

THE DAILY RECORD

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Using a certificate of relief from civil disabilities (CRD)

A second chance at the Second Amendment?

BY MICHAEL A. BURGER

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

— U.S. CONST. amend. II.

A colleague recently referred a client, call him Walter, who had his New York State pistol permit taken away due to a state felony conviction. Walter is an avid and responsible gun collector and he was very disappointed to have to surrender his pistols, in particular. He asked me to help him recover his firearms and his pistol permit.

Walter's felony case file included a full and permanent New York State certificate of relief from civil disabilities (CRD), issued by a county court, at sentencing. A certificate of relief from civil disabilities is an official government document that may restore various civil rights otherwise abrogated by a felony conviction, *see, e.g.,* NYS Correction Law § 701(1).

The Second Amendment

To begin, the prevalent interpretation of the Second Amendment to the U.S. Constitution is that its meaning is not as absolute as its too plain language might suggest. Fair or unfair, "the right of the people to keep and bear arms" has been infringed.

For example, the state Legislature has imposed an automatic bar against convicted felons' possession of firearms, NY Penal Law § 400.00(1)(c). Perhaps this is an understandable restriction, but every human rule prompts its exception.

Federal law defers to law of state of conviction

One concern facing a lawyer representing someone in Walter's position is that federal and state laws on firearms possession are in conflict. The first order of business was a careful examination of the state and federal laws to make sure Walter would not be caught between jurisdictions, with New York issuing a pistol permit only to have the federal government charge him with weapons possession.

Federal law defers to New York law for the effect of state convictions on its issuance of pistol permits where the per-



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son's civil rights have been restored, *see* 18 USC § 921(a)(20) ("Any conviction ... for which a person ... has had civil rights restored shall not be considered a conviction for purposes of this chapter ...").

The question as to whether a defendant received substantial restoration of his civil rights is determined by "the laws of the jurisdiction in which such purported predicate conviction occurred." Courts must look to "the whole of state law" in deciding the question, *United States v. Metzger*, 3 F3d 756, 758 (Fourth Cir. 1993) (citations omitted).

"[F]ederal courts are to look to the state of conviction to determine whether a disability has been imposed upon a felon's right to bear arms. If the felon is not under a disability, either due to the restoration of his civil rights, or because his civil rights were never relinquished, then the felon commits no federal crime by possessing a firearm. Whether a state chooses to restore a felon's civil rights automatically or by affirmative action should make no difference," *Harris v. United States*, 793 FSupp 754 (M.D. Tenn. 1992); *cf. United States v. Hill*, 351 FSupp2d 55 (EDNY 2005) (New York felony bar to possession of a firearm under state law and therefore federal law, where no CRD was issued and civil rights were not restored).

Fortunately for Walter, his case file already includes a state CRD.

State versus federal convictions/CRDs

Note, however, that a New York CRD does not remove the bar created by a felony conviction imposed in federal court. A state CRD may only remove the automatic bar to a New York pistol permit created by a state felony conviction. Possession of a firearm pursuant to such a state permit is neither a state nor a federal crime. However, a New York CRD will be ineffective to remove the bar to firearms possession created by a **federal** felony conviction.

Although there is a federal counterpart to the state CRD, federal CRDs are far more difficult to obtain, *see* 18 USC § 925, but are essential to avoid exposing a federal felon to sig-

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nificant federal criminal liability for possession of a federally-defined firearm, see 18 USC §§ 921(a)(3), 922(g), 924(a)(2).

Thus, federal law allowed Walter to possess a pistol pursuant to a valid New York permit. But was Walter eligible to receive a state pistol permit under New York law?

New York State CRD may remove bar to a pistol permit

The state Correction Law allows a New York supreme or county court to remove the automatic bar to a pistol permit that otherwise accompanies a New York felony conviction by issuing a full "type A" certificate of relief from civil disabilities at the time of sentence, see, e.g., NYS Correction Law § 701(1). The state Attorney General has long recognized the courts' power to remove the automatic bar to a pistol permit: "A certificate of relief from civil disabilities issued by a county court may remove the statutory bar to apply for or receive a pistol license," NY OP. ATTY GEN. 8 (1971); accord NY OP. ATTY GEN. 306 (1975).

Indeed, Walter's CRD was a full "type A" CRD, issued at the time of sentence.

"Penal Law § 400.00 governs the licensing of firearms in New York. Under Penal Law § 400.00, individuals convicted 'anywhere of a felony' may not be issued a firearms license. Under decisional law, this disability may be removed if an individual obtains a Certificate of Relief from Disabilities pursuant to Correction Law § 701," NY OP. ATTY GEN. 23, WL 643362, *4 (1998) (citations omitted); see also *Hines v. Kelly*, 222 AD2d 277 (First Dept. 1995). But see *Matter of Alarie*, 168 Misc2d 329, 643 NYS2d 926 (County Ct. 1996) (without reference to all the authorities cited herein, the *Alarie* court held that a CRD did not remove the statutory bar to a pistol license).

At least one other county court has recognized that a CRD removes the New York statutory bar to a pistol permit, *People v. Flook*, 164 Misc2d 284, 625 NYS2d 405 (Ontario County Ct. 1995) ("the 1975 opinions of the attorney general at page 306 indicate that a certificate of relief from civil disabilities issued by a county court may remove the statutory bar to apply for or receive a pistol license and possession of short and long weapons"); see also, *People v. Seaberg*, 139 AD2d 53, 530 NYS2d 278 (Second Dept. 1988) (dictum) (granting defendant a CRD "so that he could retain his federal

firearms permits"). By contrast, other limited types of CRDs may not remove the automatic bar to a pistol permit, see, e.g., NYS Correction Law § 701(1).

Conclusion

The weight of authority holds that a full "type A" CRD, issued by a state or county court at sentence on a felony, removes the automatic statutory bar to the issuance or continuance of a New York pistol permit under state law, and therefore under federal law.

This is more an indication of the broad powers possessed by New York courts than the ease with which a felon can obtain a pistol permit. The rights of convicted felons are restricted and courts look carefully and critically at applications to possess firearms of any kind.

However, in the proper case courts, particularly in Western New York, judges can and do exercise their discretion and grant pistol permits to eligible and rehabilitated citizens. While the facts of each case will govern, the felony conviction most suitable to such an application will be non-violent, isolated and remote in time and tempered by mitigating factors evincing rehabilitation.

In Walter's case, we persuaded the court that Walter was eligible for restoration of his pistol permit based upon the foregoing authority. Just as importantly, we successfully demonstrated that Walter is an otherwise deserving candidate based upon his personal history and proven reliability.

The willingness to evaluate these cases on an individual basis is a testament to the courage of our judicial branch. Judges are regularly pilloried in the media for being "soft on crime" (but are constrained by the Canons of Judicial Ethics from defending themselves). It would be all too easy for a judge in a case like this to abandon independence and integrity in favor of a politically-expedient decision denying a pistol permit.

When praise is due it should be rendered with the same vigor as criticism. In Walter's case, praise is certainly due and is hereby rendered: the court thoughtfully evaluated Walter's case in detail and granted Walter a pistol permit, affording him a second chance at the Second Amendment.

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