

Gun Control

Federal Act Did Not Preempt Motion by State To Revoke This Retired Officer's Permit

Digested by Lauren R. Cooper

IN RE CARRY PERMIT OF ANDROS, Appellate Division, A-4077-06T4, October 14, 2008, approved for publication October 14, 2008. By Stern, P.J. Also on panel: Payne and Lyons. Appealed from Neustadter, J., Law Division, Atlantic County. (16 pages).

The federal Law Enforcement Officers' Safety Act of 2004 does not prohibit New Jersey from revoking the permit of a retired police officer under subsection l(6) of N.J.S.A. 2C:39-6.

James L. Andros had been an Atlantic City police officer from 1968 to 2003. On February 1, 2003, Andros retired in good standing. Before he retired, Andros applied for and obtained a permit to carry a handgun. Andros renewed his permit every year following his retirement.

Andros was in Brigantine on July 4, 2004, where a large crowd had gathered to watch the fireworks. A group of between 20 and 50 friends remained after the fireworks ended. The group was relaxing, and children were playing along the water line in the dark when Andros drove his sport utility vehicle along the water line at a high rate of speed.

One member of the group yelled at Andros to slow down because he felt that Andros' speed created a danger to those in the area. Andros immediately stopped and exited his vehicle. Another member of the group, Bill Glose, told Andros to return to his vehicle. An altercation between Andros and Glose ensued.

Andros went to his vehicle and removed a handgun, and he warned loudly, "I'm packin, stay back." Following that warning, the group backed away from Andros and called the police. The incident already had ended when the police arrived at the scene. Some witnesses to the incident told the police that they were particularly concerned for the safety of the children who had been present. The officers spoke with Andros, and they asked him to leave the scene.

Andros was involved in a second incident on February 8, 2005. Rasheem Rose and Daril Jackson were driving in the right lane on the Black Horse Pike in Egg Harbor Township. Andros cut in front of Rose, who was forced to brake and swerve to the right to avoid an impact. When Rose passed Andros, Andros turned on his high beam lights and began tailgating Rose. Andros twice bumped the back of Rose's vehicle.

Both Andros and Rose eventually pulled onto the shoulder of the road. Rose and Andros got out of their vehicles. While he was dialing 911 from his cell phone, Rose noticed that Andros was holding a handgun, and he dropped his cell phone. Andros pointed the handgun at Jackson, who

also had gotten out of the vehicle, and told both Jackson and Rose that he would kill them if they moved. Soon afterward, Andros allowed Rose to call 911. When the police arrived, Andros gave them his handgun permit. The police conducted their investigation, returned Andros' gun to him, and allowed him to leave the scene.

The State moved pursuant to subsection l(6) of N.J.S.A. 2C:39-6 to revoke Andros' permit to carry a firearm. Subsection l(6) provides in part that a judge of the Superior Court "may revoke a retired officer's privilege to carry a handgun pursuant to this subsection for good cause shown on the application of any interested person." The Law Division granted the motion, and it terminated Andros' right to possess and carry a weapon such as the handgun he previously had carried and barred him from resuming certification in the future.

The Law Division concluded that Andros had "a temper and a hot-blooded nature," despite his 35 years of "exemplary service" as a police officer. Consequently, the Law Division concluded that Andros' "possession of a permit to carry a handgun creates a potentially dangerous situation that is 'contrary to the public interest.' "

The Law Division found that the State had satisfied its burden of proving by a preponderance of the evidence, "and even to the extent of clear and convincing evidence," that there was "good cause" to revoke Andros' permit and bar him from resuming certification in the future.

Andros had moved to dismiss the State's motion on the basis that 18 U.S.C. §926C of the federal Law Enforcement Officers' Safety Act of 2004 preempted the State from revoking the license under subsection l(6). The Law Division concluded that, under the "narrow reading" standard set forth in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), subsection l(6) remained valid and did not conflict with federal law.

The Law Division reasoned that subsection l(6) does not completely bar a retired New Jersey law enforcement officer from carrying a concealed weapon, that a retired officer can carry a concealed firearm in New Jersey as long as he meets the State's qualifications, and that subsection l(6) does not bar retired officers from other jurisdictions from carrying concealed weapons in New Jersey as long as those officers are qualified in their respective jurisdictions and possess proper identification. As a result, the court concluded that subsection l(6) did not violate the Congressional intent in enacting the federal Act.

Andros appealed from the revocation of his permit, the denial of his motion to dismiss, and the Law Division's determination on the merits. On appeal, Andros argued, among other things, that §926C preempted the revocation motion and that the Law Division had erred by finding that there was "good cause" to revoke his permit. The Appellate Division affirmed the revocation of Andros' permit.

The Appellate Division began its analysis by summarily rejecting Andros' attack on the proceedings in the Law Division. Contrary to Andros' argument, the Appellate Division concluded that the State had "good cause" to revoke Andros' permit under subsection l(6) of §2C:39-6, as long as the State could do so without violating 18 U.S.C. §926C.

Section 926C(a) provides: "Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and

who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b)."

Moreover, §926C(b) provides in part that that section "shall not be construed to supersede or limit the laws of any State" that allows private persons or entities "to prohibit or restrict the possession of concealed firearms on their property." The term "qualified retired law enforcement officer" is defined in §926C(c), including in §926C(c)(5) that the officer must, during the most recent 12 months, have met "the State's standards for training and qualification for active law enforcement officers to carry firearms."

The parties in this case agreed that Andros satisfied the requirements of the federal Act. However, the qualification requirements set forth in §926C(c)(5) demonstrate that a licensing state can revoke the officer's permit based on the officer's conduct. Stated differently, the federal Act provides that the states can establish "standards for training and qualification" that are consistent with those of "active law enforcement officers."

Consequently, the Appellate Division agreed with the Law Division that the federal Act merely preempts a state's ability to preclude, or modify, the requirements for carrying a firearm interstate if the state in which the officer formerly was employed allows the retired officer to be licensed. The Appellate Division further agreed with the Law Division that New Jersey "retains jurisdiction to hear the State's contention that it can establish 'good cause' justifying the revocation."

The doctrine of federal preemption recognizes the assumption that the historic police powers of the states are not to be superseded by federal legislation "unless that was the clear and manifest purpose of Congress." Given the presumption against federal preemption of state police-power regulations, the U.S. Supreme Court has narrowly interpreted express preemptions, even where Congress has provided them. The U.S. Supreme Court also has declared that the Congressional purpose in enacting the statute guides a court's analysis of the scope of preemption.

Applying those principles to this case, the Appellate Division found no Congressional intent to preclude the action the State took in Andros' case and no basis on which to conclude that a state cannot revoke a handgun permit merely because §926C permits a carrier licensed in one state to possess a handgun in another state. Even though Andros had submitted references to the legislative history in which speakers had opposed the federal Act and addressed adverse effects on the states, federal case law provides that, when seeking to determine legislative intent, the "fears and doubts of the opposition" provide no authority on which to construe the legislation. The appeals court thus concluded that the legislative history that Andros provided did not support the conclusion that §926C was designed to preempt New Jersey's actions in this case.

For appellant: A. Harold Kokes. **For respondent:** Anne Milgram, Attorney General (Kathleen M. Gusler, Deputy Attorney General, of counsel and on the brief).

The Barker, Scott, and Gelfand Law Firm represented Egg Harbor Township and its officers.