Circuit Court for Baltimore City
Case No. 24-C-18-000912

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2431

September Term, 2018

EDWARD H. WHALEN

v.

HANDGUN PERMIT REVIEW BOARD

Shaw Geter,
Wells,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: May 14, 2020

In this appeal, appellant Edward H. Whalen challenges the finding by the Handgun Permit Review Board[1] ("the Board") that he lacked a "good and substantial reason" to obtain a permit to wear, carry, or transport a handgun.[2] In addition, he attacks the underlying statute as a violation of the Second Amendment to the U.S. Constitution.[3]

For reasons stated below, we conclude that Mr. Whalen has failed to show that the Board lacked substantial evidence to deny him a handgun permit. In addition, we decline to reach his constitutional challenge, which was not presented to the Board. Thus, we

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[1] In 2019 the General Assembly passed HB 1343/SB 1000, which abolished the Handgun Permit Review Board and required the Office of Administrative Hearings to review denials of handgun permits. After a veto by the Governor and an override by the General Assembly, the legislation took effect as Chapter 2 and Chapter 4, Laws of 2020. This repeal does not affect the outcome of this appeal. *See* Md. Code (2014), General Provisions Article, § 1-205 (Repeal does not extinguish prior proceedings).

[2] Md. Code (2012 Repl. Vol.), Criminal Law Article, § 4-203(a) generally prohibits the wearing, carrying, or transporting of a handgun. Among the exemptions from this prohibition is the "wearing, carrying, or transporting of a handgun[] in compliance with any limitations imposed under § 5-307 of the Public Safety Article, by a person to whom a permit . . . has been issued under Title 5, Subtitle 3 of the Public Safety Article[.]" Under Md. Code (2011 Repl. Vol.), Public Safety Article, § 5-306(a)(6), a person can obtain a handgun permit, for among other reasons, if based on an investigation the person:

> (i) has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a handgun a danger to the person or to another; and
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> (ii) has *good and substantial reason* to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger. (Emphasis added).

The latter requirement is the focal point of Whalen's challenge.

[3] The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

affirm the Circuit Court for Baltimore City's decision to uphold the denial of a handgun permit.

BACKGROUND AND PROCEDURAL HISTORY

The circuit court's opinion, authored by the Honorable John S. Nugent, provides an excellent description of the facts and procedural history of this case:

> Mr. Whalen is a resident of Washington, D.C. He is currently employed as majority counsel to the United States ("U.S.") Senate Committee on Indian Affairs. Prior to his current position, he served in various staff positions in both the U.S. House of Representatives and the U.S. Senate, including as a legislative assistant for Rep. Tom Cole of Oklahoma. Mr. Whalen is an elected Advisory Neighborhood Commissioner ("ANC") in Ward 3 in Washington, D.C.[4]
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> On March 9, 2017, Mr. Whalen submitted an application for a handgun permit with the [Maryland State Police ("MSP")] Handgun Permit Section. As part of his application, Mr. Whalen completed an applicant questionnaire and a list of all current and past employers for the last five years. He further executed an authorization for release of information allowing the MSP to review and obtain records for purposes of processing his application.
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> Mr. Whalen's application was assigned to Sylvia Wright, an administrative investigator employed with the MSP. Ms. Wright conducted a background investigation relevant to Mr. Whalen's application. As part of her investigation, Ms. Wright verified Mr. Whalen's age, conducted a criminal background check, confirmed his firearms training and contacted his current and past employers.
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> On May 24, 2017, Ms. Wright interviewed Mr. Whalen at the MSP Waterloo Barrack. Mr. Whalen asserted that a handgun permit was necessary as a reasonable precaution against apprehended danger. Specifically, he claimed that a handgun was necessary because of the risk associated with his position as a publicly elected official in D.C. and as a staff member with the U.S. Senate. Mr. Whalen further stated that a permit

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4 Mr. Whalen's brief in this Court states that he "is no longer an ANC Commissioner, so Mr. Whalen's prior evidence of such service would not be relevant on remand."

was necessary because his father is a federal judge and that because Mr. Whalen had been the victim of identity theft in the past.

Ms. Wright determined that Mr. Whalen had failed to establish a good and substantial reason to qualify for a handgun permit. She reasoned that Mr. Whalen's elected position as a neighborhood commissioner did not have legislative authority, and that he failed to produce any documentation to show that he had been threatened due to his elected position. As to his employment with the federal government, Ms. Wright found that Mr. Whalen did not have a top secret security clearance suggesting that the government did not classify his position as having access to information, the release of which could jeopardize national security.[5] Ms. Wright concluded that Mr. Whalen failed to produce evidence of any specific threats related to his father's position as a federal judge or as to having been the victim of identity theft.

Based on Ms. Wright's investigation, Mr. Whalen's application was denied. Mr. Whalen was notified of the denial by letter dated July 5, 2017. The listed reason for the denial was that he was "[a] person who lacks good and substantial reasons." Mr. Whalen was given several options, including the right to seek an informal review of the denial with the MSP and the right to a hearing before the Board.

On July 27, 2017, Sgt. Kevin Moriarty, MSP Licensing Division, conducted an informal review on the disapproval of Mr. Whalen's permit. On the day of the informal review, Mr. Whalen submitted a letter entitled "informal review statement." The letter highlighted threats received by Republican offices on Capitol Hill and the fact that Mr. Whalen's photograph and biography would appear on the ANC website for Ward 3.

Sgt. Moriarty sustained the disapproval of Mr. Whalen's handgun permit application. He determined that Mr. Whalen failed to produce any additional significant information or documentation to show that he had been threatened. By letter dated August 9, 2017, Mr. Whalen was informed of Sgt. Moriarty's decision[6] and provided the right to request the Board to review the MSP's decision.

A Board hearing was convened on September 19, 2017. Mr. Whalen was present and testified in support of his application. The Board also heard testimony from Sgt. Bonnell on behalf of the MSP. In addition to written

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5 Later reviews of Mr. Whalen's permit claim noted that he "maintained a secret clearance for his employment duties."

6 This review letter also noted that Mr. Whalen "has not applied for a carry permit in Washington, D.C., where he is employed, serves as an elected official, and resides."

> testimony, the Board considered Mr. Whalen's application along with written correspondence between Mr. Whalen and the MSP.
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> [] The Board concluded that it could "not see the need for a Maryland permit when Mr. Whalen's activities, work and residence are all in [D.C.]" Therefore, the Board sustained the decision of the MSP denying Mr. Whalen's application for a handgun permit[7] and provided Mr. Whalen notice of his right to seek judicial review.
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> (Citations and exhibits omitted).

In the circuit court, Mr. Whalen sought to admit two additional exhibits into the record: (1) a copy of his concealed carry pistol license that he received from the District of Columbia; and (2) a copy of his father's wear and carry permit that he received from the State of Maryland. Judge Nugent denied his motion, concluding that "[t]he fact that another jurisdiction issued him a license, by itself, is not material to whether the Board should have given him a permit in Maryland" and "[t]he added fact that his father has a Maryland permit is not relevant to Mr. Whalen's application."

Mr. Whalen argued that the Board should have applied a "palpable need test" to evaluate his handgun permit application, because the U.S. Court of Appeals for the

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7 The key portion of the Board's decision states:

> Mr. Whalen's testimony was compelling and appeared truthful. He stated his need to be armed in the State of Maryland was due to his Washington, D.C. residence being within walking distance of the Maryland state line. He stated he frequently was in the Maryland area for shopping and going to restaurants. His testimony confirmed that all of his work and his residence are located in the District of Columbia. Mr. Whalen's testimony regarding his father is a judge and that he serves as an elected official in Washington, D.C. has no merit in Maryland. Mr. Whalen has not applied for a concealed carry permit in the District of Columbia where he resides. The Board does not see the need for a Maryland permit when Mr. Whalen's activities, work and residence are all in the District of Columbia.

Fourth Circuit used the words "palpable need" in upholding the constitutionality of the Maryland statute in *Woollard v. Gallagher*, 712 F.3d 865, 880 (4th Cir. 2013).

The circuit court rejected this contention, noting:

> The *Woollard* Court used the word "palpable" one time in its decision. *Woollard*, 712 F.3d at 880. In addressing whether the good and substantial reason requirement was reasonably adapted to Maryland's significant interests, the Court stated "it ensures that those persons in *palpable* need of self-protection can arm themselves in public places where Maryland's various permit exceptions do not apply . . . ." [emphasis in original]. Such language cannot be fairly read to require that a palpable need test be applied to handgun permit applications in Maryland. To the contrary, the plain language of the *Woollard* decision indicates that the approach used by the Board complies with the Second Amendment and ensures that those in need of a handgun permit will be able to obtain one.

In the circuit court, for the first time, Mr. Whalen raised a Second Amendment challenge to the Maryland statute. He argued that the U.S. Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) superseded Maryland cases upholding "the good and substantial reason" requirement. This contention was rejected by the circuit court.

Finally, the court held that the Board's decision not to give Mr. Whalen a handgun permit because his actual work and residence were in D.C. was not arbitrary or capricious.

This appeal followed.

QUESTIONS PRESENTED

Mr. Whalen orders and presents the issues in the following fashion:

1. Whether the statutory requirement for a "good and substantial reason" set forth in MD Code Public Safety § 5-306(a)(6)(ii), for the issuance of a Maryland handgun wear and carry permit facially violates the Second Amendment.

2. Independently of Question 1, whether the Maryland State Police and the Handgun Permit Review Board used an erroneous legal standard by failing to apply the Fourth Circuit's decision in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), in denying Mr. Whalen's application for a handgun wear and carry permit.

The Board sets forth the questions in a contrary manner:

1. Has Mr. Whalen waived his arguments that the "good and substantial reason" requirement of Maryland's handgun permit law violates the Second Amendment by failing to raise the issue before the administrative agency or the circuit court?

2. Is Maryland's "good and substantial reason" requirement constitutional given that the Court of Appeals of Maryland has held that laws regulating public wear and carry of handguns fall outside the scope of the Second Amendment?

3. Was the decision of the Handgun Permit Review Board that Mr. Whalen lacked "good and substantial reason" to obtain a permit to carry a handgun legally correct and supported by substantial evidence?

DISCUSSION

I. The Second Amendment Claim/Preservation

Because the parties have devoted much attention to the issue or non-issue of whether the requirement of a "good and substantial reason" to obtain a gun permit offends the Second Amendment, we will address that question first.

Although Mr. Whalen did press his constitutional claim in the circuit court, it is not contested that he did not raise his Second Amendment challenge before the Board. This is ordinarily fatal to Mr. Whalen's constitutional challenge. *YIM, LLC v. Tuzeer*, 211

Md. App. 1, 49 (2013) (Even constitutional issues must be preserved and exhausted before the relevant administrative agency before resorting to the courts). Raising the issue in the circuit court does not cure this fundamental defect. *Thana v. Bd. of License Comm'rs for Charles County*, 226 Md. App. 555, 576 (2016).

Mr. Whalen's response is four-fold: (1) He attacks the Board's competence to decide the Second Amendment issue; (2) He relies on the facial constitutionality exception to the exhaustion of administrative remedies requirement; (3) He asserts that the Board waived any objection to its preservation argument by failing to raise it in the circuit court; and (4) He invokes our discretion under Md. Rule 8-131(a) to resolve this purely legal question.

In our view, the first three contentions can be dismissed summarily. Administrative agencies routinely decide constitutional questions and are presumed competent to do so. *Id.* at 569. Mr. Whalen has not set forth any facts that would rebut that presumption with respect to the Board. His focus on the exhaustion doctrine misses the point. This is a non-preservation case not a failure to exhaust case. Because the Board did not raise a preservation issue in the circuit court does not excuse his failure to raise his constitutional claim before the Board.

The legal landscape surrounding Mr. Whalen's Second Amendment challenge influences our decision on his fourth argument urging our resolution of his constitutional claim. On April 27, 2020, the U.S. Supreme Court vacated as moot a request for declaratory and injunctive relief against enforcement of a portion of a repealed New York

City handgun licensing ordinance. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 590 U.S. ___ (2020), 2020 WL 1978708. Three dissenting Justices would have invalidated the City ordinance as a violation of the Second Amendment. In a concurring opinion, Justice Kavanaugh agreed with the general analysis of the dissent and shared the dissenters' concern that some federal and state courts may not be properly applying the Court's recent Second Amendment decisions. The concurring opinion noted in conclusion: "The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court."

One such case is *Malpasso v. Pallozzi*, 767 Fed. Appx. 525 (Mem.) (2019), *petition for certiorari docketed Sept. 30, 2019*, where petitioners are seeking the Supreme Court's review of the constitutionality of the very statute Mr. Whalen questions in this appeal. The Court appears to have been sitting on this cert petition until the New York City case was decided. Whether the Court will grant review of this or another Second Amendment case, or what it might hold, are, of course, matters of speculation. But this uncertainty highlights the wise words of Judge Wilkinson in *United States v. Masciandaro*, 638 F.3d. 458 (4th Cir. 2011). There, Judge Wilkinson said that courts should address a Second Amendment challenge "only upon necessity and only then by small degree." *Id.* at 475. He added that at times, "the need for clarity and guidance in future cases is paramount, but in this instance we believe the most respectful course is to await that guidance from the nation's highest court." *Id.*

Mr. Whalen's constitutional challenge was not made before the Board, it is not preserved here, and we see no reason to reach out to address it now.

II. The Legal Standard for Reviewing the Board's Decision to Deny a Handgun Permit.

The parties are sharply divided over the proper legal standard to be applied to the Board's denial of a permit to Mr. Whalen and to our review of the denial. The Board argues for the traditional and deferential substantial evidence test for judicial review of agency action. Mr. Whalen argues that the U.S. Court of Appeals for the Fourth Circuit in *Woollard v. Gallagher*, *supra*, has altered that standard of review by allowing applicants for handgun permits to win approval upon a showing of "palpable need."

Before addressing these contentions, we briefly turn to the question of whether *Woollard* is binding on Maryland courts. The short answer is a Maryland court is not bound by decisions of the U.S. Court of Appeals for the Fourth Circuit. This is true whether a federal constitutional or statutory issue is presented, *Pope v. State*, 284 Md. 309, 320 n. 10 (1979) (Unlike the decisions of the Supreme Court of the United States, decisions of federal circuit courts of appeal construing the federal constitution and acts of the Congress pursuant thereto, are not binding on us); *see also Henry v. Gateway, Inc.*, 187 Md. App. 647, 666 (2009), or whether a federal court has decided a matter of state law, *cf. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018) (If the relevant State law is established by a decision of the state's highest court, that decision is binding on the federal courts).

Thus, whether Mr. Whalen's contention is that the "palpable need" test is a federal court gloss on state law or a federal constitutional override of state law, such a ruling would not be binding on a Maryland court.

However, like the circuit court, we are not convinced that the Fourth Circuit in *Woollard* intended either result. A fair reading of *Woollard* shows that the words "palpable need" are a mere characterization of the interests served by the "good and substantial reason" requirement, not a free-standing test for determining compliance with the statute.

In his brief, Mr. Whalen argues that the facts he presented to the Board demonstrated "palpable need." Because we believe no such test exists, we will review the denial of his application for a handgun permit under the only legally permitted standard, the substantial evidence test.

Under the substantial evidence test, a reviewing court must review the agency's decision in the light most favorable to it. *Motor Vehicle Admin. v. Salop*, 439 Md. 410, 421 (2014). The agency's decision is "presumed valid" and "it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence." *Id.* The agency's decision may not be set aside if a reasoning mind could have reached the factual conclusion the agency reached. *Charles County Dep't of Soc. Servs. v. Vann*, 382 Md. 286, 299 (2004).

The Board rejected Mr. Whalen's application because it did not see the need for a Maryland permit when his activities, work, and residence are all in D.C. This uncontested

finding is one a reasonable mind could have reached. Although unnecessary to uphold the Board's decision, we note the fact that Mr. Whalen is no longer an ANC Commissioner and that he now has a concealed carry pistol license issued by the District of Columbia completely undercut any argument that he has a good and substantial reason for obtaining a handgun permit in Maryland.

For all of these reasons, we affirm the decision of the circuit court upholding the Board.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.