

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: APPEAL OF FIREARMS LICENSE : DOCKET NO. 11-02306
OF FRANKLIN D. LOWE : CIVIL ACTION – LAW

OPINION AND ORDER

AND NOW, this 14th day of February, 2012, following oral argument on Mr. Lowe's appeal of Sheriff Lusk's decision to not renew Mr. Lowe's License to Sell Firearms #519, it is hereby ORDERED and DIRECTED that the decision of Sheriff Lusk to refuse to grant Mr. Lowe's license renewal is AFFIRMED.

Factual Findings

1. Mr. Franklin D. Lowe (Mr. Lowe) operates a store in Williamsport, Lycoming County, Pennsylvania. Mr. Lowe sells firearms to the public.
2. On July 28, 2011, Mr. Lowe was indicted in the United States District Court for the Middle District of Pennsylvania for violating 18 U.S.C. §§ 371, 922(b), 922(d), 922(m), and 1001 and 26 U.S.C. § 5861. *See* Indictment. These sections pertain to making false statements, aiding and abetting possession by a felon, and possessing an unregistered machine gun. *See* Summons. The indictment contains twenty-five counts. *See* Indictment.
3. On August 2, 2011, Mr. Lowe submitted an application to renew his Pennsylvania license to sell firearms. *See* Application.
4. On August 10, 2011, Mr. Lowe was served with the summons pertaining to his Federal Firearms Violations Indictment. *See* Summons.

5. On September 2, 2011, Lycoming County Sheriff R. Mark Lusk (Sheriff Lusk) sent Mr. Lowe a letter advising him that his License to Sell Firearms #5219 was not going to be renewed and that the Pennsylvania State Police Firearms Division would treat this decision as a revocation of his license.
6. In the September 2011 letter, Sheriff Lusk stated that he would reexamine Mr. Lowe's renewal application once Mr. Lowe's Federal Firearms Violations Indictment was resolved.
7. On November 30, 2011, Mr. Lowe wrote a letter to Lycoming County Court Administrator Kevin Way. This letter served as an appeal of the decision of the Sheriff's Office in regard to Mr. Lowe's license.
8. On January 6, 2012, this Court held a preliminary conference on the matter. At that time, the Solicitor for the Sheriff's Office, Attorney James D. Casale, stated that Mr. Lowe's renewal application was denied by Sheriff Lusk for two reasons. First, Sheriff Lusk denied Mr. Lowe's application on the basis of his pending Federal Firearms Violations Indictment. Secondly, Sheriff Lusk denied Mr. Lowe's application because he falsified information on that application. In particular, Mr. Lowe answered "No" to Question No. 36 (relating to being charged with or convicted of crimes punishable by imprisonment for a term exceeding one year).
9. After granting the parties an appropriate time to submit briefs, this Court held oral argument regarding Mr. Lowe's appeal on February 8, 2012.

Conclusions of Law

1. 18 Pa. C.S. § 6113 governs the licensing of firearms dealers within the Commonwealth.

Section (a) provides that the sheriff of the county shall grant licenses to reputable applicants. 18 Pa. C.S. § 6113(a). However, Section (c) provides that:

Revocation. - - Any license granted under subsection (a) of this section may be revoked *for cause* by the person issuing the same, upon written notice to the holder thereof.

18 Pa. C.S. § 6113(c) (emphasis added).

2. Pursuant to 18 Pa. C.S. § 6114, the decision of the sheriff to grant or deny a license shall be subject to judicial review pursuant to 2 Pa. C.S. Chapter 7, Subchapter B (relating to judicial review of local agency action).
3. 2 Pa. C.S. § 754 governs this Court's disposition of an appeal of a local agency decision.

The statute differentiates between incomplete and complete records. This Court finds that the record below was complete for the purposes of Mr. Lowe's appeal. Therefore, Section (b) applies in this instance; that section provides that:

(b) *Complete record.* - - In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with the law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence.

2 Pa. C.S. § 754(b).

4. Substantial evidence exists establishing that Sheriff Lusk had good cause to revoke Mr. Lowe's license based on the pending twenty-five count Federal Firearms Violations Indictment charging Mr. Lowe with violations of federal firearms statutes.

5. 18 U.S.C. § 925(b) provides that:

[a] licensed importer, licensed manufacturer, licensed dealer, or licensed collector who is indicted for a crime punishable by imprisonment for a term exceeding one year, *may*, notwithstanding any other provision of this chapter [18 USCS § 921 et seq.], continue operation pursuant to his existing license (if prior to the expiration of the existing license timely application is made for a new license) during the term of such indictment and until any conviction pursuant to the indictment becomes final.

18 U.S.C. § 925(b) (emphasis added).

6. 18 U.S.C. § 927 provides that:

[n]o provision of this chapter [18 USCS §§ 921 et seq.] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

18 U.S.C. § 927.

7. In this instance, Congress did not intend the federal firearms statute to pre-empt the Commonwealth's statute because there is no direct and positive conflict between the federal statute and the Commonwealth's statute so that the two cannot consistently stand together. *See Oefinger v. Zimmerman*, 601 F. Supp. 405, 412 (W.D. Pa. 1984).
8. Mr. Lowe's application should not have been denied based on his response to Question No. 36 because he had not been served with his Federal Firearms Violations Indictment at the time that he submitted his license renewal application.

Discussion

In his appeal, Mr. Lowe argues that federal law, in particular the Gun Control Act of 1968, 18 U.S.C. §§ 921-931, pre-empts the Pennsylvania Crimes Code provision relating to licensure revocation and that Sheriff Lusk should not have revoked Mr. Lowe's license because of the

federal statute. This Court believes that the federal statute on which Mr. Lowe bases his argument expressly denies pre-emption in the field of licensure of firearms dealers. Also, this Court notes that the federal statute is permissive, and not mandatory, in nature.

The Supremacy Clause of the United States Constitution, Article VI, Clause 2, governs the doctrine of pre-emption. The doctrine of pre-emption requires state statutes to fall to federal law when Congress regulates an aspect of commerce. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Oefinger v. Zimmerman*, 601 F. Supp. at 411. When examining whether Congress intended its regulations to pre-empt state statutes, courts must examine the intent of Congress. *See* 601 F. Supp. at 411.

Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Id. (citing *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). When an actual conflict exists between federal and state law, the state law should fall even if Congress did not completely displace the state law. *See* 458 U.S. at 153; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941); 601 F. Supp. at 411-12.

This Court holds that the Gun Control Act does not pre-empt the field of licensing firearms dealers. The language of the statute illustrates Congress' intent to allow state legislatures to regulate the licensure of firearms dealers such as Mr. Lowe. *See* 601 F. Supp. at 412. Congress stated in the federal statute that the statute should not be construed as any attempt by Congress to

occupy the field of firearms distribution and licensure. *See* 18 U.S.C. § 927. Congress provided that the federal statute should trump individual state law only when “direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together” as required by the United States Constitution. *Id.* Additionally, 18 U.S.C. § 925(b) provides that a licensed dealer who is indicted *may* continue to operate pursuant to his existing license during the term of the indictment and until a final conviction. 18 U.S.C. § 925(b).

In this instance, this Court believes that no conflict exists between the federal law and the law of the Commonwealth and that the two may consistently stand together. The federal statute does not provide that the Commonwealth must allow Mr. Lowe to continue his operations until his federal indictment is resolved. The statute provides that the Commonwealth may allow Mr. Lowe to operate pursuant to his existing license during his indictment term and until any resulting conviction becomes final. *See* 18 U.S.C. § 925(b). Subsequently, the Commonwealth’s statute provides that a county sheriff may revoke a dealer’s license for good cause upon written notice to the license holder. *See* 18 Pa. C.S. § 6113(c).

This Court holds that Sheriff Lusk’s decision, based on the Commonwealth’s statute, should not be disturbed, because of the permissive nature of the federal statute and the expressed intent of Congress to not pre-empt the field of licensing firearms dealers. The Commonwealth’s statute provides that any license granted by the county sheriff may be revoked for cause upon written notice to the license holder. Here, Sheriff Lusk discovered a twenty-five count Federal Firearms Violations Indictment charging Mr. Lowe with various violations of federal firearms statutes. In a letter dated September 2, 2011, Sheriff Lusk notified Mr. Lowe that his application for licensure renewal was denied based upon his pending federal indictment. Sheriff Lusk had good

cause to deny Mr. Lowe's renewal application, and this Court will not disturb that decision. This Court believes the Sheriff's decision reflects sound public policy for the protection of the citizens of the Commonwealth.

In short, this Court holds that Sheriff Lusk's refusal to grant Mr. Lowe's renewal application is affirmed because the adjudication was not in violation of Mr. Lowe's constitutional rights, the adjudication process did not violate local agency practice and procedure, and the adjudication made by Sheriff Lusk was supported by substantial evidence. *See* 2 Pa. C.S. § 754(b).

BY THE COURT,

Date

Richard A. Gray, J.

RAG/abn

cc: Charles J. Soschin, Esquire
400 Seventh Street, N.W., Suite 400, Washington, DC 20004
James D. Casale, Esquire
R. Mark Lusk, Lycoming County Sheriff