

OP. NO. 04-040

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – OTHER ILLEGAL WEAPONS.

Applicant for concealed handgun permit who is denied permit based on submission of incomplete application should not have his application dismissed with prejudice; may reapply by submitting complete application.

The Honorable David F. Pugh
Judge, Seventh Judicial Circuit
July 13, 2004

Issues Presented

You ask whether an applicant, who is denied a concealed handgun permit because he fails to comply with the procedural requirements of § 18.2-308, should have his subsequent application dismissed with prejudice when the applicant failed to request an ore tenus hearing or appeal the denial of his initial application. If the application is not dismissed with prejudice, you further inquire on what basis the court may hear reapplication.

Response

It is my opinion that an applicant for a concealed handgun permit who is denied a permit based on submission of an incomplete application should not have his application dismissed with prejudice and may reapply by submitting a complete application pursuant to § 18.2-308(D).

Background

You submit a hypothetical situation wherein a circuit court denies an application for a concealed handgun permit due to the applicant's failure to submit to fingerprinting. The applicant did not avail himself of either an ore tenus hearing pursuant to § 18.2-308(I) or an appeal pursuant to § 18.2-308(L). Should the applicant subsequently submit to fingerprinting, you ask whether the court should rehear the application or whether the applicant is barred from obtaining a concealed handgun permit.

Applicable Law and Discussion

Section 18.2-308(D) provides, in part:

Any person 21 years of age or older may apply in writing to the clerk of the circuit court of the county or city in which he resides ... for a five-year permit to carry a concealed handgun.... As a condition for issuance of a concealed handgun permit, the applicant shall submit to fingerprinting if required by local ordinance in the county or city where the applicant resides^[1] The court shall issue the permit within forty-five days of receipt of the completed application unless it is determined that the

applicant is disqualified.... An application is deemed complete when all information required to be furnished by the applicant is delivered to and received by the clerk of court before or concomitant with the conduct of a state or national criminal history records check.

When an applicant does not comply with the procedural requirements of § 18.2-308(D), the applicant fails to provide an application to the circuit court clerk that is "deemed complete." For example, in the hypothetical situation wherein the applicant did not submit to fingerprinting, his application was not complete pursuant to § 18.2-308(D). According to § 18.2-308(D), it is incumbent on the applicant to furnish the required information to the circuit court clerk in order for his application to be "deemed complete." An application that is incomplete lacks ripeness for adjudication by a circuit court, as it is still within the purview of the clerk of court.

Further, § 18.2-308(D) limits the role of a circuit court. The court either issues the permit within forty-five days of the completed application or determines that an applicant is disqualified.² Under your hypothetical situation, the court did not determine that the applicant was disqualified from obtaining a concealed handgun permit. Section 18.2-308(E) details the persons who "shall be deemed disqualified from obtaining a permit."³ Therefore, an incomplete application would not constitute disqualification under § 18.2-308(E).

Finally, due to the lack of ripeness for adjudication, principles of *res judicata* would not be applicable and, therefore, would not bar the applicant's resubmission of his application.⁴

Conclusion

Accordingly, it is my opinion that an applicant for a concealed handgun permit who is denied a permit based on submission of an incomplete application should not have his application dismissed with prejudice and may reapply by submitting a complete application pursuant to § 18.2-308(D).

¹The City of Newport News has enacted an ordinance that requires an applicant to submit to fingerprinting. See Newport News, Va., Code of Ordinances § 43-2(d) (1989).

²Va. Code Ann. § 18.2-308(D) (LexisNexis Interim Supp. 2004).

³Section 18.2-308(E) describes twenty categories of individuals who "shall be deemed disqualified from obtaining a permit," such as fugitives from justice (§ 18.2-308(E)(12)), and individuals subject to restraining or protective orders (§ 18.2-308(E)(5)). The applicant in the hypothetical situation was not denied a permit on the basis that he was disqualified pursuant to § 18.2-308(E).

⁴The following cases offer a comprehensive analysis of the principles of *res judicata*: *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 576 S.E.2d 504 (2003) (noting that doctrine of *res judicata* applies if cause of action asserted in pending proceeding is same cause asserted in former proceeding); *Commonwealth ex*

rel. Gray v. Johnson, 7 Va. App. 614, 376 S.E.2d 787 (1989) (defining *res judicata* as matter adjudged).

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