STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

September 18, 2014

Opinion No. 14-86

Use of Alcohol or Controlled Substances and Handgun Carry Permits

QUESTIONS

1(a). What is the meaning of the phrase "is not an unlawful user" of alcohol or any controlled substance or controlled-substance analogue in subdivision (c)(10) of the handgun-carry-permit statute, Tenn. Code Ann. § 39-17-1351?

1(b). What is the significance of the use of the present-tense "is" in this phrase?

1(c). What is the meaning of the term "rehabilitation program" in subdivisions (c)(10)(A) and (B)?

1(d). What is the significance of the use of the conjunctive "and" in subdivision (c)(10)'s requirement that the applicant not be an unlawful user or addict and not have been a patient in a rehabilitation program or hospitalized for alcohol or drug abuse or addiction?

1(e). What kind of proof would be required to determine that an applicant is ineligible for a handgun carry permit under subdivision (c)(10)?

1(f). Once a permit is issued, would an applicant be required to notify the State if he or she should get treatment that would implicate subdivisions (c)(10)(A) or (B)?

1(g). Are the requirements of subdivision (c)(10) too vague to be enforceable?

2. If a handgun carry permit is denied or revoked, what options are available to the applicant or the permit holder to challenge the denial or revocation, and who would have the burden of proof in such a proceeding?

3. Does Tenn. Code Ann. § 39-17-1351 impact a citizen's right to keep and bear arms for self-defense under the Second Amendment, and if so, would a higher level of scrutiny apply if a court or agency is asked to review a denial or revocation of a handgun-carry permit under this statute?

OPINIONS

1(a) and (b). The phrase "is not an unlawful user" as used in Tenn. Code Ann. § 1351(c)(10) is not defined by State law, but applying analogous federal law leads to the conclusion that the phrase contemplates the regular and repeated use of alcohol, a controlled substance, or a controlled-substance analogue in a manner other than as prescribed by a physician or otherwise permitted by law during a period that reasonably covers the time in which a handgun carry permit is sought.

1(c). The term "rehabilitation program" as used in subdivisions (c)(10)(A) and (B) of the statute is not defined by State law. Whether a particular substance-abuse program constitutes a "rehabilitation program" under the statute will depend on the specific characteristics and circumstances of the program.

1(d). The use of the conjunctive "and" in subdivision (c)(10) means that a permit applicant must confirm *both* that he or she is not an unlawful user of or addicted to a substance *and* that he or she has not been in a rehabilitation program or hospitalized for substance abuse or addiction.

1(e). Under Tenn. Code Ann. § 39-17-1351(i), the Department of Safety may consider any information that comes to its attention when determining eligibility for a handgun carry permit, including information from the State and federal bureaus of investigation, court clerks, and county sheriffs. The statute requires that the Department deny an application if it determines that an applicant does not meet eligibility requirements, but the statute does not specify the kind of proof necessary to make that determination.

1(f). A permit holder would be required to reconfirm his or her eligibility under subdivision (c)(10) as part of any permit-renewal application but would not otherwise be required to notify the State if he or she should get treatment that would implicate subdivisions (c)(10)(A) or (B).

1(g). The eligibility requirements of subdivision (c)(10) are not too vague to be enforceable.

2. Revocation of a handgun carry permit may be reviewed, at the permit holder's option, administratively or in the general sessions court. Denial of a permit application may be reviewed in the general sessions court. The burden of proof at the administrative level is that set forth in Tenn. Code Ann. § 39-17-1353(d). The burden of proof in the general sessions court is on the applicant.

3. As stated in Tenn. Code Ann. § 39-17-1351(a), the citizens of Tennessee have a right to keep and bear arms for their own defense, but the General Assembly has the power to regulate the wearing of arms. Judicial or administrative review of

the denial or revocation of a handgun carry permit is not, therefore, subject to a higher level of scrutiny.

ANALYSIS

Tenn. Code Ann. § 39-17-1351 governs the issuance of handgun carry permits. Subsection (c) of the statute sets forth certain eligibility requirements; under subdivision (c)(10), a permit applicant is required to confirm, under oath:

> That the applicant is not an unlawful user of or addicted to alcohol, any controlled substance or controlled substance analogue, and the applicant has not been either:
>
> > (A) A patient in a rehabilitation program pursuant to a court order or hospitalized for alcohol, controlled substance or controlled substance analogue abuse or addiction pursuant to a court order within ten (10) years from the date of application; or
> >
> > (B) A voluntary patient in rehabilitation program or voluntarily hospitalized for alcohol, controlled substance or controlled substance analogue abuse or addiction within three (3) years from the date of application[.]

1(a) and (b). The phrase "is not an unlawful user" as used in this subdivision is not specifically defined within the Tennessee Code. Nor have Tennessee appellate courts had occasion to construe the meaning of the phrase within the context of this statute. Where there is no directly relevant State law, it is appropriate to look to a related body of federal law. *See Thomas v. Oldfield*, 279 S.W.3d 259 (Tenn. 2009) (state appellate court may look to federal interpretation of comparable federal rule for guidance in interpreting identical phrase in state rule).

The term "unlawful user" appears in 18 U.S.C. § 922(g)(3), which makes it unlawful for "any person . . . *who is an unlawful user of* or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act) . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" (emphasis added). Federal courts addressing the meaning of this provision have emphasized that there must be some regularity of drug use in addition to contemporaneousness with possession of a firearm to meet the statute's requirements. In *United States v. Burchard*, 580 F.3d 341 (6th Cir. 2009), for example, the Sixth Circuit offered the following jury instruction for future use in the circuit:

> The term "unlawful user of a controlled substance" contemplates the regular and repeated use of a controlled substance in a manner other

> than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance. The government need not show that the defendant used a controlled substance at the precise time he possessed a firearm. It must, however, establish that he was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was possessed.

580 F.3d at 352; *see id.* n.4 (citing cases from other federal circuits discussing the meaning of the term "unlawful user" consistent with this definition). As the Third Circuit explained in *United States v. Augustin*, 376 F.3d 135 (3d Cir. 2004), Congress's use of the present-tense "is" in § 922(g)(3) "was not idle" but intended to cover "unlawful drug use at or about the time of the possession of the firearm, with that drug use not remote in time or an isolated occurrence." 376 F.3d at 138.

Applying this federal authority to Tenn. Code Ann. § 39-17-1351(c)(10) leads to the conclusion that the phrase "is not an unlawful user" contemplates the regular and repeated use of alcohol, a controlled substance, or controlled substance analogue in a manner other than as prescribed by a physician or otherwise permitted by law during a period that reasonably covers the time in which a handgun carry permit is sought.

1(c). The term "rehabilitation program" as used in Tenn. Code Ann. § 39-17-1351(c)(10) is not defined within the Tennessee Code. Nor have Tennessee appellate courts had occasion to construe the meaning of the term within the context of this statute. In construing a statute, courts will generally look to the "natural and ordinary meaning" of the words used without unduly restricting or expanding the statute's coverage beyond its intended scope. *Bryant v. Genco Stamping & Manufacturing Co., Inc.*, 33 S.W.3d 761 (Tenn. 2000). Rehabilitation is generally defined as restoring an individual "to a normal, healthy condition after an illness, injury, drug problem," or other debilitating condition.[1] A "rehabilitation program" under Tenn. Code Ann. § 39-17-1351(c)(10) is thus understood as a formal system or plan for rehabilitating a person suffering from alcohol or substance abuse or addiction. Subdivision (c)(10) places no further limiting definition or qualifier on the term. Whether a particular program constitutes a "rehabilitation program" within the meaning of the statute would depend on the specific circumstances of each case.

1(d). In construing a statute, a court will assume that the legislature used each word in the statute purposely and that the use of each word has a meaning and purpose. *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998). The requirements of

[1] *See* http://www.merriam-webster.com/dictionary/rehabilitation.

subdivision (c)(10) of § 39-17-1351 are stated in the conjunctive, i.e., an applicant must confirm that he is not an unlawful user of or addicted to alcohol, any controlled substance or controlled substance analogue "and" has not been in a rehabilitation program or hospitalized for substance abuse or addiction within a specified period. Statutory phrases separated by the word "and" are usually construed together. *Stewart v. State*, 33 S.W.3d 785, 792 (Tenn. 2000) (citing *Tenn. Manufactured Hous. Ass'n v. Metro. Gov't of Nashville*, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990)), and nothing in this statute indicates that these phrases should be construed otherwise. Under subdivision (c)(10), therefore, both requirements must be satisfied before the Department of Safety may issue a handgun carry permit to an applicant.

1(e). Tenn. Code Ann. § 39-17-1351(i) requires that the Department of Safety deny a permit application if it determines from information contained in a criminal-history records check conducted by the Tennessee or federal bureaus of investigation, information received from the clerks of court, or other information that comes to its attention that the applicant does not meet the eligibility requirements for issuance of a handgun carry permit. This information may include information from the sheriff of the county in which the applicant resides concerning the truthfulness of the applicant's answers to the eligibility requirements of subsection (c) that is within the knowledge of the sheriff. Tenn. Code Ann. § 39-17-1351(g)(2). The statute does not otherwise specify the kind of proof necessary to determine whether an applicant is "an unlawful user of or addicted to alcohol or controlled substances." Nor does the statute impose an obligation upon the department to confirm the applicant's eligibility beyond the information received from the Tennessee and federal bureaus of investigation, clerks of court, or county sheriffs, if any. *See* Tenn. Code Ann. § 39-17-1351(i). Rather, such decisions are made on a case-by-case basis depending on the individual circumstances of each application.

1(f). A handgun carry permit issued under Tenn. Code Ann. § 39-17-1351 is generally valid for four years, *id.* § 39-17-1351(n)(1), and a permit holder may apply for renewal prior to or within six months of the permit's expiration, *id.* § 39-17-1351(q)(1), (2).[2] A permit holder must certify on the renewal application that he or she still satisfies all of the eligibility requirements of subsection (c) for the issuance of a permit, *id.* § 39-17-1351(q)(1), and failure to disclose disqualifying information under subdivision (c)(10) would be grounds for suspension or revocation of the permit, *id.* § 39-17-1352(a). The statute, however, contains no other requirement that a permit holder affirmatively report treatment in a rehabilitation program occurring after the issuance of a permit.

[2] Different periods apply for members of the United States armed forces. *See id.* § 39-17-1351(n)(2), (q)(3). Also, 2014 legislation provides for the implementation of staggered handgun-permit expiration and renewal dates to conform with a permit holder's driver-license expiration date. *See* 2014 Tenn. Pub. Acts, ch. 866.

1(g). Tenn. Code Ann. § 39-17-1351(c)(10) is not unconstitutionally vague. The United States Constitution does not require that a statute define its terms with exact precision. *See Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973). Nor does a statute fail for vagueness merely because it requires a decisionmaker to apply his or her own reasonable judgment. *United States v. Ragen*, 314 U.S. 513, 523 (1942). Rather, words appearing in a statute should be given their natural and ordinary meaning. *Boles v. Chattanooga*, 892 S.W.2d 4156, 420 (Tenn. Ct. App. 1994); *State ex rel. Woodall v. D&L Co., Inc.*, No. W1999-00925-COA-R3-CV, 2001 WL 524279 (Tenn. Ct. App. May 16, 2001).

While subdivision (c)(10) of the handgun-carry-permit statute may require the exercise of reasonable judgment, it is not so vague that the determination of whether a permit applicant falls within its parameters is "entirely subjective." *See Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993). As the Supreme Court observed in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110. An ordinary person would understand at the time of application for a handgun carry permit whether he or she was an unlawful user of or addicted to, or had previously been in a rehabilitation program or hospitalized for abuse of, alcohol, a controlled substance, or a controlled-substance analogue.

2. As discussed in Tenn. Att'y Gen. Op. 98-199 (Oct. 12, 1998), a person whose handgun carry permit has been revoked has a choice; he or she may challenge the Department's action in a court of general sessions, under Tenn. Code Ann. § 39-17-1352(d), or through administrative procedures and subsequent judicial review, under Tenn. Code Ann. §§ 39-17-1353, -1354. *See* Tenn. Att'y Gen. Op. 98-199, at 2-3.[3] A person whose handgun permit application has been denied may challenge the Department's action in a court of general sessions, under Tenn. Code Ann. § 39-17-1352(d). *See* Tenn. Att'y Gen. Op. 98-199, at 3.

At an administrative hearing pursuant to § 39-17-1353, the sole issue shall be "whether by a preponderance of the evidence the person has violated any provision of §§ 39-17-1351 – 39-17-1360." "If the presiding hearing officer finds the affirmative of this issue, the . . . revocation shall be sustained. If the presiding hearing officer finds the negative of this issue, the . . . revocation shall be rescinded." Tenn. Code Ann. § 1353(d). A person aggrieved by the Department's determination has the right to judicial review pursuant to Tenn. Code Ann. § 39-17-1354.

Where review of the denial or revocation of a permit is sought in the general sessions court, the burden of proof rests with the one seeking relief, i.e., the permit applicant. It is well established in Tennessee caselaw that the "burden of proof is on the party having the affirmative of an issue, and that burden does not shift." *Big Fork Mining Co. v. Tenn. Water Quality Control Bd.*, 620 S.W.2d 515, 520 (Tenn. Ct. App.

[3] This option is also available for permit suspensions.

1981) (holding that company seeking water discharge permit bears the burden of proof). *See also Smith v. State*, No. M2012-00115-COA-R3-CV, 2012 WL 2914178, at *2 (Tenn. Ct. App. July 17, 2012) (where Department's denial of handgun carry permit was reviewed in general sessions and then circuit court, appellate court would presume trial court's findings of fact to be correct but would review its conclusions of law de novo).[4]

3. The Second Amendment to the United States Constitution confers an individual right to keep and bear arms for the purpose of self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3026 (2010). But the right is not unlimited, *Heller*, 554 U.S. at 626; its core purpose is to permit "law-abiding, responsible citizens to use arms in the defense of hearth and home." *Id.* at 635; *see also id.* at 626 (observing that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues").

Both the Tennessee Constitution, in Article I, § 26, and the handgun-carry-permit statute itself, in Tenn. Code Ann. § 39-17-1351(a), recognize that the "citizens of this state have a right to keep and bear arms for their common defense" but also that "the general assembly has the power, by law, to regulate the wearing of arms with a view to prevent crime." Where a handgun carry permit is denied or revoked pursuant to such regulation, therefore, a court or agency will not review such action under any higher level of scrutiny simply because a constitutional right is implicated. *See Andrews v. State*, 50 Tenn. 165, 1871 WL 3579, at *10 (1871) (the right to keep arms is "no more above regulation for the general good than any other right").

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[4] In *Flatt v. State*, No. 2012-00928-COA-R3-CV, 2013 WL 1738423 (Tenn. Ct. App. Apr. 22, 2013), a case involving the revocation of a handgun carry permit that was reviewed in the general sessions and then circuit court, the Court of Appeals stated that the "trial court's review of the Department's decision in this matter was governed by Tenn. Code Ann. § 4-5-322(h)." 2013 WL 1738423, at *2. But § 4-5-322(a) provides that such review is available to a person "who is aggrieved by a final decision in a *contested case*" (emphasis added). The Department's revocation or denial of a handgun carry permit is not, in itself, a contested case. *See* Tenn. Code Ann. § 4-5-102(3) (defining "contested case"); *Mid-South Indoor Horse Racing, Inc. v. Tenn. State Racing Comm.*, 798 S.W.2d 531, 537 (Tenn. Ct. App. 1990) (holding that Racing Commission's denial of an application for a horse-racing license was not a contested case).

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