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NOT FOR OFFICIAL PUBLICATION

ORIGINAL

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION NO. III

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

OCT 21 2005

MICHAEL S. RICHIE
CLERK

THE STATE OF OKLAHOMA, ex rel.)
OKLAHOMA STATE BUREAU OF)
INVESTIGATION,)

Respondent/Appellant,)

vs.)

JERRY P. DURKEE,)

Petitioner/Appellee.)

Case No. 101,176

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APPEAL FROM THE DISTRICT COURT OF
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE DOUGLAS L. COMBS, JUDGE

AFFIRMED

Jimmy Bunn, Jr.,
Chief Legal Counsel,
Oklahoma State Bureau of Investigation,
Oklahoma City, Oklahoma,

For Appellant,

Joe Freeman,
Shawnee, Oklahoma,

For Appellee.

Opinion by Larry Joplin, Presiding Judge:

¶1 Respondent/Appellant the State of Oklahoma, ex. rel. Oklahoma State Bureau of Investigation (Appellant or OSBI) seeks review of the trial court's order reversing the administrative decision to suspend the concealed handgun license of Petitioner/Appellee Jerry P. Durkee (Appellee or Durkee). In this appeal, OSBI asserts the trial court erred as a matter of law in finding the underlying statute unconstitutional. Having reviewed the record, we discern no error. The order of the trial court is therefore affirmed.

¶2 Pursuant to the Oklahoma Self Defense Act (OSDA or Act),¹ Durkee obtained a license to carry a concealed weapon. In August 2003, Durkee's non-resident 21-year-old son, Casey, unexpectedly came to Mr. Durkee's home, allegedly agitated, inquiring if Mr. Durkee had given shelter to Casey's wife and infant child. Durkee contends that he then asked Casey to leave, that an altercation erupted, and that the altercation ended when he struck Casey with his fist. A Deputy Sheriff subsequently arrested Durkee for "misdemeanor assault and battery/domestic violence." See, 21 O.S. 2001 §644.

¶3 Based upon the arrest, OSBI summarily suspended Durkee's license to carry a concealed weapon. At a subsequent administrative hearing, Durkee presented evidence that the District Attorney's office of Pottawatomie County would not prosecute criminal

¹21 O.S. 2001 §1290.1, *et seq.*

charges based upon the arrest. The administrative hearing officer nevertheless upheld the suspension of Durkee's license.

¶4 Durkee sought judicial review. The trial court found the statutory basis for suspending Durkee's license unconstitutional, both on its face and as applied. The court entered an order reversing the administrative decision and directing OSBI to restore Durkee's license. OSBI appeals.

¶5 Because the trial court based its ruling on statutory interpretation, this "raises a legal question which is subject to a *de novo* standard of review" *State ex rel. Dept. of Transp. v. Little*, 2004 OK 74, ¶10, 100 P.3d 707, 711. "An appellate court is endowed with plenary, independent and nondeferential authority to re-examine a trial court's legal rulings." *Id.*

¶6 An arrest for domestic abuse constitutes a ground for denial of a license to carry a concealed weapon:

The following conditions shall *preclude a person from being eligible for a concealed handgun license* . . . for a period of time as prescribed in each of the following paragraphs: *An arrest for* an alleged commission of, [or] a charge pending for, any one or more of the following misdemeanor offenses in this state or another state: an act of *domestic abuse* as defined by Section 644 of this title

21 O.S.2001 §1290.11(A)(10)(f). (Emphasis added.) An arrest for domestic abuse also constitutes a ground for suspension of a license. 21 O.S.2001 §1290.17(A).

¶7 The trial court interpreted the above statutes as *facially* violative of the Constitutional prohibition against “bills of attainder.” Okl. Const., art. II, §15. A bill of attainder is “a legislative act which inflicts punishment without a judicial trial.” *Gilbert Cent. Corp. v. State*, 1986 OK 6, 716 P.2d 654. OSDA provisions that allow denial of licenses have, in some instances, been interpreted as bills of attainder. *See, e.g., Oklahoma State Bureau of Investigation v. Warren*, 1998 OK 133, 975 P.2d 900 (Opala J., concurring in result.)

¶8 The trial court in the present case also ruled that the OSDA provisions were unconstitutional as applied. In this regard, we agree with the trial court. As such, we need *not* reach bill of attainder issues.

¶9 The OSDA places various restrictions on who may carry concealed weapons, but the Act “shall be liberally construed to carry out the constitutional right to bear arms for self-defense and self-protection.” 21 O.S.2001 §1290.25. The person ““challenging [the] state’s exercise of its police power”” bears the burden of proof. *See, Warren*, 1998 OK 133, ¶16, 975 P.2d at 903.

¶10 The constitutional right to bear arms does *not* give rise to an absolute right for an individual to carry a concealed weapon “on or about their person . . . at all times and in all circumstances.” *Warren*, 1998 OK 133, ¶¶12-13, 975 P.2d at 902. Thus, restrictions on carrying a concealed weapon may be upheld if a rational basis exists. *See, Warren*, 1998 OK 133, ¶26, 975 P.2d at 904. Without a sufficient nexus between

the facts of the case and the restriction, however, application of the restriction will not be upheld:

[B]ecause the jury found the defendant “not guilty” of the felony with which he was indicted, as a matter of law he is now, and will be forever more, presumed to be legally innocent of the arson conspiracy charge. There is no allegation or evidence in this record to indicate that a handgun or concealed weapon was in any way connected to or with the indicted offense.

....

[W]e find the . . . provision as it applies to this appellant lacking any rational basis whatsoever because there exists no nexus or connection between appellant’s arrest for arson conspiracy and any firearm.

Warren, 1998 OK 133, ¶¶21, 26, 975 P.2d at 904.

¶11 Durkee consequently argues that no rational basis exists to suspend his license because (1) he will not be prosecuted, so the presumption of innocence will remain with him, and (2) the factual basis for the arrest did *not* involve, nor was in any way connected with, the use of a firearm. OSBI, on the other hand, argues a sufficient nexus exists. OSBI relies upon statistics reported by the Domestic Violence Fatality Review Board (DVFRB).² OSBI contends these statistics link domestic abuse with domestic homicide, which, in turn, is linked to use of firearms. However, restrictions on licenses to carry concealed weapons are not necessarily linked to possession of firearms in private residences.

²22 O.S. 2001 §1601. *See also*, 22 O.S. 2001 §1517 (“Oklahoma Criminal Justice Resource Center”).

¶12 In determining whether a sufficient nexus exists between the arrest and the suspension, we are bound by the presumption of innocence: “[A]ll defendants in criminal cases are clothed with a presumption of innocence which abides with them until such time as the prosecuting authority has proven their guilt beyond a reasonable doubt, or they have entered a plea . . .” *Warren*, 1998 OK 133, ¶19, 975 P.2d at 903. In the present case, the evidence shows that, because the district attorney will not prosecute, Durkee will not be proven guilty, and Durkee will not plead guilty. The result is that Durkee will remain “forever more” presumed legally innocent. *Warren*, 1998 OK 133, ¶21, 975 P.2d at 904. Because the presumption of innocence abides, and because a weapon was not used or connected with the offense for which Durkee was arrested, we cannot say a rational basis exists for suspension of Durkee’s license.

¶13 The order of the trial court, finding the statute unconstitutionally applied, and on that basis reversing the administrative suspension of Durkee’s license to carry a concealed weapon, is therefore AFFIRMED.

BUETTNER, C.J., concurs, and HANSEN, J., concurs in result.