, and the ISP director's decision to deny plaintiff a FOID card was not an abuse of discretion.

¶ 25 Next, plaintiff challenges the constitutionality the Illinois FOID statute that adopts the provisions of the federal statute defining a misdemeanor act of domestic violence. Specifically, plaintiff claims of section 8(n) of the Illinois FOID Act (430 ILCS 65/8(n) (West 2010)) should be rendered unconstitutional because it is so vague it violates the due process clauses of both the Illinois and U.S. Constitutions. Plaintiff also attempts to argue that the federal laws, used by ISP to deny him a FOID card (18 U.S.C. §§ 921(a)(33)(A); 922(g)(9)) violated his right to equal protection and interfered with his Second Amendment right to bear arms. In response, ISP argues that plaintiff failed to present a clear concise constitutional argument in his appellate brief without relevant supporting authority.

¶ 26 A court of review is entitled to have briefs submitted that are articulate and organized and present cohesive legal argument in conformity with our Supreme Court rules. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Avery v. State Farm Mutual Automobile Insurance Co.*, 321 Ill. App. 3d 269, 276 (2001). A reviewing court is also entitled to have the issues clearly defined with pertinent authority cited and coherent arguments presented, or they are waived on appeal. *Avery*, 321 Ill. App. 3d at 276. Mere contentions, without argument or citation of authority, do

not merit consideration on appeal, nor do contentions that are supported by some argument but by no authority. *Id.*

¶ 27 Here, plaintiff's brief on appeal includes several interspersed paragraphs declaring the constitutional infirmity of the State and federal statutes on various grounds. These contentions of constitutional error are neither clearly delineated nor supported by *relevant* authority. Accordingly, we conclude that plaintiff has waived his constitutional arguments on appeal by insufficiently presenting his constitutional challenges in compliance with Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 28 However, the doctrine of waiver is an admonition upon the parties, not a restriction upon the jurisdiction of a reviewing court.[2] See *Avery*, 321 Ill. App. 3d at 278. A reviewing court, in its discretion, may consider issues not properly preserved by the parties, in the interests of justice. *Id.*

¶ 29 In the interests of justice, we elect to address the inartfully raised contention that section 8(n) of the Illinois FOID Act is unconstitutionally vague. Before the trial court, plaintiff claimed section 8(n), allowing ISP to deny a FOID card to a person who is "prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law," was unconstitutionally "vague, imprecise, and indefinite" for "the public to interpret its meaning."

---

[2] We are mindful that, recently, there has been of flourish of federal and Illinois decisions addressing the constitutionality of gun control laws, most specifically pertaining to a total ban within a municipality of certain type of guns, holding that the Second Amendment's right to bear arms is a fundamental right that applies to the states. See *McDonald v. City of Chicago,* 561 U.S.____, 130 S.Ct. 3010 (2010); *Wilson v. County of Cook*, 2012 IL 112026. Although distinguishable from and, therefore, not applicable to the case at bar, these cases reiterate that the second amendment right to bear arms is not absolute and the holdings of these cases do not imperil every law regulating firearms. *McDonald,* 130 S.Ct. at 3047; *Wilson*, 2012 IL 112026 ¶ 39.

Plaintiff also contended the federal statute interferes with his constitutional rights to bear arms.

¶ 30 Initially, we note that all statutes carry a strong presumption of constitutionality and the burden of rebutting that presumption is on the party challenging the validity of the statute, who must clearly demonstrate a constitutional violation. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005); *People v. Dabbs*, 239 Ill. 2d 277, 291 (2010); *People v. Dinelli,* 217 Ill. 2d 387, 397 (2005). A court has a duty to uphold the constitutionality of a statute if it is reasonably possible to do so. *Id.* If there is any doubt as to the construction of a statute, we must resolve it in favor of its validity. *Id*. Whether a statute is constitutional is a question of law which we review *de novo*. *Dabbs*, 239 Ill. 2d at 291; *Dinelli,* 217 Ill. 2d at 397.

¶ 31 The Seventh Circuit has upheld the constitutionality of the federal statutes prohibiting any person from possessing a firearm after being convicted of "misdemeanor crimes of domestic violence" based on the application of 18 U.S.C. § 922(g)(9). See *U.S. v. Skoien*, 614 F. 3d 638 (2010); *U.S. v. Hemmings*, 258 F. 3d 587 (2001); *U.S. v. Lewitzke*, 276 F. 3d 1022 (1998). Specifically, in *Skoien*, the court held the a Wisconsin statute, similar to the Illinois statute at issue, was in fact constitutionally valid after balancing the governmental objective, to reduce and prevent the potential for serious domestic injuries, against a person's due process and equal protection rights as well as his Second Amendment right to bear arms. *Skoien*, 614 F. 3d at 429-30. Moreover, the U.S. Supreme Court has upheld the validity of sections 921(a)(33)(A) and 922 (g)(9) (18 U.S.C. §§ 921(a)(33)(A); 922(g)(9)), and clarified the definition of "misdemeanor crimes of domestic violence," although it was not specifically called upon to address the constitutionality of that statute in *Hayes*. *U.S. v. Hayes*, 555 U.S. 415 (2009).

¶ 32 Although, our supreme court has held that Illinois courts are not bound by the decisions

of federal courts when interpreting a federal statute in the absence of a definitive decision by the Supreme Court, our supreme court has repeatedly recognized that uniformity of decision is an important consideration when state courts interpret federal statutes. *Sprietsma v. Mercury Marine, a Division of Brunswick Corp.*, 197 Ill. 2d 112, 119 (2001) (citing *Wilson v. Norfolk & Western Ry. Co.,* 187 Ill. 2d 369, 383 (1999); *Weiland v. Telectronics Pacing Systems, Inc.,* 188 Ill. 2d 415, 422 (1999)). Our supreme court elected to follow the precedent of the Seventh Circuit with regard to its interpretation of a federal statute, in *Wilson*, because it found the Seventh Circuit analysis to be "reasonable and logical," whereas our supreme court declined to follow Seventh Circuit precedent in a case involving a federal statute where there was a split of authority among the federal circuits and our supreme court believed the Seventh Circuit case was wrongly decided. *Id.* at 119-20 (citing *Wilson*, 187 Ill. 2d at 119; *Weiland,* 188 Ill. 2d at 423).

¶ 33 Here, in the absence of a U.S. Supreme Court case addressing the constitutionality of the federal statute at issue, we find the Seventh Circuit's decisions addressing that issue to be consistent, reasonable and logical. Accordingly, we are persuaded by ISP's argument in this case, based in part, on the rationale incorporated into the decisions of the Seventh Circuit (*supra.*) that have addressed this very issue.

¶ 34 Consequently, based on our *de novo* review of the facts and the existing state and federal case law, we reject plaintiff's contentions and hold 18 U.S.C. § 922(g)(9) is constitutionally valid and was properly applied in the ISP decision to deny plaintiff's FOID card in the case at bar.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 37 Affirmed.