

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WARREN K. HOLLINGHEAD,

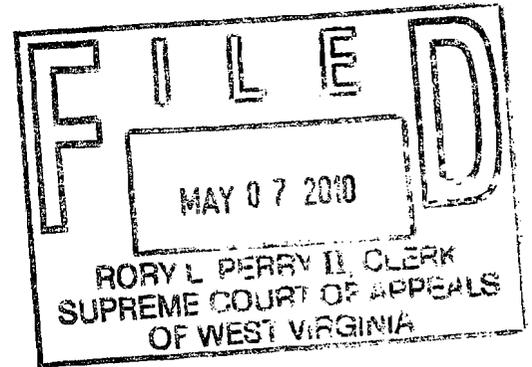
Appellant,

vs.

No.:35530

**JAMES W. CHILDERS, as
ELECTED SHERIFF OF
GREENBRIER COUNTY,**

Appellee.



APPELLANT'S BRIEF

Appellant herein, and Petitioner below, Warren Hollinghead, by counsel, Barry L. Bruce and Mark J. Jenkins, of Barry L. Bruce and Associates, L.C., does hereby respectfully submit Appellant's Brief, and moves this Honorable Court to reverse the Greenbrier County Circuit Court's Order dated October 2, 2009, which denied the Appellant's appeal of the denial of his application to carry a concealed weapon, and herein states the following in support thereof:

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GREENBRIER COUNTY,

Appellee.

APPELLANT'S BRIEF

Appellant, Warren Hollinghead, by counsel, Barry L. Bruce and Mark J. Jenkins, of Barry L. Bruce and Associates, L.C., does hereby submit Appellant's Brier, and therein states the following:

I. KIND OF PROCEEDING AND NATURE OF THE RULING

Appellant filed a petition for review of the denial of his concealed weapons permit in the Circuit Court of Greenbrier County on March 13, 2009. By Order dated October 2, 2009, the Circuit Court denied the Appellant's petition for review of the denial of his concealed weapons permit. (See Appellant's Exhibit 1 Attached Hereto).

Appellant filed his Petition for Appeal on January 20, 2010, with the Supreme Court of Appeals of West Virginia. After consideration thereof, this Honorable Court, by Order dated March 30, 2010, granted Appellant's Petition for Appeal.

II. STATEMENT OF THE FACTS

A criminal complaint was filed against the Appellant on September 15, 1994, in the Magistrate Court of Greenbrier County, West Virginia. (See Appellant's Exhibit 2 Attached

Hereto). The complaint alleged that the Appellant violated West Virginia Code Section 61-2-9, (Simple Battery) by unlawfully physically contacting Brian Hollinghead, Appellant's nephew, at the residence of a third party, Shelia Smith. (See Appellant's Exhibit 2 Attached Hereto).

Thereafter, on or about September 19, 1994, the Appellant plead no-contest to violating West Virginia Code Section 61-2-9, (Simple Battery) in the Magistrate Court of Greenbrier County, West Virginia.

Nearly three years later, on July 31, 1997, the Appellant filed an initial application for a concealed pistol/revolver license with Albert W. Lindsey, former Sheriff of Greenbrier County, West Virginia, and subsequently, on or about August 15, 1997, said application was granted. (See Appellant's Exhibit 3 Attached Hereto).

On August 29, 2002, the Appellant filed a renewal application for his concealed pistol/revolver license with Albert W. Lindsey, former Sheriff of Greenbrier County, West Virginia, and subsequently, on or about October 15, 2002, said application was granted. (See Appellant's Exhibit 4 Attached Hereto).

On September 14, 2007, the Appellant filed another renewal application for a concealed pistol/revolver license with Roger L. Sheppard, former Sheriff of Greenbrier County, West Virginia.

After considerable time elapsed without receiving notification from the Sheriff's department regarding his renewal application, Appellant's counsel, Barry L. Bruce, sent a letter to Roger L. Sheppard, former Sheriff of Greenbrier County, on August 5, 2008, wherein the Appellant respectfully requested that his concealed weapons license be re-issued due to the fact that he met the requirements of West Virginia Code Section 61-7-4 (a)(6) for the issuance of a

concealed weapons license.

By letter dated August 8, 2008, Roger L. Sheppard, former Sheriff of Greenbrier County, West Virginia, denied the Appellant's request to renew his license to carry a concealed weapon, due to the fact that the Appellant had plead no-contest to a charge of battery, in 1994, in which the victim was Appellant's nephew. Sheriff Sheppard's letter stated that said conviction prohibited the Appellant from possessing a firearm pursuant to West Virginia Code Section 61-7-7. (See Appellant's Exhibit 5 Attached Hereto).

By letter dated February 13, 2009, James W. Childers, current Sheriff of Greenbrier County, West Virginia, stated that he had reviewed the Appellant's file, and that he also was denying the Appellant's application because he was in agreement with the decision of Roger L. Sheppard, the former Sheriff of Greenbrier County, West Virginia, in that West Virginia Code Section 61-7-7 prohibited the Appellant from possessing a concealed weapons permit due to the fact the Appellant plead no-contest to a charge of battery in 1994. (See Appellant's Exhibit 6 Attached Hereto).

III. ASSIGNMENTS OF ERROR

West Virginia Code Section 61-7-4 clearly establishes the prohibitions which prevent an applicant from obtaining a license to carry a deadly weapon. The Circuit Court of Greenbrier County failed to properly apply West Virginia Code Section 61-7-4, to the facts of the instant matter. As such, the Appellant was wrongfully denied his right, under West Virginia law, to obtain a license to carry a deadly weapon.

IV. DISCUSSION

(1) Appellant Is Entitled To Receive A Concealed Weapons Permit According To West Virginia Code Section 61-7-4

According to West Virginia Code Section 61-7-4, the Appellant is entitled to receive a license to carry a deadly weapon as long as he has not been :

“convicted of a misdemeanor offense of assault or battery either under the provisions of section twenty-eight, article two of this chapter [61-2-28] or the provisions of subsection (b) or (c), section nine, article two of this chapter [61-2-9 (b) or (c)] in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant’s child or ward or a member of the defendant’s household at the time of the offense...”

The language of West Virginia Code Section 61-7-4 is clear and without ambiguities, and as such, the plain meaning of its provisions should be accepted without resorting to the rules of interpretation. Whiteside v. Whiteside, 222 W.Va. 177, 663 S.E. 2d 631 (2008); State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968).

West Virginia Code Section 61-7-4 is clear, in that the Appellant’s renewal application should have been denied **only** if the Appellant had been convicted of a crime of assault or battery under West Virginia Code Section 61-2-28 (Domestic Battery) or 61-2-9 (Simple Battery) in which the victim was a current or former spouse of the Appellant, current or former sexual or intimate partner of the Appellant, person with whom the Appellant had a child in common, person with whom the Appellant cohabited or had cohabited with, a parent or guardian of the Appellant, the Appellant’s child or ward or a member of the Appellant’s household at the time of the offense.

The uncontested facts of the instant matter demonstrates that the Appellant has never been convicted of a misdemeanor offense of assault or battery under the provisions of West Virginia Code Section 61-2-28. (Domestic Battery)(See Appellant's Exhibit 2 Attached Hereto). In fact, the undisputed facts demonstrate that the Appellant has never been charged with violating West Virginia Code Section 61-2-28. (Domestic Battery)(See Appellant's Exhibit 2 Attached Hereto).

Accordingly, the next question should be whether the Appellant was convicted of a crime under West Virginia Code Section 61-2-9, (Simple Battery) in which the victim was a current or former spouse of the Appellant, current or former sexual or intimate partner of the Appellant, person with whom the Appellant had a child in common, person with whom the Appellant cohabited or had cohabited with, a parent or guardian of the Appellant, the Appellant's child or ward or a member of the Appellant's household at the time of the offense.

The uncontested facts of the instant matter, as stipulated to by both parties hereto, is that in 1994, the Appellant pleaded non-contest to a charge of simple battery under West Virginia Code Section 61-2-9, and that the victim was the Appellant's nephew. The uncontested facts, as stipulated to by both parties, is that the Appellant's nephew was not the Appellant's former spouse, current or former sexual or intimate partner, person with whom the Appellant had a child in common, person with whom the Appellant cohabited or had cohabited with, a parent or guardian of the Appellant, the Appellant's child or ward or a member of the Appellant's household.

Consequently, the Appellant is not prohibited from possessing a concealed weapons permit according to West Virginia Code Section 61-7-4.

**(2) Appellant Is Not Prohibited From Possessing A Firearm According To
West Virginia Code Section 61-7-7.**

Sheriff Sheppard and Sheriff Childers both stated that they denied the Appellant's application pursuant to West Virginia Code Section 61-7-7. This code section prohibits certain individuals from possessing firearms outright. That is, this code section would prohibit the Appellant from receiving a concealed weapons permit even though he complies with West Virginia Code Section 61-7-4.

West Virginia Code Section 61-7-7 states that individuals are prohibited from possessing a firearm if he/she:

“Has been convicted of a misdemeanor of assault or battery either under the provisions of section twenty-eight, article two of this chapter {61-2-28} or the provisions of subsection (b) or (c), section nine of said article {61-2-9} in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or has been convicted in any court of any jurisdiction of a comparable misdemeanor crime of domestic violence.”

The language of West Virginia Code Section 61-7-7 is identical to the language used in West Virginia Code Section 61-7-4. According to West Virginia Code Section 61-7-7, the Appellant is prohibited from possessing a firearm only if he was convicted of a misdemeanor of assault or battery under West Virginia Code Section 61-2-28 (Domestic Battery) or West Virginia Code Section 61-2-9 (Simple Battery) in which the victim was a current or former spouse of the Appellant, a current or former sexual or intimate partner of the Appellant, a person with whom the Appellant has a child in common, person with whom the Appellant cohabited or had cohabited with, a parent or guardian of Appellant, the Appellant's child or ward or a member

of Appellant's household at the time of the offense. Appellant's nephew is not one of the individuals listed in West Virginia Code Section 61-7-7, and as such, Appellant is not prohibited from possessing a firearm pursuant to West Virginia Code Section 61-7-7.

It is important to note, that in 2004, the West Virginia Legislature amended West Virginia Code Section 61-7-7. Hence, if the West Virginia Legislature wanted to add nephew to the class of domestic parties covered by the statute, they could have done so. Yet, they opted not to. Consequently, the plain meaning of the statute should be applied, and no interpretation is warranted, as the legislature has shown their clear intention not to add nephew to the domestic parties included in the statute.

(3) The United States v. Hayes Decision Has No Relevance To The Instant Matter

In this case, the West Virginia Code should be followed. The Appellant is not prohibited from obtaining a concealed weapons permit according to West Virginia Code Section 61-7-4, nor is he prohibited from possessing a firearm according to West Virginia Code Section 61-7-7. As such, the Appellant's renewal application for a license to carry a concealed weapon should have been granted.

Amazingly, however, the Circuit Court determined that the Appellant's renewal application should have been denied. The Circuit Court used a recent Supreme Court of the United States decision, being United States v. Hayes, 555 U.S. ---, 129 S.Ct. 1079, 172 L.E. 2d 816 (2009), to justify its decision. (See Appellant's Exhibit 7 Attached Hereto).

It must be stressed that the Hayes decision has no relevancy to the instant matter. The Hayes decision dealt with the Federal Gun Control Act of 1968, 18 U.S.C. § 921. The Appellant has never been charged with any violation of said act. The only issue presented to the Circuit

Court was whether the Appellant was entitled to obtain a concealed weapons permit. Yet, in addressing that question, the Circuit Court relied on a Supreme Court of the United States decision that addressed the Federal Gun Control Act.

The Federal Gun Control Act of 1968, 18 U.S.C. § 921, has long prohibited possession of a firearm by any person convicted of a felony. In 1996, Congress extended the prohibition to include persons convicted of a misdemeanor crime of domestic violence. The definition of “misdemeanor crime of domestic violence”, contained in § 921 (a)(33)(A), was the issue in the Hayes case.

In 1994, Edward Hayes was convicted of battery, in violation of West Virginia Code Section 61-2-9. (Simple Battery). The victim was Mr. Hayes’ then wife, who he had a child with and cohabitated with at the time of the offense.

In 2004, law enforcement officers went to Mr. Hayes’ home, in response to a domestic violence call. While there, the officers discovered Mr. Hayes had several firearms in his possession. Mr. Hayes was later charged with violating §§ 922 (g)(9) and 924(a)(2), for possessing firearms after having been convicted of a crime of domestic violence.

Mr. Hayes moved to dismiss the charges against him, maintaining that he had been convicted of a crime of simple battery under West Virginia Code Section 61-2-9, and as such, he could not violate the Federal Gun Control Act, as it requires that he be convicted of a crime of domestic violence.

The United States District Court for the Northern District of West Virginia rejected Mr. Hayes’ argument. In a 2-to-1 decision, the United States Court of Appeals for the Fourth Circuit reversed. The Court of Appeals held that for a violation of § 922 (g)(9) of the Federal Gun

Control Act to occur, the predicate offense must have as an element a domestic relationship between the offender and the victim. 482 F. 3d 749, 751 (2007).

Upon appeal, the United States Supreme Court addressed the issue. In United States v. Hayes, 555 U.S. ---, 129 S.Ct. 1079, 172 L.E. 2d 816 (2009), the Court held that Mr. Hayes could be convicted of violating the Federal Gun Control Act, even though he had not been convicted of a crime which required a showing of a domestic relationship. That is, it did not matter that Mr. Hayes was convicted of violating West Virginia Code Section 61-2-9, (Simple Battery) which is a non-domestic related offense.

The Hayes Court found that as long as evidence could be presented that the victim of Mr. Hayes' battery was within the group of individuals defined by the federal act, the federal government could present such evidence, and could convict Mr. Hayes of violating the Federal Gun Control Act even though he had not been convicted of a state crime which required a showing of that domestic relationship.

In doing so, the Hayes Court determined that Section 922 (a)(33)(A) of the Federal Gun Control Act, defined misdemeanor crime of domestic violence to include an offense that:

is a misdemeanor under Federal, State, or Tribal law, and

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 of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

The Hayes Court stated that since the victim of Mr. Hayes' conviction of West Virginia Code Section 61-2-9 was his wife, who he cohabitated with, and had a child with, it met the

definition of 'misdemeanor crime of domestic violence' using the definition provided by Section 922 (a)(33)(A) of the Federal Gun Control Act.

The Court went on to determine, that since Mr. Hayes violated the Federal Gun Control Act, it was immaterial if the predicate offense required a showing of a domestic relationship, since the Federal Gun Control Act required, as an element to the offense, a showing that the victim fell within the definition provided by Section 922 (a)(33)(A) of the Federal Gun Control Act.

The Circuit Court of Greenbrier County used the decision in Hayes, to rationalize that the Appellant should be prohibited from obtaining his license to carry a deadly weapon. The Circuit Court acknowledged that the Appellant plead no-contest to violating West Virginia Code Section 61-2-9, (Simple Battery) and that the victim was not one of the enumerated victims listed by West Virginia Code Sections 61-7-4 or 61-7-7, such as to prevent the Appellant from obtaining a license to carry a deadly weapon.

Nonetheless, the Circuit Court reasoned that the Appellant **could have** been convicted of the current version of West Virginia Code Section 61-2-28, since the Appellant and the victim shared the necessary domestic relationship required by the current version of West Virginia Code Section 61-2-28. The Circuit Court reasoned that the Hayes decision allows a court to look beyond what actually happened, and to hypothesize about what could have happened.

The Circuit Court was wrong in finding that the Appellant could have been charged with violating West Virginia Code Section 61-2-28, as it existed in 1994. The current version of West Virginia Code Section 61-2-28, states that the definition of family or household member is to be found by referencing West Virginia Code Section 48-27-204. The Circuit Court determined that

the Appellant could have been charged with violating West Virginia Code Section 61-2-28 as Appellant's nephew is one of the parties defined as a family member/household member pursuant to West Virginia Code Section 48-27-204.

However, at the time the Appellant was charged with his subject crime, West Virginia Code Section 61-2-28, used the definition of family/household member found in West Virginia Code Section 48-2A-2. (See Appellant's Exhibit 8 Attached Hereto). The definition of family/household member in effect at the time of Appellant's crime, being September 1994, did **NOT** include nephew as a family/household member. In fact, the West Virginia Legislature did not add the current definition of family/household member until 2004, some ten (10) years after Appellant was charged. Consequently, the Circuit Court was wrong in finding that the Appellant could have been charged with violating West Virginia Code Section 61-2-28 in 1994.

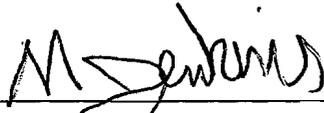
The Circuit Court should have determined if the Appellant met the requirements of West Virginia Code Section 61-7-4. In doing so, the Circuit Court should have determined that the Appellant does. Specifically, the Circuit Court should have determined that the Appellant was not charged with a crime pursuant to West Virginia Code Section 61-2-28 and that the victim of the crime the Appellant was charged with was his nephew, and thus, outside of the purview of West Virginia Code Section 61-2-9.

Secondly, the Circuit Court should have determined if the Appellant was prohibited from possessing a firearm altogether, pursuant to West Virginia Code Section 61-7-7. In doing so, the Circuit Court should have determined that the Appellant was not prohibited, as the victim of the crime the Appellant was charged with was his nephew, and thus, outside of the purview of West Virginia Code Section 61-7-7.

The Circuit Court's analysis should have stopped there, and the Appellant should have been awarded his license fo carry a concealed weapon. Instead, the Circuit Court, used the Hayes decision to justify that the Appellant could have been charged with a crime which would have precluded him from obtaining a concealed weapons permit.

AS SUCH, the Appellant respectfully requests this Honorable Court to find that Appellant meets the requirements for a license to carry a deadly weapon according to West Virginia Code Section 61-7-4 and that the Appellant is not prohibited from possessing a firearm according to West Virginia Code Section 61-7-7.

APPELLANT
BY COUNSEL,



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CERTIFICATE OF SERVICE

I, Mark J. Jenkins, Barry L. Bruce and Associates, L.C., counsel for Appellant, Warren K. Hollinghead, certify that I have on this date served a true and correct copy of the foregoing **APPELLANT'S BRIEF**, by U.S. Mail, first class, postage prepaid on this the 6th day of May, 2010, upon:

Patrick Via
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EXHIBITS

ON

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