

IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Warren K. Hollinghead

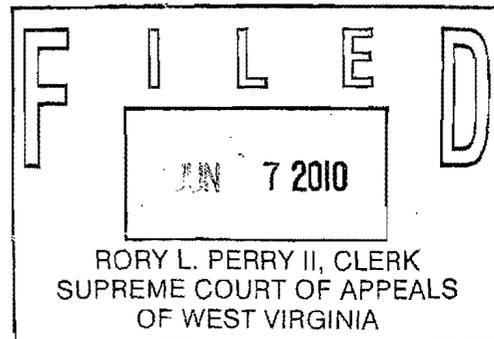
Vs No. 35530

James W. Childers, Elected  
Sheriff of Greenbrier County,  
West Virginia

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APPELLEE'S BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WARREN K. HOLLINGHEAD,

Appellant,

Vs

No. 35530

JAMES CHILDERS, as the  
Elected Sheriff of Greenbrier  
County,

Appellee.

APPELLEE'S BRIEF

The Appellee herein, and Respondent below, James Childers, as Sheriff of Greenbrier County, by counsel, Patrick I. Via, Prosecuting Attorney of Greenbrier County, comes now in response to the Appellant's Brief requesting relief and moves this Honorable Court to deny the appeal herein and re-affirm the Order of the Greenbrier Circuit Court dated the 2<sup>nd</sup> day of October, 2009, denying the Appellant's appeal of the Greenbrier County Sheriff's refusal to grant a concealed weapon permit upon application, and states and avers in support hereof:

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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.

APPELLEE' s BRIEF

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Appellee, James W. Childers, Elected Sheriff of Greenbrier County, by counsel, Patrick I. Via, Prosecuting Attorney of Greenbrier County, does hereby submit the Appellee' s Brief, and states and avers as follows:

I. KIND OF PROCEEDING AND NATURE OF THE RULING

The Appellant in this matter filed an appeal of the denial of the issuance of a concealed weapons permit by the Appellee herein, in the Circuit Court of Greenbrier County, West Virginia on or about the 13<sup>th</sup> day of March 2009. By Order dated the 2<sup>nd</sup> day of October 2009, the Circuit Court of Greenbrier County denied the Appellant' s petition for review and up held the Appellee' s denial of the issuance of a concealed weapons permit.

The Appellant filed a Petition for Appeal on or about the 20<sup>th</sup> day of January 2010, with the Supreme Court of Appeals of West Virginia, whereupon this Honorable Court granted the request for appeal by Order dated the 30<sup>th</sup> day of March, 2010.

## II. STATEMENT OF THE FACTS

The Appellant herein, plead no contest to the crime of battery, pursuant to and in accordance with W.Va. Code §61-2-9, upon a complaint charging the same on the 19<sup>th</sup> day of September 1994, in the Magistrate Court of Greenbrier County, West Virginia. It is uncontested that the victim in the aforementioned case was and is the Appellant's nephew.

On or about the 17<sup>th</sup> day of September 2007 the Appellant filed a renewal application for a concealed weapons permit pursuant to W.Va. Code §61-7-4. By written correspondence dated the 8<sup>th</sup> day of August 2008, former Sheriff of Greenbrier County, Roger Sheppard denied the request for renewal of said permit. By written correspondence approximately 6 months later, newly elected Sheriff James W. Childers re-affirmed former Sheriff Sheppard's decision and likewise denied the re-issuance of a permit.

On or about the 13<sup>th</sup> day of March, 2009, the Appellant herein filed a Petition for Review of the denial of the re-issuance of a concealed weapons permit with the Circuit Court of Greenbrier

County. On or about the 25<sup>th</sup> day of August 2009, the matter was scheduled and heard before the Honorable J. C. Pomponio, Jr., Circuit Judge. At which time both the Appellant and Appellee stipulated that there were no issues of fact to be decided, only issues of law to be resolved by the Court, and the presentment of evidence and oral arguments were waived with the parties to present briefs to be presented to the Court. Appellant filed said brier with the Court on the 29<sup>th</sup> day of August, 2009, with the Appellee's brief being filed on the 18<sup>th</sup> day of September 2009.

On or about the 2<sup>nd</sup> day of October 2009, the Circuit Court of Greenbrier County, denied the Petition for Review filed by the Appellant and up-held the denial of the re-issuance of a concealed weapons permit by the Appellee, James W. Childers, Sheriff of Greenbrier County.

### III. STATEMENT ON APPELLANT'S ASSIGNMENT OF ERROR

The Circuit Court of Greenbrier County properly considered the requisite application of law in denying the Petition for Review filed by the Appellant upon the Sheriff of Greenbrier County's denial of the reissuance of a concealed weapons permit.

### IV. DISCUSSION

- (1) The legislative intent of West Virginia Code Chapter 61, Article 7, Section 4 would dictate the denial of a

concealed weapons permit to one convicted of a violent crime against a family member.

The clear intent of Chapter 61, Article 7, Section 4(a)(6) of the West Virginia Code was to ensure that individuals having been convicted of a domestic crime of violence not avail themselves of the freedom to be armed in a concealed fashion. The dangerous nature and extent of domestic violence throughout the country, has been widely accepted as a chronic societal problem.

The establishment of the prohibition against so licensing individuals having been convicted of such an offense reflects the acknowledgment by the legislature of the dangerous nature of such conflicts. The specific language which prevents the issuance of a permit to one having been convicted of a domestic related offense, W.Va. Code 61-7-4, is extended to include those individuals having been convicted of what is often referred to as simple assault or simple battery to be found within W.Va. Code 61-2-9.

"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 interpretation argued by the Appellant herein would lead to the illogical conclusion that college roommates getting into a scuffle could prevent the future issuance of a concealed weapons permit, but would allow an uncle to physically attack a nephew and lawfully carry a concealed weapon in the future, or, more poignantly, allow an uncle to assault a niece and qualify for carrying a deadly weapon in a concealed fashion.

More specifically, West Virginia Code Chapter 48, Article 27, Section 204(7)(N-0), is far more inclusive and logical in defining those intended to be protected, and sets out the definition of those to be protected through the criminal prosecution of violent aggressors in West Virginia Code Chapter 61, Article 2, Section 28(a) and (b).

Chapter 61, Article 7, Section 4 provides enhanced protections from those aggressors prosecuted prior to the establishment of the statute pertaining to domestic battery and domestic assault, who were convicted of simple battery or simple assault, if their victims were of a special class of individual.

- (2) The State would concede that the Defendant could not and should not be subject to criminal penalty by way of Chapter 61, Article 7, Section 7 for possessing a firearm.

The State would concede and would argue for the strict construction of criminal statutes, regarding the potential prosecution of one alleged to have committed a crime, subjecting them to the imposition of criminal punishment.

It is the position of the Appellee herein, that the administrative function of granting or denying a concealed weapons permit, should not be held to the same standard as the pursuit of criminal conviction of a defendant. Indeed, the State has no intent nor desire to prosecute the Appellant herein for simply *possessing* a firearm. The Appellant's constitutional rights in that regard are in no way meant to be infringed.

On the contrary it is the State's interest in public safety, and the recognition that the carrying of a deadly weapon creates a heightened opportunity, and therefore likelihood of not only breaches of the peace but life threatening encounters. It is that recognition which has given rise to the permitting process for concealed weapons, and its' resilience to constitutional challenge.

It is therefore, logical, that under the specific language of the criminal statute, §61-7-7 W.Va. Code, that the Appellant so situated should not be prosecuted for committing a crime by the mere possession of a firearm. It is the Appellee's position that the strong interests in public safety, however, make it clear that the Legislature intended that those having had, in the past

a propensity for violence in a domestic environment, should be regulated and prevented from lawfully carrying a concealed weapon.

"The Legislature of this state finds that Domestic Violence is a major health and law-enforcement problem in this state with enormous costs to the state in both dollars and human lives. It affects people of all racial and ethnic backgrounds and all socioeconomic classes; and Domestic Violence can be deterred, prevented or reduced by legal intervention that treats this problem with the seriousness it deserves."

W.Va. Code §48-27-101(a) (3-4) (1991)

"The article shall be liberally construed and applied to promote the following purposes:...to create a speedy remedy to discourage violence against family or household members with whom the perpetrator of domestic violence has continued contact;...; to recognized that domestic violence constitutes serious criminal behavior with potentially tragic results and that it will no longer be excused or tolerated; and to recognize that the existence of a former or on-going familial or other relationship should not serve to excuse, explain or mitigate acts of domestic violence which are otherwise punishable as crimes under the laws of this state."

W.Va. Code §48-27-101(b) (2-6)

The Appellee firmly believes that, in the application of an administrative permitting function it is entirely appropriate to consider the interaction of the various relevant statutes to determine the actual intent and goal of the overriding policy, which in this case, is to reduce the opportunity for deadly violence, by one having shown a propensity, by criminal conviction, to violence.

"Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments."

Smith v. State Workman's Comp. Comm'r.  
159 W.Va. 108, 210 S.E.2<sup>d</sup> 361 (1975)

In this particular case the Appellant was convicted of a crime of violence against a family member, a nephew, a crime, by operation of West Virginia Code Chapter 48, Article 27, Section 204(7)(N-O), which would qualify as the crime of Domestic Battery under Chapter 61, Article 2, Section 28.

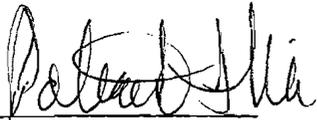
It is the position of the Appellee that there exists no logical explanation for an interpretation that the Legislature intended to prevent one convicted of battery on a room-mate from carrying a concealed weapon, but not prevent one convicted of battery on a family member situated as nephew from carrying a concealed weapon lawfully.

(3) The Appellee believes the Greenbrier County Circuit Court's interpretation and application of U. S. v. Hayes (129 S.Ct. 1079, 1082 (2009)) is appropriate.

The Appellee is not asking the court to up hold a conviction for an alleged criminal violation. But rather to re-affirm the lower court's assertion that the interpretation of the Statutes, read together as a feasible, logical policy to address and diminish the substantial and deadly problems associated with Domestic.

WHEREFORE, the Appellee would respectfully request that this Honorable Court deny the Appellant's requested relief and re-affirm the Order of the Circuit Court of Greenbrier County.

Appellee  
By Counsel



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Counsel for the Appellee

CERTIFICATE OF SERVICE

I, Patrick I. Via, Prosecuting Attorney for the County of Greenbrier and counsel for the Appellee, do hereby certify that I have served the attached Appellee's Brief upon the Appellant, by United States Mail, postage prepaid and properly addressed as:

Barry L. Bruce, Esq.  
Barry L. Bruce & Associates  
P.O. Box 388  
Lewisburg, West Virginia 24901

This the 4<sup>th</sup> day of June 2010.



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