

Tenn. Op. Atty. Gen. No. 98-199 (Tenn.A.G.), 1998 WL 746201

Office of the Attorney General

State of Tennessee
Opinion No. 98-199
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Forum and Costs to Appeal Denial, Revocation, or Suspension of Handgun Carry Permit

*1 The Honorable Stephen I. Cohen
State Senator
8 Legislative Plaza
Nashville, Tennessee 37243-0030

QUESTIONS

1. To what court may one petition for judicial review of the Department of Safety's denial, suspension, or revocation of one's handgun carry permit and to what court may one appeal an adverse ruling of the reviewing court?
2. May clerks of court assess fees pertaining to actions for judicial review of a denial, suspension, or revocation of a handgun carry permit and appeals thereof? If so, what are the amounts of those fees?
3. If a court rules in favor of a petitioner, may the court assess any allowable court costs against the department?
4. If a court rules in favor of a petitioner and the department does not appeal the ruling or has exhausted its appeals, when must the department issue a handgun carry permit to that petitioner?
5. How is a clerk of court to notify a district attorney general of the filing of a petition for judicial review of a denial, suspension, or revocation of a handgun carry permit?
6. Does the Equal Access to Justice Act, Tenn. Code Ann. §§ 39-37-101, *et seq.* (Supp. 1997), apply to proceedings for judicial review of a denial, suspension, or revocation of a handgun carry permit?
7. May a person seek a writ of mandamus in lieu of or in addition to any other procedure for judicial review of a denial, suspension, or revocation of a handgun carry permit?

OPINIONS

1. A person may seek direct judicial review of suspension or revocation of a handgun carry permit in the court of general sessions of the person's county of residence and an appeal therefrom lies in circuit court. Alternatively, a person may first seek administrative review of a suspension or revocation of a handgun carry permit under the Uniform Administrative Procedures Act with subsequent judicial review in the chancery court of the person's county of residence and an appeal therefrom lies in the court of appeals. A person may seek direct judicial review of denial of a handgun carry permit in the court of general sessions of the person's county of residence and an appeal therefrom lies in circuit court.
2. The clerks of courts may charge appropriate statutory fees in cases seeking judicial review of a denial, suspension, or revocation of a handgun carry permit and appeals thereof.

3. A court may not assess court costs to the State, except in an action for a writ of mandamus for the issuance of a handgun carry permit.
 4. The Department of Safety should issue a handgun carry permit within a reasonable time after a final ruling in favor of a petitioner.
 5. The clerks of general sessions courts should send a copy of the petition to the sheriff who will serve the petition upon the Department of Safety.
 6. The Equal Access to Justice Act does not apply to judicial review of denial, suspension, or revocation of a handgun carry permit.
- *2 7. A person may seek a writ of mandamus for the issuance of a handgun carry permit only after having sought relief through judicial review as set forth in Tenn. Code Ann. §§ 39-17-1352(d), by which the person prevailed and despite which the department of safety refuses to issue a handgun carry permit.

ANALYSIS

1. Forum for challenging denial, suspension, or revocation of a handgun carry permit.
 - A. Judicial review of suspension or revocation of permit.

In its 1996 session, the legislature enacted a handgun carry permit scheme. Tenn. Code Ann. §§ 39-17-1351, *et seq.* (1997). Section 1351 set forth the eligibility requirements for a handgun carry permit. Section 1352 provided for revocation and suspension of permits and challenges thereof. 1996 Pub. Acts ch. 905 § 5. Specifically, section 1352(d) originally stated: (d) The applicant shall have a right to request an administrative hearing pursuant to the Uniform Administrative Procedures Act ... or to bring a mandamus action to challenge such suspension or revocation of a permit.

Section 1353 detailed the procedure for obtaining administrative review of the Department of Safety's initial suspension or revocation of a handgun carry permit. Section 1354 provided for judicial review of the department's final decision to suspend or revoke a permit. Section 1355 referred the reader to the Uniform Administrative Procedures Act for other procedural matters.

In sum, a person whose permit had been suspended or revoked had thirty days from notice of the adverse action to request an administrative hearing. Tenn. Code Ann. § 39-17-1353(b). After the administrative hearing process had concluded with the issuance of a final determination, the person had thirty days to file a petition for judicial review of that final administrative determination in the chancery court of the person's county of residence. Tenn. Code Ann. § 39-17-1354 (1997). An appeal from chancery court went to the court of appeals. Tenn. Code Ann. § 4-5-323 (1991).

That was the law on June 13, 1997 when the General Assembly enacted 1997 Pub. Acts ch. 476 § 2, which replaced section 1352 in its entirety. The new section 1352(d) states:

(d) The applicant shall have a right to petition the general sessions court of the applicant's county of residence for judicial review of departmental denial, suspension, or revocation of a permit

It appears that the legislature may have intended, by the change in section 1352(d), to replace administrative hearings and subsequent judicial review in chancery court with direct judicial review in general sessions courts as the means of

challenging suspensions and revocations of handgun carry permits. Despite having amended section 1352(d), though, the legislature retained sections 1353-1355 that provide for administrative review. Moreover, the legislature did not express on the face of the statutes an intent to remove the suspension and revocation procedures from the broadly applicable Uniform Administrative Procedures Act. *See* Tenn. Code Ann. §§ 4-5-103 (1991), 4-5-106 (1991), 4-5-320(c) (Supp. 1997).

*3 “A statute must be construed so as to ascertain and give effect to the intent and purpose of the legislation considering the statute as a whole and giving words their common and ordinary meaning.... In construing statutes, courts must presume that the legislature has knowledge of its prior enactments and knows the state of the law at the time it passes legislation.” *State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997). ““A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.”” *Shelby County v. Hale*, 200 Tenn. 503, 292 S.W.2d 745, 748 (1956) (quoting 2 Sutherland Statutory Construction § 4705). “When a literal construction of a section will render it repugnant to the provisions of a subsequent section they shall be considered, if possible, so as to let both be operative and give effect to every part of the Statute.” *May Co. v. Anderson*, 156 Tenn. 216, 219-20, 300 S.W. 12 (1927).

Viewed through the guiding principles of statutory construction cited above, the statutes can be reconciled and given full meaning and effect when read to grant a person whose handgun carry permit has been suspended or revoked a choice. Such person may directly challenge the department's action in a court of general sessions, Tenn. Code Ann. § 39-17-1352(d), or such person may challenge the department's action through administrative procedures and subsequent judicial review in chancery court, Tenn. Code Ann. § 39-17-1353, *et seq.*

To the extent that the two provisions create an ambiguity, one may resort to the legislative history. *Southern Railway v. Fowler*, 497 S.W.2d 891, 898 (Tenn. 1973). The debate in the senate judiciary committee evidences dissatisfaction with requiring citizens to challenge suspensions and revocations through the administrative process which necessitated them coming to Nashville and hiring an attorney familiar with the administrative process. The committee adopted an amendment to the bill under consideration that permits citizens to challenge suspensions and revocations in their home counties, and that amendment became section 1352(d). The legislative history, then, is supportive of the conclusion drawn above that the citizens may choose either to employ administrative review and subsequent judicial review in chancery court of their counties of residence or to bypass administrative review and seek judicial review in courts of general sessions in their counties of residence.

B. Judicial review of denial of permit.

Tenn. Code Ann. § 39-17-1352(d) provides the procedure for judicial review of a denial of a handgun carry permit. Section 1352(d) specifically allows persons whose applications for a permit have been denied to petition general sessions courts in their county of residence for judicial review of that denial. Denial of a permit is not subject to the Uniform Administrative Procedures Act. *See Midsouth Indoor Horse Racing, Inc. v. Tennessee State Racing Comm'n*, 798 S.W.2d 531, 537 (1990).

C. Appeal of general sessions ruling lies in the circuit court.

*4 The statutes under examination do not specifically provide for appellate jurisdiction over actions for review of denial, suspension, or revocation of a handgun carry permit in general sessions courts. Accordingly, we must rely upon the general procedure for appeals from courts of general sessions. Tenn. Code Ann. § 27-5-108 (1980) provides: “Any party may appeal from an adverse decision of the general sessions court to the circuit court of the county within a period of ten (10) days on complying with the provisions of [Tenn. Code Ann. title 27 ch. 5].” Therefore, an appeal from an adverse ruling in general sessions lies with the circuit court.

The statutes under examination do specifically provide for appellate jurisdiction over judicial review of suspensions or revocations of a handgun carry permit in chancery courts. Such appeals go directly to the court of appeals. Tenn. Code Ann. §§ 39-17-1355, 4-5-323.

2. Clerk of court fees.

Tenn. Code Ann. § 8-21-401(a) (Supp. 1997) enumerates the types and amounts of fees which the clerks of courts may collect. The clerks of courts may charge such fees as are provided for in Tenn. Code Ann. § 8-21-401(a) to the extent they are applicable to actions for judicial review of a denial, suspension, or revocation of a handgun carry permit. Such fees may include:

Issuing notice required by law	\$5.00 Tenn. Code Ann. § 8-21-401(a)(1)(A)
For filing of petition	\$2.00 Tenn. Code Ann. § 8-21-401(a)(2)
For entering judgment	\$3.00 Tenn. Code Ann. § 8-21-401(a)(4)(D)
For entering order of appeal	\$3.00 Tenn. Code Ann. § 8-21-401(a)(4)(F)

3. Assessing court costs to the State.

Absent express statutory authority, a court may not assess court costs against the State. *See State ex rel. Bedford v. McCorkle*, 163 Tenn. 496, 43 S.W.2d 496, 496 (1931) (citing *Morgan v. Pickard*, 86 Tenn. 210, 9 S.W. 690). *See also*, Tenn. R. Civ. P. 54.04(1). The statute authorizes the assessment of court costs against the State in an action for a writ of mandamus. Tenn. Code Ann. § 39-17-1358 (1997). Similar authority is not granted, however, in actions for judicial review under section 1352(d).

4. When should the Department of Safety issue a handgun carry permit.

It is axiomatic that a party must comply with a court order within the time specified by the order unless a stay is timely sought and granted pending appeal or reconsideration. When a court order does not specify a time for compliance, then a party must do so in a reasonable amount of time unless a stay is granted pending appeal or reconsideration. *See e.g., Harrison v. Metropolitan Government of Nashville and Davidson County*, 80 F.3d 1107, 1109 (6th Cir. 1996) (“The test for determining a violation [of an order] is whether the defendants failed to take ‘all reasonable steps within their power to comply with the court’s order.’” quoting *Peppers v. Barry*, 873 F.2d 967, 969 (6th Cir. 1989)).

5. Notice of petition to general sessions courts.

*5 Service of process from general sessions courts is accomplished according to statute. Tenn. Code Ann. §§ 16-15-901, *et seq* (Supp. 1997). The clerk of court forwards a copy of the petition for review to the sheriff who serves it on the state. Tenn. Code Ann. § 16-15-901. Alternatively, the clerk of court may return a copy of the petition to the petitioner who then lodges it with the sheriff who mails it to the state via certified return receipt mail. Tenn. Code Ann. § 16-15-905.

Service of process is to be on the named defendant. Tenn. Code Ann. § 16-15-901, *et seq*. Even though Tenn. Code Ann. § 39-17-1352(d) assigns the responsibility for representing the department in these actions to the district attorneys general, such does not alter the person to be served with initial process. Therefore, the sheriff must serve the petition for judicial review upon the Commissioner of the Department of Safety.

6. The Equal Access to Justice Act.

The Equal Access to Justice Act applies only to small businesses in administrative or judicial proceedings against the State. Tenn. Code Ann. § 29-37-102 (Supp. 1998). Non-business entity individuals do not come within the provisions of the Act. Thus, individuals seeking judicial review of a denial, suspension, or revocation of a handgun carry permit do not benefit from that statute.

7. Writ of mandamus.

Tenn. Code Ann. § 39-17-1358 specifically grants a person the option of seeking a writ of mandamus “as provided by law.” See Tenn. Code Ann. §§ 29-25-101, *et seq.* (1980). A writ of mandamus is not appropriate unless all other remedies have failed or there is no other remedy available. See *State ex rel. Spratlin v. Thompson*, 118 Tenn. 571, 579, 102 S.W. 349 (1907); *Winters v. Buford*, 46 Tenn. 328, 330 (1869). Further, a writ of mandamus is proper only when a person's right to have performance is not in controversy. See *Peerless Constr. Co. v. Bass*, 158 Tenn. 518, 14 S.W.2d 732, 732 (1929).

Tenn. Code Ann. §§ 39-17-1352(d) provides the means by which one may challenge a denial, suspension, or revocation of a handgun carry permit and thereby obtain his remedy. A person must avail himself of and prevail through that procedure, and yet still be refused a permit, before he may seek a writ of mandamus.

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