35530

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

**WARREN K. HOLLINGHEAD**
**Plaintiff**

**v.** **CIVIL ACTION NO. 09-P-13**

**JAMES W. CHILDERS, SHERIFF OF GREENBRIER COUNTY**
**Defendant**

## ORDER

This matter came on for hearing on the 25th day of August, 2009, before the Court Joseph C. Pomponio Jr., presiding, upon the Plaintiff's Petition for Review of Denial of Petitioner's Application for a Concealed Weapon. The Plaintiff, Warren K. Hollinghead, appeared by counsel, Barry L. Bruce. The Defendant, James W. Childers, Sheriff of Greenbrier County, appeared by counsel, Patrick I. Via. The Petition for Appeal, memorandums, and pleadings were reviewed by Joseph C. Pomponio, Jr., Circuit Court Judge.

### Findings of Fact

1. Plaintiff plead no contest to battery (W. Va. Code § 61-2-9) in Magistrate Court of Greenbrier County West Virginia on September 19, 1994.
2. The victim of the battery for which the Defendant plead no contest is the Plaintiff's nephew.
3. On September 17, 2007, Plaintiff filed a renewal application for his concealed weapons license ("CWL") pursuant to W. Va. Code § 61-7-4.
4. By letter dated August 8, 2008, the former Sheriff of Greenbrier County West

Virginia, Roger Sheppard, denied the Plaintiff his renewal of the CWL.

5. By letter dated February 13, 2009, the current Sheriff of Greenbrier County West Virginia and Defendant herein, James W. Childers, also denied the Plaintiff his renewal of the CWL.

6. Plaintiff filed his "Petition for Review of Denial of Petitioner's Application for a Concealed Weapons Permit" ("Appeal") on March 13, 2009.

7. On August 25, 2009, oral arguments were heard on the current Appeal.

8. At the oral arguments, both Plaintiff and Defendant agreed that there were no questions of material fact to be decided and that the only matters to be resolved were questions of law to be left to the Court.

9. At the oral arguments, both Plaintiff and Defendant agreed to forgo oral arguments in favor of briefing the Court on the issue.

10. Plaintiff's brief was filed on August 29, 2009.

11. Defendant's brief was filed on September 18, 2009.

**Conclusions of Law**

1. "Each applicant [for a CWL] shall file with the sheriff, a complete application, as prepared by the Superintendent of the West Virginia State Police, in writing, duly verified, which sets forth only the following licensing requirements...[t]hat the applicant has not been convicted of a misdemeanor offense of assault or battery either under the provisions of [W. Va. Code § 61-2-28] or the provisions of subsection (b) or (c) [of W. Va. Code § 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 a misdemeanor offense with similar essential elements in a jurisdiction other than this state." W. Va. Code § 61-7-4(a)(6).

2. "If the information in the application is found to be true and correct, the sheriff shall issue a [concealed weapons] license." W. Va. Code § 61-7-4(f).

3. "When read together with the amendment to Article III, § 22, which gives a citizen the constitutional right to keep and bear arms, we believe the legislative intent [in enacting W. Va. Code § 61-7-4] was to allow only those citizens who qualify under W.Va.Code § 61-7-4, to obtain a license to carry a concealed weapon." In re Metheney, 182 W. Va. 722, 725, 391 S.E.2d 635, 638 (1990), overruled on other grounds, In re Dailey, 195 W. Va. 330, 465 S.E.2d 601 (1995).

4. "In ascertaining legislative intent, effect must be given to each part of the statue and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl Pt. 2, Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 210 S.E.2d 361 (1975).

5. By enacting W. Va. Code § 61-7-4(a)(6), the legislature made known its intention to keep concealed weapons out of the hands of batterers and domestic batterers by limiting possession of a CWL to those who have not been convicted under W. Va. Code § 61-2-28 or under W. Va. Code §§ 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.

6. "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 that it deserves." W. Va. Code § 48-27-101(a)(3-4).

7. "This article shall be liberally construed and applied to promote the following purposes:...[t]o create a speedy remedy to discourage violence against family or household members with whom the perpetrator of domestic violence has continuing contact;...; [t]o facilitate equal enforcement of criminal law by deterring and punishing violence against family and household members as diligently as violence committed against strangers; [t]o recognize that domestic violence constitutes serious criminal behavior with potentially tragic results and that it will no longer be excused or tolerated; and [t]o 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).

8. "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered rom the whole of the enactments." Syl. Pt. 3, Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 210 S.E.2d 361 (1975).

9. "Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member...is guilty of a misdemeanor...." W. Va. Code § 61-2-28(a).

10. "As used in this section, 'family or household member' means 'family or household member' as defined in 48-27-204 of this code." W. Va. Code § 61-2-28(e).

11. "'Family or household members' means persons who [h]ave the following relationships to another person:...[u]ncle, uncle-in-law or step uncle; [n]iece or nephew...." W. Va. Code § 48-27-204(7)(N-O).

12. The Supreme Court of the United States found that for a federal conviction under 18 U.S.C. § 922(g)(9), which makes it a federal crime to possess a firearm if you have even been convicted of a "misdemeanor crime of domestic violence," the predicate misdemeanor need not have as an element a specified domestic relationship between the misdemeanant and the victim. U. S. v. Hayes, 129 S.Ct. 1079, 1082 (2009).

13. The reasoning employed by the Supreme Court of the United States was previously affirmed by the West Virginia Supreme Court of Appeals when it stated, "We adopt the reasoning of the *Belless* court and its sister courts and hold that a violation of 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by one who has a prior misdemeanor conviction for domestic violence, does not require that the underlying statute include as an element of the offense a domestic relationship between the victim of the domestic violence and the misdemeanant." In re Petition of Parsons, 218 W.Va. 353, 359, 624 S.E.2d 790,

796 (2005).

**Discussion**

It is uncontested that the victim in the Plaintiff's underlying battery conviction is the Plaintiff's nephew. It is also uncontested that the Plaintiff was not convicted under W. Va. Code § 61-2-28 ("Domestic Battery") or W. Va. Code § 61-2-9 ("Simple Battery") subsections (b) or (c) in which the victim and misdemeanant shared one of the enumerated domestic relationships found in W. Va. Code § 61-7-4(a)(6).

However, that is not the end of the story. Obviously, the Legislature of West Virginia has promulgated several pieces of legislation which enshrine the Legislature's intent to protect the victims of domestic violence and to keep concealed, deadly weapons out of the hands of those with a history of perpetrating such domestic violence.

Furthermore, although the Plaintiff was convicted of Simple Battery and not convicted under the Domestic Battery statute, he undoubtedly could have been convicted for Domestic Battery because the Plaintiff shared a necessary relationship with his victim under W. Va. Code § 48-27-204(7)(N-O).

In much the same way, the underlying predicate offenses of the petitioner in Parsons and the defendant in Hayes did not have as an element the domestic relationship required by 18 U.S.C. § 922(g)(9), yet both the West Virginia Supreme Court of Appeals and the Supreme Court of the United States affirmed that the underlying conviction's elements were not necessarily dispositive on the issue of liability under 18 U.S.C. § 922(g)(9). In Hayes, the Defendant was convicted under 18 U.S.C. § 922(g)(9) for possessing a firearm, even though his predicate offense was Simple

Battery and not a domestic battery, as required under the federal law. Hayes at 1082-1083. In Parsons, the West Virginia Supreme Court of Appeals positively treated the rationale of the federal Circuit Courts of Appeals that the Supreme Court of the United States affirmed in Hayes. Parsons at 359. Essentially, the two cases read in tandem stand for the idea that the West Virginia Supreme Court (and the Supreme Court of the United States for that matter) would allow a citizen to be convicted under 18 U.S.C. § 922(g)(9) based on a predicate conviction that did not have as an element of that predicate conviction the necessary domestic relationship required by U.S.C. § 922(g)(9).

Because of such, this Court reasons that if neither court would oppose such a loss of freedom for a citizen, then certainly neither court would oppose a citizen losing his lesser right to possess a CWL for being convicted of a crime that does not possess the necessary domestic relationship required by W. Va. Code § 61-7-4(a)(6). This is especially so, considering how the required domestic relationship is present and would allow for a conviction under the Domestic Battery statute, and such conviction would necessarily prevent the Plaintiff from obtaining a CWL. Moreover, this opinion of the Court is further buttressed by the overwhelming intent of the Legislature of West Virginia to keep concealed, deadly weapons out of the hands of domestic batterers and to eradicate the scourge of domestic violence within our state.

It is, therefore, **ORDERED** that

1. Plaintiff's Appeal is DENIED.

The Clerk is directed to forward a copy of this Order to Barry L. Bruce, counsel

for the Plaintiff, and to Patrick I. Via, counsel for the Defendant.

Entered October 2, 2009

J.C. Pomponio Jr.
Joseph C. Pomponio, Jr.

CIRCUIT COURT GREENBRIER CO., W.VA.
FILED
OCT 02 2009
LOUVONNE ARBUCKLE CLERK

A True Copy:
ATTEST:

Louvonne Arbuckle
Clerk, Circuit Court
Greenbrier County, WV

By_____
Deputy

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**WARREN K. HOLLINGHEAD,**

**Petitioner Herein,**

**vs.** **No.:_____**
**(Greenbrier County Civil No.: 09-P-13)**

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

**Respondent Herein.**

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**CERTIFICATE OF SERVICE**

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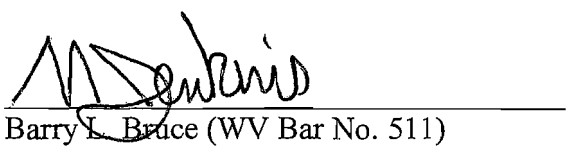
I, Mark J. Jenkins, Barry L. Bruce and Associates, L.C., Counsel for Petitioner, Warren K. Hollinghead, certify that I have on this date served a true and correct copy of the foregoing **DOCKETING STATEMENT**, by U.S. Mail, first class, postage prepaid on this the 20th day of January, 2010, upon:

Patrick Via
Prosecuting Attorney's Office
200 N. Court Street
Lewisburg, WV 24901



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