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20-P-1052

Appeals Court

CHIEF OF POLICE OF WAKEFIELD vs. ADAM W. DeSISTO & others.<sup>1</sup>

No. 20-P-1052.

Middlesex. May 12, 2021. - June 21, 2021.

Present: Green, C.J., Blake, & Kinder, JJ.

Firearms. License. Controlled Substances. Practice, Civil,  
Judgment on the pleadings, Judicial review of license to  
carry firearms, Action in nature of certiorari. Evidence,  
Administrative proceeding.

Civil action commenced in the Superior Court Department on  
July 19, 2019.

The case was heard by Michael D. Ricciuti, J., on a motion  
for judgment on the pleadings.

Neil S. Tassel for Adam W. DeSisto.  
Yael Magen for the plaintiff.

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<sup>1</sup> The Justices of the Malden Division of the District Court  
Department.

KINDER, J. In 2019, the chief of the Wakefield Police Department, Richard Smith,<sup>2</sup> denied Adam W. DeSisto's application for a license to carry a firearm (LTC). DeSisto sought judicial review of the denial and, following an evidentiary hearing before a judge of the District Court (hearing judge), the chief's decision was vacated. See G. L. c. 140, § 131 (f). The chief filed a petition for certiorari review in the Superior Court, see G. L. c. 249, § 4, and a motion for judgment on the pleadings, which DeSisto opposed, see Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). A Superior Court judge (motion judge) allowed the chief's motion for judgment on the pleadings and reinstated the denial of DeSisto's application for an LTC, reasoning that the hearing judge improperly substituted her judgment for that of the licensing authority. On appeal, DeSisto principally argues that it was error for the chief to rely on evidence that was suppressed, unreliable, or stale in determining DeSisto's suitability for an LTC. We affirm.

Background. DeSisto was issued an LTC in 2006. In 2011, Wakefield police officers observed DeSisto participate in two drug transactions with a confidential informant who was

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<sup>2</sup> The chief is the "[l]icensing authority" as defined by G. L. c. 140, § 121. The chief designated Sergeant Kevin McCaul as his agent for the purpose of firearms licensing. For convenience, we refer to McCaul as the "chief."

purchasing Percocet, a controlled substance. DeSisto was never charged in connection with that conduct. In January of 2012, police stopped DeSisto's vehicle after observing DeSisto's passenger engage in an apparent drug transaction. The passenger told police that he was "help[ing] [DeSisto] out" because DeSisto was "drug sick." DeSisto was charged with possessing one-half gram of heroin discovered on the ground after DeSisto and the passenger were removed from the vehicle. That charge was dismissed after a motion to suppress was allowed by agreement. In August of 2012, DeSisto's LTC was revoked because the licensing authority determined that he was "unsuitable." G. L. c. 140, § 131 (d).

In 2019, DeSisto reapplied for an LTC. The chief investigated DeSisto's application and submitted a report. The chief concluded that "DeSisto is still unsuitable to hold an LTC as nothing has changed since 2012." Specifically, there was no evidence that DeSisto had addressed his "previous issues." On judicial review, the hearing judge credited the police officers' testimony regarding their observations of DeSisto in 2011 and 2012, and discredited DeSisto's testimony that he had never used or sold drugs.<sup>3</sup> She further found that DeSisto had "been

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<sup>3</sup> We note that DeSisto's dishonesty could have been considered by the hearing judge as a separate basis for concluding that he was not a suitable person for an LTC. See Hightower v. Boston, 693 F.3d 61, 74-75 (1st Cir. 2012).

gainfully employed for at least the last seven years, ha[d] no record of mishandling any type of weapon, ha[d] no record of violence and ha[d] no record of any mental health issue." Based on that evidence, the hearing judge concluded that the chief had only a "generalized concern about the potential for harm of mixing guns and narcotics . . . [i]n light of the amount of time that ha[d] passed since the illegal uncharged conduct occurred and the absence of any evidence of [DeSisto's] present unsuitability." The hearing judge concluded that evidence of DeSisto's conduct in 2011 amounted to "[a]t best . . . reasonable suspicion about drug activity." She further found that the 2012 heroin charge should not have been considered because "[t]he stop in that case was suppressed."<sup>4</sup>

Discussion. "The purpose of G. L. c. 140, § 131, is to 'limit access to deadly weapons by irresponsible persons.'" Chief of Police of Worcester v. Holden, 470 Mass. 845, 853 (2015), quoting Ruggiero v. Police Comm'r of Boston, 18 Mass. App. Ct. 256, 258 (1984). Accordingly, a licensing authority may deny an LTC application "if, in a reasonable exercise of discretion," it determines that the applicant is unsuitable,

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<sup>4</sup> The hearing judge surmised that there had been an unconstitutional vehicle stop, but the basis for the motion to suppress and the reason that it was allowed by agreement are not part of the record before us.

"based on: (i) reliable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety; or (ii) existing factors that suggest that, if issued a license, the applicant or licensee may create a risk to public safety." G. L. c. 140, § 131 (d). The "suitable person" standard "confers upon a licensing authority considerable latitude or broad discretion in making a licensing decision" (quotations omitted). Holden, supra at 854, quoting Chardin v. Police Comm'r of Boston, 465 Mass. 314, 316, cert. denied sub nom. Chardin v. Davis, 571 U.S. 990 (2013).

"On review of a denial of a[n] LTC . . . a judge of the District Court, after an evidentiary hearing, may find facts and direct the licensing authority to issue a license if the judge finds that the licensing authority had 'no reasonable ground' for denying the license." Nichols v. Chief of Police of Natick, 94 Mass. App. Ct. 739, 743-744 (2019), quoting G. L. c. 140, § 131 (f). However, "[a] conclusion that the licensing authority lacked any reasonable ground to deny the license is warranted only upon a showing by the applicant that the licensing authority's refusal was arbitrary, capricious, or an abuse of discretion" (alteration and quotations omitted). Nichols, supra at 744, quoting Godfrey v. Chief of Police of

Wellesley, 35 Mass. App. Ct. 42, 46 (1993). We apply the same standard of review as the motion judge and "examine the record of the District Court . . . to correct substantial errors of law apparent on the record adversely affecting material rights" (quotations and citation omitted). Chief of Police of Taunton v. Caras, 95 Mass. App. Ct. 182, 185-186 (2019).

Here, the chief found that DeSisto posed a risk to public safety due to his participation in the illegal use and distribution of controlled substances and the absence of evidence of his rehabilitation. See Nichols, 94 Mass. App. Ct. at 745 ("the licensing authority must take into consideration efforts at rehabilitation"). The denial of an LTC on this ground was not arbitrary, capricious, or an abuse of discretion. "The danger of negligent discharge of a gun in the hands of a person under the influence of . . . opiates is evident." Id. at 747. "The fact that there was no conviction removes the incident[s in 2011 and 2012] as a license disqualifier, but it does not remove the chief's consideration of the incident[s] on the question of [DeSisto's] suitability." Holden, 470 Mass. at 856. See DeLuca v. Chief of Police of Newton, 415 Mass. 155, 160 (1993) (even pardoned offenses can be considered in determining suitability); Chief of Police of Shelburne v. Moyer, 16 Mass. App. Ct. 543, 546 (1983) (licensing authority can consider contents of police reports). See also G. L. c. 140,

§ 131 (e) (licensing authority required to consider applicant's criminal offender record information).

We decline DeSisto's invitation to create a new rule that suppressed evidence cannot be considered in suitability determinations. The general rule is that evidence suppressed in a criminal proceeding may be used in a subsequent civil action. See Kelly v. Civil Serv. Comm'n, 427 Mass. 75, 78 (1998). Although there may be exceptions to this general rule if a government entity seeks to profit from its own wrongdoing, see Selectmen of Framingham v. Municipal Court of Boston, 373 Mass. 783 (1977), this is not such a case. Nothing in this record suggests that Wakefield enlisted its police, and recruited police in Saugus, to conduct an illegal stop of DeSisto so that evidence obtained during that stop could later be used to deny his application for an LTC. Therefore, "no purpose underlying the exclusionary rule would be served by excluding evidence obtained as a result of the stop." Kelly, supra at 79. Simply put, the exclusionary rule does not apply in this context.

Nor do we see any due process violation in the chief's consideration of information from a confidential informant. DeSisto was represented by counsel and testified at the hearing. He introduced evidence and cross-examined the officers who witnessed the events. These procedures afforded DeSisto "notice and the opportunity to be heard 'at a meaningful time and in a

meaningful manner," which is all that due process requires. Spenlinhauer v. Spencer Press, Inc., 81 Mass. App. Ct. 56, 65 (2011), quoting Matter of Angela, 445 Mass. 55, 62 (2005).

We agree with the motion judge that the hearing judge's "role was not to re-weigh the facts to determine whether she would also find a 'palpable risk,' but rather to determine whether the [c]hief's conclusion that such a risk existed was arbitrary, capricious or an abuse of discretion." The hearing judge made no such finding. Rather, she re-evaluated the evidence and decided that it was "too thin" and "too stale" to constitute a palpable risk. This was error because, as we have previously said, "[t]he [hearing] judge . . . may not second guess the licensing authority's decision to take one reasonable action over another." Caras, 95 Mass. App. Ct. at 187. Where the Commonwealth's interest in regulating firearms is of the "utmost importance" because it "directly affects the physical safety of the citizenry" (citation omitted), Holden, 470 Mass. at 858, and where the hearing judge did not find that the chief's decision was arbitrary, capricious, or an abuse of discretion, or that the chief did not have a reasonable basis for concluding that DeSisto was unsuitable, it was error for the hearing judge to order that the LTC be issued.

Conclusion. For the above reasons, we affirm the judgment of the Superior Court.



So ordered.