



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

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The Honorable Jack Kennedy
Clerk of the Circuit Court
Wise County and City of Norton
Wise, Virginia 24293-1248

Dear Mr. Kennedy:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether, prior to issuing a concealed handgun permit, the issuing court must verify with the local general district and juvenile and domestic relations courts the existence or non-existence of any criminal charges or restraining or protective orders against the applicant pending in those courts. You further inquire whether a failure to detect pending charges constitutes gross negligence pursuant to § 18.2-308(D). In particular, you are concerned about disqualifying events that may occur during the period between obtaining the Central Criminal Exchange Records Exchange (“CCRE”) report and the actual issuance of the permit.¹

Response

It is my opinion that, when issuing a concealed weapon permit, the clerk of court has no duty to verify with the general district or the juvenile and domestic relations court whether the applicant has any criminal charges or protective orders pending against him in those courts. It further is my opinion that the failure of a clerk to detect any existing protective orders or criminal charges does not constitute gross negligence, provided the clerk has followed the statutory requirements governing the issuance of a concealed weapon permit.

Background

You relate that, as the Clerk of the Court for Wise County and the City of Norton, you have been delegated the responsibility of reviewing applications for concealed weapon permits. You note that applications for such permits must include only the information necessary to determine eligibility for the permit. You advise that, to date, the Wise County and City of Norton Circuit Court requires the following: (1) a completed application made under oath, (2) proof of valid handgun training, (3) a criminal history report from the CCRE based upon the applicant’s name, date of birth, and/or social

¹ You also inquire about the duties of judges and sheriffs in this setting. My response is limited to the duties of the clerk. By statute, the Attorney General cannot issue an opinion to a local official unless that opinion “is directly related to the discharge of the duties of the official requesting the opinion.” VA. CODE ANN. § 2.2-505(B) (2008).

security number which the Sheriff verifies by signature, and (4) verification of pending charges in the Circuit, General District and Juvenile and Domestic Relations Court which are verified by signature of a clerk of the respective court. You further report, however, that both the General District and the Juvenile and Domestic Relations Courts have been advised that they should no longer provide verification of pending charges because such verification creates a risk of liability.

Applicable Law and Discussion

Section 18.2-308 of the *Code of Virginia* prohibits the carrying of a concealed weapon by all citizens other than certain enumerated classes of individuals and those to whom a concealed weapon permit has been issued. Individuals may obtain a permit pursuant to § 18.2-308(D), which provides in relevant part that

Any person 21 years of age or older may apply in writing to the clerk of the circuit court of the county or city in which he resides . . . for a five-year permit to carry a concealed handgun The application shall be made under oath before a notary or other person qualified to take oaths and shall be made only on a form prescribed by the Department of State Police . . . requiring only that information necessary to determine eligibility for the permit. . . . The court shall consult with either the sheriff or police department of the county or city and receive a report from the Central Criminal Records Exchange.

The Code also authorizes the circuit court to delegate to the clerk responsibility for issuance of the permit:

A court may authorize the clerk to issue concealed handgun permits, without judicial review, to applicants who have submitted complete applications, for whom the criminal history records check does not indicate a disqualification and, after consulting with either the sheriff or police department of the county or city, about which there are no outstanding questions or issues concerning the application.^[2]

Within 45 days of receiving a completed application, the “court shall issue the permit and notify the State Police of the issuance of the permit . . . unless it is determined that the applicant is disqualified.”³ Section 18.2-308(E) provides, in relevant part, that

The following persons shall be deemed disqualified from obtaining a permit: . . .

5. An individual who is subject to a restraining order, or to a protective order and prohibited by § 18.2-308.1:4 from purchasing or transporting a firearm. . . .

14. An individual who has been convicted of any assault, assault and battery, sexual battery, discharging of a firearm in violation of § 18.2-280 or 18.2-286.1 or brandishing of a firearm in violation of § 18.2-282 within the three-year period immediately preceding the application.

15. An individual who has been convicted of stalking. . . .

² VA. CODE ANN. § 18.2-308(D) (Supp. 2010). The clerk, however, should not issue the permit without judicial review if “the sheriff, chief or police, or attorney for the Commonwealth [has] submit[ted] to the court a written statement . . . indicating that the applicant is likely to use a weapon unlawfully or negligently to endanger others.”

³ *Id.*

17. An individual who has a felony charge pending or a charge pending for an offense listed in subdivision 14 or 15.

The applicant must state under penalty of perjury whether he has any pending criminal charges or is the subject of a restraining or protective order.⁴ The court then, in determining eligibility, verifies the petitioner's application by comparing his statements to the information provided by the CCRE and by consultation with law enforcement. The CCRE is the "sole criminal record keeping agency of the Commonwealth,"⁵ and is charged with collecting and keeping records pertaining to "arrests, detentions, indictments, informations, or other formal charges" and oversees the state's Protective Order Registry, which functions as "a central repository of information regarding outstanding, valid protective orders."⁶

A previous opinion of the Attorney General explained the process for verification for eligibility:

Pursuant to the clear language of Section 18.2-308(D), the decision of the circuit court must be based only on information required on the application form prescribed by the Supreme Court, on information received from local law-enforcement officials, on any sworn statements submitted by local law-enforcement officials, and on information contained in the report from the Central Criminal Records Exchange.⁷

The mention of one thing in a statute implies the exclusion of another.⁸ A statute limiting a thing to be done in a particular manner, or by a prescribed person or tribunal, implies that it shall not be done otherwise, or by a different person or tribunal.⁹ Section 18.2-308(D) specifies that verification is to be made through local law enforcement personnel and the CCRE report, which is typically obtained by the sheriff. The statute does not specify that the clerk or judge must further inquire with the general district or juvenile and domestic relations courts concerning pending charges.

You express a concern about disqualifying events that occur after the CCRE report has been received but before issuance of the permit. I note that the permitting statute is designed with significant safeguards to ensure that only qualified persons receive and hold permits. If an individual incurs a criminal charge or is the subject of a protective order after permit is issued, the permit will be revoked or forfeited.¹⁰ The applicant is aware of this potential result because the application form prescribed by the Department of State Police specifically inquires as to the existence of any restraining orders, protective orders and pending charges.¹¹ Materially false statements in the application process are not only subject to penalties for perjury,¹² but also result in forfeiture of the permit.¹³ Additionally, the Code requires the

⁴ See SP- 248 (7-1-2010), question 8.F, 8K and signature block.

⁵ VA. CODE ANN. § 19.2-387 (2009).

⁶ Section 19.2-387.1 (2009).

⁷ 1995 Op. Va. Att'y Gen. 130, 131. This situation is distinguished from that in which a court seeks to add requirements, other than those enumerated, to issue a handgun permit.

⁸ *Id.* See also 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION 47.23 (5th ed. 1992 & Supp. 1995).

⁹ 1981 Op. Va. Att'y Gen. 190, 1991 Op. Va. Att'y Gen. 91, 92.

¹⁰ Section 18.2-308(D). Section 18.2-308(J) (requiring the Central Criminal Records Exchange to notify the court having issued a permit of any disqualifying arrest, conviction or other event).

¹¹ See Virginia Department of State Police Form 248 (7-1-2010), questions 8(F), 8(K) and signature block.

¹² *Id.* See also § 18.2-308(F).

¹³ Section 18.2-308(J).

application review process to be completed within 45 days,¹⁴ which minimizes the potential for applicants to incur a disqualifying event after submitting their petition and before the issuance of the permit.

To ensure that the report from the CCRE fully reflects current restraining orders, protective orders and any pending charges, the best practice is to eliminate any delay between issuing the permit and receiving the CCRE and the required input from local law enforcement. The criminal records maintained in the Exchange are available to criminal justice entities on the state and national level 7 days a week, 24 hours a day. Generally, an immediate response concerning an individual's criminal history record is available.¹⁵ The type of information available depends on the status of the inquirer and the reason for the inquiry. A simple criminal inquiry by law enforcement should capture all necessary information for a criminal records check. An inquiry using purpose code "F" provides automated records of all state or federal crimes committed by the applicant, as well as pending criminal charges, protective orders, and mental health history.¹⁶ Nonetheless, if delay is a concern, you are not precluded from requesting an updated report immediately prior to issuing the permit or from inquiring with a court not of record for any pending charges.

With respect to your question about clerk liability, clerks of court specifically are exempt from suit "arising from any acts or omissions relating to the issuance of concealed handgun permits without judicial review . . . unless the clerk was grossly negligent or engaged in willful misconduct."¹⁷ As a constitutional officer, considerable deference is given to ministerial decisions made by circuit court clerks unless such actions are contrary to law.¹⁸ Gross negligence has been defined as "the heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care."¹⁹ It is such negligence as would shock fair-minded people, although it is something less than willful recklessness.²⁰

Accordingly, it is my opinion that if a clerk adheres to the statutory requirements regarding the procedure for verifying eligibility for concealed weapon permits, a failure to detect any pending criminal charges or protective orders does not constitute gross negligence. The clerk may rely on the CCRE report and consultation with local law enforcement to discharge his statutory duties. The clerk may, but is not required to, inquire with courts not of record concerning pending charges or restraining or protective orders.

¹⁴ Section 18.2-308(D).

¹⁵ See VIRGINIA STATE POLICE, *Central Criminal Records Exchange (CCRE)*, available at http://www.vsp.state.va.us/CJIS_CCRE.shtm (last visited March 3, 2011).

¹⁶ According to Captain Thomas Turner, Criminal Justice Information Systems (CJIS) Officer for the Virginia State Police, a request for a criminal records check using purpose code "F" will supply all data needed to complete the required verification under § 18.2-308(D).

¹⁷ Section 18.2-308(D).

¹⁸ 2009 Va. Att'y Gen. 40 (citing 2003 Op. Va. Att'y Gen. 60).

¹⁹ *Chapman v. City of Virginia Beach*, 252 Va. 186, 190, 475 S.E.2d 798, 801 (1996) (quoting *Town of Big Stone Gap v. Johnson*, 184 Va. 375, 378, 35 S.E.2d 71, 73 (1945)). See also *Frazier v. City of Norfolk*, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987).

²⁰ *Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971); *Clark v. Clark*, 216 Va. 539, 543, 221 S.E.2d 123, 126 (1976); 1980-81 Op. Va. Att'y Gen. Va. 152.

Conclusion

Accordingly, it is my opinion that, when issuing a concealed weapon permit, the clerk of court has no duty to verify with the general district or juvenile and domestic relations court whether the applicant has any criminal charges or protective orders pending against him in those courts. It further is my opinion that the failure of a clerk to detect any existing protective orders or criminal charges does not constitute gross negligence, provided the clerk follows the statutory requirements governing the issuance of a concealed weapon permit.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized, with the first name "Ken" and the last name "C" being prominent, followed by a Roman numeral "II".

Kenneth T. Cuccinelli, II
Attorney General