IN THE SUPERIOR COURT OF COWETA COUNTY
STATE OF GEORGIA

CRAIG MOORE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	File No. 06-V-589
MARY T. CRANFORD, Judge of the Coweta County Probate Court,	)	
	)	
Defendant.	)	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Craig Moore files this reply brief in support of his motion for summary judgment and response to Defendant's motion for summary judgment.

BACKGROUND

Plaintiff applied to Defendant for a Georgia Firearms License ("GFL") on December 13, 2005. Because Defendant greatly exceeded the 60-day statutory time limit by which she was required to issue the GFL, Plaintiff commenced this action for mandamus (to issue the GFL) and declaratory and injunctive relief. Defendant has issued the GFL, so mandamus no longer is necessary. Plaintiff moved for summary judgment on the request for declaratory and injunctive relief. Defendant opposes the motion, claiming she is bound to wait, apparently indefinitely, for a law enforcement report before she can issue a GFL.

INTRODUCTION

Defendant is laboring under a misconception as to the meaning of the word "report" in O.C.G.A. § 16-11-129 (d) and the identity of the law enforcement agency that is to deliver the report. The only law enforcement agency required to notify the probate court within 50 days of any derogatory information bearing on the applicant's eligibility for a license is the local law enforcement agency that captures the applicant's fingerprints. The statute does not contemplate that the GBI or the FBI is to deliver a report to the probate court within 50 days, and no FBI check was contemplated in 1978 when the attorney general issued its unofficial opinion U78-451. Nor does the statute contemplate that the Probate Judge may delay the issuance of a firearms license beyond 60 days by waiting to run a criminal background check from her office 125 days after the date of application.

NO FACTUAL ISSUES FOR A JURY RESOLUTION

As an initial matter, it should be stated that there is no genuine dispute of material fact in this case. Defendant does not dispute any material facts asserted by Plaintiff. The only issues raised are legal in nature and relate to the appropriate interpretation of O.C.G.A. § 16-11-129. By filing a cross

motion for summary judgment, Defendant has clearly shown that she agrees there is nothing for a jury to resolve.

Defendant did assert several "facts" in her Rule 6.5 Statement of Material Facts that are not statement of fact at all. Instead, Defendant recites her case in numbered paragraphs and labels her mistaken interpretation of law as "fact." While Plaintiff has addressed each of these in his Statement of Disputed Facts, Plaintiff points out that Defendant's misunderstanding of the law is the very issue in this case, and not a material fact.

Defendant admitted in her answer that Plaintiff had a clear legal right to obtain a firearms license but contends that he was not entitled to receive a firearms license until such time as the FBI notified her that the FBI approved of Plaintiff's application. See Answer, ¶ 5; Response to Interrogatory No. 3. Thus, the only issue for determination by this Court on summary judgment is whether an applicant for a GFL is not entitled to a firearms license until the FBI gives the probate court its permission to issue the GFL or whether "[n]ot later than 60 days after the date of application the judge of the probate court shall issue the applicant" a GFL.

Defendant contends that she may wait until the FBI tells her to proceed. The logical consequence of Defendant's argument

is that if the FBI failed to notify the probate court that Defendant had the FBI's permission to issue the license, then an applicant would never receive his license in spite of the clear 60 day limitation contained in the statue. The statute does not require such an absurd result.

THE PHRASE "THE RECORDS TO WHICH IT HAS ACCESS" UNDER THE OLD STATUTE REFERS TO THE LOCAL LAW ENFORCEMENT AGENCY PERFORMING A COMPUTER CHECK OF GCIC AND NCIC RECORDS

On page 4 of Defendant's brief, she asserts that the phrase "records to which it has access" appearing in the prior statute[1], O.C.G.A. § 16-11-129(d), means the records of GCIC to which Defendant has access in her courtroom. Response brief, p.4 and n.1. This phrase is no longer part of the statute,[2] but even under the old statute there is no authority for such an interpretation. O.C.G.A. § 16-11-129 is very clear about who is to perform the check of records "to which it has access," and it is the local law enforcement agency to which the probate court sends the applicant to have his fingerprints captured.

O.C.G.A. § 16-11-129(c) provides that "the probate court shall require the applicant to proceed to an appropriate law

[1] During the pendency of this case, the statute at issue, O.C.G.A. 16-11-129, was changed by HB 1032. Plaintiff maintains the same position under both statutes. Although a brief discussion of the statute in effect when the complaint was filed is in order, because Plaintiff is seeking prospective relief, the case should be decided under the current law.

[2] The current statute is addressed in the next section.

enforcement agency in the county with the completed application. The appropriate local law enforcement agency in each county shall then make two sets of classifiable fingerprints . . .” (emphasis added). The “local” law enforcement agency then puts a single fingerprint on the actual blank Georgia Firearms License (“GFL”), subsection 129(c)(1), inserts the applicant’s name onto the license, and then transmits only one set of fingerprints to the GCIC, subsection 129(c)(2). The local law enforcement agency retains one set of fingerprints, the GFL with the applicant’s name and single fingerprint, and the completed application that the applicant brought with him at the direction of the probate court until it “shall promptly conduct a thorough search of its records and the records to which it has access” and notifies the probate court if any derogatory information is found. See the prior O.C.G.A. § 16-11-129(d).

It is worth noting here that nowhere in the statute is it contemplated that the search should be limited to the records to which the probate court has access on a computer terminal in its office. Such a criminal check is not mentioned in the statute. Rather, the statute contemplates that the law enforcement agency “receiving such applications and obtaining such fingerprints, shall” conduct the search of records to which it has access. See the prior O.C.G.A. § 16-11-129(d). The only law enforcement

agency receiving "applications and obtaining fingerprints" under the old statute is the local law enforcement agency (in this case, the Coweta County Sheriff Department) where the probate court sends the applicant. No other law enforcement agency even sees an application. The application does not go to the GBI, and it does not go to the FBI.

Moreover, the Coweta County Sheriff Department has access to both GCIC (the GBI records), NCIC (the FBI records), and NICS (National Instant Criminal Background Check – FBI firearms national background check records) just like every other local law enforcement agency in the State of Georgia. O.C.G.A. §§ 35-3-4(a)(1), (8); 35-3-33(a)(2), (10); 35-3-36; 35-3-34.2.; 35-3-39.1; 42 U.S.C. § 14616(b)(10) ("The term 'direct access' means access to the National Identification Index by computer terminal or other automated means not requiring the assistance of or intervention by any other party or agency"). If it did not have such access, the Sheriff's Department could not do its job. The sheriff is, therefore, able to provide Defendant, a virtually instant report, based on local, state, and national (FBI) records. There simply is no need, nor any legal authority, for Defendant to wait for any other reports.

THE NEW STATUTE MAKES PERFECTLY CLEAR WHO REPORTS

On July 1, 2006, O.C.G.A. § 16-11-129 was amended, and the current statute reaffirms that it is only the local law enforcement agency that reports to the probate court within 50 days. The new subsection (d) is divided into 4 subparts. In pertinent part, (d)(2) provides:

> For both license applications and requests for license renewals, the judge of the probate court shall also direct the law enforcement agency to conduct a background check using the Federal Bureau of Investigation's National Instant Criminal Background Check System and return an appropriate report to the probate judge.

The statute could not be clearer. Subpart (d)(4) then states in its entirety:

> The law enforcement agency shall notify the judge of the probate court within 50 days, by telephone and in writing, of any findings relating to the applicant which may bear on his or her eligibility for a license or renewal license under the terms of this Code section. When no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license or renewal license, a report shall not be required. The law enforcement agency shall return the application and the blank license form with the fingerprint thereon directly to the judge of the probate court within such time period. Not later than 60 days after the date of the application the judge of the probate court shall issue the applicant a license or renewal license to carry any pistol or revolver if no facts establishing ineligibility have been reported and if the judge determines the applicant has met all the qualifications, is of good moral character, and has complied with all the requirements contained in this Code section. [emphasis supplied]

The statute uses a definite article ("the") to make clear that there is only one law enforcement agency contemplated in (d)(4), and it is the same law enforcement agency that is directed to return a report to the probate judge in (d)(2) after conducting an "instant" background check of FBI records. These are "national" records, and these are the very same records Defendant claims she needs to determine an applicant's eligibility. For the court's convenience, a courtesy copy of H.B. 1032, which amended O.C.G.A. § 16-11-129, is attached.

NO REPORT IS REQUIRED

The requirement in the statute of a report to the probate judge assumes that something derogatory is found bearing on the applicant's eligibility under O.C.G.A. § 16-11-129(b) (listing the ineligibility factors). What happens if the law enforcement agency finds no derogatory information? The statute provides a clear answer. "When no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license or renewal license, a report shall not be required." O.C.G.A. § 16-11-129(d)(4) (emphasis added). Instead, the law enforcement agency is to "return the application [and recall that only the local law enforcement agency receives the application] and the blank license form with the fingerprint thereon directly to the judge of the probate court" within 50 days. Id.

It is worth noting at this point that Defendant in this case admits to receiving back everything from the local law enforcement agency on the same day that Plaintiff applied. See Defendant's Response to Plaintiff's Interrogatory No. 3. Nor does Defendant argue anywhere in her brief that she was waiting for a report from the Coweta County Sheriff's Department.

REVOCATION OF THE LICENSE

Both the old and the current statute require one set of fingerprints to be transmitted to the GBI and FBI (although now it can be performed electronically if desired) for a records check, but this is not the report contemplated in subsection (d) (or the current sub-subsection (d)(2)). If for some reason the applicant's fingerprints returned a derogatory criminal history following issuance of the license on the 60th day based upon the local law enforcement report (or lack thereof if no derogatory information is found), then the statute instructs the probate judge on the appropriate action to take. O.C.G.A. § 16-11-129(e) provides that at any time after the 60 days:

> [T]the judge of the probate court in the county in which the license was issued shall learn or have brought to . . . her attention in any manner any reasonable ground to believe the licensee is not eligible to retain the license, the judge may, after notice and a hearing, revoke the license of the person . . .″

O.C.G.A. § 16-11-129(e). This subsection was untouched by the amendment of H.B. 1032.

UNOFFICIAL ATTORNEY GENERAL OPINION

With the statutory framework in mind, it is important to examine the 28 year old Attorney General opinion cited in Defendant's brief as support for her systematic refusal to issue GFLs within the mandatory 60 day time period to any applicant in Coweta County. Unofficial AG Opinion No.U78-45 was issued in 1978. In 1978, there was simply no requirement in the law that anybody other than the local law enforcement agency report anything to the probate judge. See Code Section 26-2904(a)(3) and (b). A courtesy copy of the relevant historical statute is attached (the 1976 enactment was unchanged in 1978). While this is no different from the situation today, it is important to note that the terms GBI and FBI do not even appear in the statute in 1978, so a report from the FBI could not have possibly been contemplated by Arthur K. Bolton when he wrote the opinion. The phrase "Each law enforcement agency . . ." in 26-2904(b) referred only to each local law enforcement agency obtaining both the fingerprints and application. As a result, the unofficial opinion provides no support for Defendant's

refusal to issue a firearms license in every case until the FBI gives her permission to do so.

The unofficial opinion should also be considered in the context in which it was issued. It should fall within judicial notice that in 1978 a criminal background check did not involve the use of a computer or FBI records accessed over the internet.

DECLARATORY RELIEF AND AN INJUNCTION ARE NOT "ADVISORY" IN THIS CASE

Defendant argues that the GBI and FBI should be added as "indispensable parties" and that any order of this court declaring that "No later than 60 days after the date of application the judge of the probate court shall issue the applicant a [GFL] . . ." would be merely advisory because she cannot order the FBI to respond within the 50 day timeline. Nor should she. The statute clearly states that the instant background check of the National Instant Criminal Background Check System ("NICS") is to be performed by the Coweta County Sheriff's Department when it receives the fingerprints. See O.C.G.A. § 16-11-129(d)(2). Moreover, Defendant is to "direct" that this instant background check be performed. Id. The premise that somehow Defendant must rely on the FBI to issue a GFL within the time allowed in the statute is without any basis in the language of the statute. Accordingly, the premise of

Defendant's argument, that she is without any authority to issue orders to the FBI, is flawed. No such authority is needed or even relevant to a determination of this motion.

Even if this were not the case, however, the appropriate remedy for failing to add an indispensable party is an order adding the party. See O.C.G.A. § 9-11-19(a). Defendant has requested no such order.

A plaintiff is entitled to a declaratory judgment when his rights are affected by an actual controversy between the parties. O.C.G.A. § 9-4-2 et. seq. An opinion of a court is "advisory" when no controversy exists between the parties. Gwinnett County v. Blaney, 572 Ga. 696, 704 572 S.E.2d 553, 560 (2002). In the present case, Defendant continues to maintain that she does not have to issue a GFL within 60 days of application, and she admits that she routinely does not do so. There clearly remains a controversy between the parties.

THE PETITION IS "SUPPORTED BY OTHER SATISFACTORY PROOFS"

Defendant argues that Plaintiff's motion for summary judgment should fail because his petition is unverified. In support of this petition, she cites to O.C.G.A. § 9-10-110, which states that, in addition to verifying the petition, another procedure is to support the petition "by other satisfactory proofs." Id. Plaintiff filed an affidavit in

support of this motion for summary judgment. In addition, Defendant filed an affidavit and Plaintiff filed in the record Defendant's responses to discovery. The request for an injunction in this case is amply "supported by other satisfactory proofs."

"The failure to file a verified complaint can be amended and does not subject the injunction to dismissal if it was supported by evidence; however, the unverified petition must be supported by other satisfactory proofs, i.e., affidavit , deposition, or oral testimony." BEA Systems, Inc. v. WebMethods, Inc., 265 Ga. App. 503, 504, 595 S.E.2d 87, 88 (2004). [emphasis supplied].

NO JUDICIAL IMMUNITY APPLIES TO THIS CASE

Defendant raises the defense of judicial immunity, which is inapplicable to the circumstances of this case. Plaintiff contends that because she is bound by statute to issue GFLs, she necessarily must be immune from any action relating to the issuance of GFLs. This is not the law in Georgia.

Judicial immunity applies only to acts taken in a judicial capacity. The act of issuing a license is ministerial and not judicial. Some of us may recall when what is now a probate judge was referred to as the county ordinary:

> The ordinary, under our laws, is an official charged with the performance of duties judicial, ministerial, and clerical. Not by his title, but only by his acts, can the exact capacity in which he appears ever be known upon any special occasion. In admitting a will to probate, he acts as a judicial officer.... In issuing a marriage license, he for the moment becomes a ministerial officer.

Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). Clearly, issuing marriage licenses is very similar to issuing GFLs. Both require receiving an application, assessing the applicants' eligibility, and issuing the license. Probate courts perform a great number of ministerial functions in addition to judicial functions. See O.C.G.A. § 15-9-30.

Furthermore, as stated in Plaintiff's original brief, the defense of judicial immunity has no application to claims for declaratory and injunctive relief. Earl v. Mills, 275 Ga. 503,. 570 S.E.2d 282 (2002).

DEFENDANT DOES NOT ADDRESS THE USE OF THE WORD "SHALL" IN THE STATUTE

Having addressed Defendant's points in detail, it is worth noting and reiterating a significant matter raised in Plaintiff's initial Brief but that was not addressed by Defendant. As Plaintiff notes in his initial Brief, the statute directs that the judge "shall issue" a GFL within 60 days. Plaintiff wrote extensively on the use of the word "shall" in

statutes, including case law indicating that "shall" is directory and not precatory, and that only very narrow circumstances allow for a different interpretation. Defendant does not attempt to rebut this meaning of the word "shall" in O.C.G.A. § 16-11-129.

CONCLUSION

Neither party contends there is a dispute of fact in this case. The only determination to be made is one of law, and the statute clearly sets forth who is to provide a report, that no report is required if the applicant has no derogatory information on his background check, and the timeline for issuance of the GFL. There is no authority in Georgia law for intentionally waiting more than twice the length of time allotted by the General Assembly based on delay in receiving a report not contemplated in the statute.

Under the forgoing authorities, Plaintiff is entitled to summary judgment as a matter of law and Defendant's motion must be denied.

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