

IN THE SUPREME COURT OF VIRGINIA

RUDOLPH DIGIACINTO,

Appellant

v.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY,

Appellees

Record No. 09-1934

BRIEF AMICUS CURIAE OF
VIRGINIA CITIZENS DEFENSE LEAGUE

ON APPEAL FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

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**This Brief was
Rejected by the
Court**

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ASSIGNMENTS OF ERROR

Amicus adopts Appellant's assignments of error.

QUESTIONS PRESENTED

Amicus adopts Appellant's questions presented.

NATURE OF THE CASE

Amicus adopts Appellant's statement of the nature of the case.

PROCEEDINGS IN COURTS BELOW

Amicus adopts Appellant's statement of the nature of the case.

FACTS

Amicus adopts Appellant's statement of the facts, in particular that Appellant "has obtained the statutory granted privilege to carry a concealed handgun under Va. Code § 18.2-308(D)."

CONSENT OF THE PARTIES

Amicus received consent of Appellant and of the Attorney General, by Stephen McCullough, Opinions Counsel & Senior Appellate Counsel, to file this brief in support of Appellant. Copies of the emails received from Appellant and the Attorney General are attached hereto.

ARGUMENT

I.

The Circuit Court Had Jurisdiction
To Issue A Declaratory Judgment

In its Final Order, the circuit court held:

That the scope of the regulatory authority exercised by the University is not subject to a Declaratory Judgment action as result of the sovereign immunity of the Commonwealth

Final Order 2.

The circuit court erred as "the legislature acting in its policy-making capacity can abrogate the Commonwealth's sovereign immunity" *Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, ___ (2000).

In Code § 8.01-184, the General Assembly has abrogated the Commonwealth's sovereign immunity with respect to declaratory judgments concerning regulations:

In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. *Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations,*

may be so determined

Code § 8.01-184.

Accordingly, the scope of the regulatory authority exercised by the University is subject to a declaratory judgment action.

II.

The University's Regulation
Conflicts With State Law

In its oral opinion, the circuit court found that the University regulation was "not inconsistent with the general laws of the Commonwealth." Opinion Transcript 9.

The circuit court then noted:

While open carrying firearms is permitted under the Constitution and the laws of the Commonwealth, there's many limitations within the code on this right. Virginia prohibits the carrying of firearms in places of worship, airport terminals, parks, schools, other specific locations

Id.

The circuit court did not, however, address Code § 18.2-308(D), which authorizes the issuance of "a five-year permit to carry a concealed handgun." Code § 18.2-

308(D).¹ The Attorney General has accurately characterized the scope of the right established by Code § 18.2-308(D):

The right of a citizen, with a properly issued permit, to carry a concealed handgun is considered *universal within the Commonwealth*, subject to limited constraints.

Opinion of the Attorney General, 2006 Va. AG 116, 117, 05-078, ___ (2006) (emphasis added).

The "limited constraints" on the exercise of the authority granted by the permit are that the permittee may not "carry a concealed handgun onto the premises of any restaurant or club as defined in § 4.1-100 for which a license to sell and serve alcoholic beverages for on-premises consumption has been granted by the Virginia Alcoholic Beverage Control Board under Title 4.1 of the Code of Virginia" (Code § 18.2-308(J3)) and that the "granting of a concealed handgun permit shall not thereby authorize the possession of any handgun or other weapon

¹ The applicability of Code § 18.2-308(D) is ripe for this Court's consideration as the undisputed facts include the fact that Appellant "has obtained the statutory granted privilege to carry a concealed handgun under Va. Code § 18.2-308(D)."

on property or in places where such possession is otherwise prohibited by law² or is prohibited by the owner of private property." Code § 18.2-308(O). Because the General Assembly set forth only the above specific exceptions to the validity of a permit to carry a concealed handgun, the permit would be valid at all other locations, which would include university facilities because they are not within the specific exceptions. As the Court explained in *Belton v. Crudup*, 273 Va. 368, 641 S.E.2d 74 (2007):

[U]nder the maxim of *expressio unius est exclusio alterius*, when the General Assembly sets forth specific exceptions to the general applicability of a statute, those exceptions are deemed to be the only ones the legislature intended to make available.

273 Va. at 373.

Indeed, the Attorney General has previously issued an opinion concluding that "the governing boards of Virginia's public colleges and universities may not

² The "places where such possession is otherwise prohibited by law" are: places of worship (Code § 18.2-283); courthouses (Code § 18.2-283.1); elementary through high schools (Code § 18.2-308.1(B)); and air carrier airport terminals (Code § 18.2-287.01).

impose a general prohibition on the carrying of concealed weapons by permitted individuals." 2006 Va. AG 116, 117, 05-078, ___ (2006). The Opinion further stated:

Pursuant to specific grants of statutory authority, however, it is my opinion that colleges and universities may regulate the conduct of students and employees to prohibit them from carrying concealed weapons on campus.

Id.

Thus, to the extent that the University's regulation restricts the carrying of concealed handguns by permittees who are not students or employees, it indisputably exceeds statutory authority and must be invalidated.

With respect to permittees who are students or employees, however, the Opinion is in error. The basis for the Opinion's conclusion that colleges and universities "may regulate the conduct of students and employees to prohibit them from carrying concealed weapons on campus" was that there are "specific grants of statutory authority" to colleges and universities to regulate students and employees:

[T]he board of visitors or other governing body of every educational institution shall have the power:

* * *

2. To establish rules and regulations for the conduct of students while attending such institution.

* * *

5. To establish rules and regulations for the employment of professors, teachers, instructors and all other employees and provide for their dismissal for failure to abide by such rules and regulations.

Code § 23-9.2:3(A).

These grants of statutory authority conflict, however, with Code § 18.2-308(D). When statutes conflict, the rule of statutory construction enunciated in cases such as *Commonwealth v. Brown*, 259 Va. 697, 529 S.E.2d 96 (2000) governs:

[It is] the established rule of statutory construction that when one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute prevails. (Citations omitted). This is so because a specific statute cannot be controlled or nullified by a statute of general application unless the legislature clearly intended such a result.

259 Va. at 706.

Accordingly, Code § 18.2-308(D), which deals

specifically with the subject of carrying handguns, prevails because it cannot be controlled or nullified by Code § 23-9.2:3(A), a statute of general application, and there is nothing whatever in Code § 23-9.2:3(A) which suggests that the General Assembly "clearly intended" that Code § 23-9.2:3(A) would control or nullify Code § 18.2-308(D). On the contrary, the General Assembly's enactment of specific exceptions to the applicability of Code § 18.2-308(D) -- which notably includes certain educational institutions: elementary through high schools (Code § 18.2-308.1(B) -- only serves to emphasize that the General Assembly did not intend to exempt all educational institutions, i.e., colleges and universities, or even some classes of persons using the facilities of colleges and universities, from the application of Code § 18.2-308(D).³ Thus, to the extent

³ This Court may not, of course, question the wisdom of the General Assembly's omission of colleges and universities from the exceptions to Code § 18.2-308(D): "Whether an enactment is wise, and matters of policy, are questions for the legislative branch of government, and not the judicial branch." *Horner v. Dept. of Mental Health*, 268 Va. 187, 193, 597 S.E.2d 202, ___ (2004).

that the University's regulation restricts the carrying of concealed handguns by permittees, it exceeds statutory authority and must be invalidated.⁴

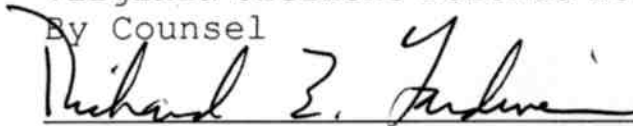
CONCLUSION

This Court should reverse the judgment of the circuit court.

Respectfully submitted,

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⁴ The fact that the General Assembly has not amended Code § 18.2-308(D) to add colleges and universities to the exceptions is not evidence of the General Assembly's acquiescence to the Attorney General's opinion because, for an "interpretation placed upon a statute by those charged with its enforcement" to be considered to have been acquiesced in by the General Assembly, that interpretation must have "continued for a long period of time" *Commonwealth v. Champion Int. Corp.*, 220 Va. 981, 992, 265 S.E.2d 720, ___ (1980). As the Attorney General's Opinion here was issued only in 2006, the interpretation has not continued for a long period of time.