COURT OF APPEALS

Smith Takes Judges to Task for Failure to Find Substantial Constitutional Issue in Gun Case

BY JOEL STASHENKO

ALBANY

IN A RARE written dissent, Judge Robert S. Smith has taken his six colleagues on the Court of Appeals to task for not finding the "substantial constitutional question" that would allow them to review a judge's denial of a pistol permit to a Westchester County attorney.

Judge Smith said the refusal of the Court to hear an appeal in *Kachalsky v. Cacace*, SSD4, highlights the "amorphous definition" that the judges have come to attach to "substantial" and how it is at odds with provisions in Article 6, §3(b)(1), of the state Constitution and provisions of CPLR 5601 and 5602 governing when the Court recognizes a right to appeal in civil cases.

Most such appeals are dismissed unanimously in batches, with the Court merely noting that "no substantial constitutional question is directly involved."

ALAN SOLOMON

Robert S. Smith

One Court observer said he could recall only a few dissents in the last decade to denials of leaves to appeal.

Here, however, Judge Smith protested that the majority had used a standard with no basis in state law to deny a hearing in a case that raised a serious constitutional issue.

The judge acknowledged that, like his colleagues, he also has been guilty of relying on loose readings of what constitutes a "substantial" constitutional question triggering the Court's review as of right.

"We have at times followed the practice—one in which, I confess, I have joined—of giving 'substantial' a much more flexible meaning, so flexible that it confers on us, in effect, discretion comparable to that we have in deciding whether to grant permission to appeal under CPLR 5602," Judge Smith wrote. "I am convinced that this practice is inconsistent with both the constitutional provision and the statute implementing it."

Kachalsky v. Cacace presented the question of whether Penal Law §400.20(2)(f), which requires "proper cause" for the issuance of a license to carry a concealed handgun, violated the » Page 6

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...to Article VI, Section 28(b) of the State Constitution

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Judge Smith

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Second Amendment of the U.S. Constitution. Judge Smith argued that there could hardly be an issue posing a more "substantial" constitutional question for the Court.

Kachalsky raises the questions of whether the Second Amendment limits the states or the federal government from issuing gun-possessing permits and whether a prohibition from carrying a concealed weapon without proper cause is consistent with the Second Amendment, Judge Smith wrote.

"I make no comment on the merits of either issue, except to say that neither is insubstantial," the judge wrote in his Feb. 16 dissent to the majority's summary refusal to grant leave to appeal. "On neither issue could petitioner's case, by any remote stretch, be called frivolous or fanciful."

He noted that the issue of whether the Second Amendment limits the powers of states and the federal government to set limits on gun possession is of "such great substance" that the U.S. Supreme Court heard oral arguments on Tuesday in a case about the legality of Chicago gun control ordinances in *McDonald v. City of Chicago*. (NYLJ, March 3).

If nothing else, Judge Smith's dissent provides some insight into the thoughts of at least one judge on his colleagues' bases for denying leave to appeal on constitutional grounds in civil matters, court observers said.

Stewart Sterk, a professor at Benjamin N. Cardozo School of Law, said Judge Smith is suggesting that it is not really "intellectually honest" for the Court to be declining jurisdiction on appeals where it says a substantial constitutional question is missing when "there are some cases where you can't really say that, because the Supreme Court appears to be dealing with those issues."

"What he is really complaining about is that in some cases, the court effectively is deciding a case on the merits by declining to take jurisdiction," said Mr. Sterk, who once clerked for Court of Appeals Judge Charles D. Breitel. "The constitutional question is rejected and he is objecting to that practice."

E. Leo Milonas, a partner at Pillsbury Winthrop Shaw Pittman who writes a column on Appellate Division practice for the New York Law Journal, said he welcomed Judge Smith's unconventional dissent in *Kachalsky*.

"It is good that they differ and when they do so, that they feel strongly enough about it that judges want to assert their position," said Mr. Milonas, a former state chief administrative judge. "It is good for the public. It is good for the law."

Judge Smith is no stranger to standing apart from his colleagues on the Court. He has by far been the member most apt to write dissents in cases the bench has heard, delivering 53 since he was appointed to the Court by Governor George E. Pataki in 2003.

In some of those dissents, Judge Smith has written in less-than-glowing-terms of the reasoning used by judges in the majority or the ramifications of their rulings.

Threshold Determination

Challenging the failure to grant leave in this case, Judge Smith wrote that neither Article VI, §3, of the state Constitution nor CPLR 5601 and 5602 of state law require that a constitutional question be found to be "substantial" for an appeal to be taken to the Court as of right.

"But we have interpreted them to mean that," he wrote.

The judge said there is a logical basis for establishing threshold standards by the Court—the fear of letting the Court's calendar get overwhelmed by "frivolous" actions or those advanced by attorneys through "fanciful" arguments.

It could not be said "by any remote stretch" that issues posed by *Kachalsky* are "frivolous or fanciful."

CPLR 5601 specifies that an appeal may be taken to the Court "as of right" from a decision of the Appellate Division "which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." Civil cases also get to the Court where Appellate Division panels split 3-2 in cases over questions of law.

Judges debate the Court's jurisdiction to take civil appeals in conference. They accept appeals if two of seven judges vote to do so.

In 2009, the Court granted leave to appeal in 77 civil cases out of 1,074 submitted and 81 criminal cases of 2,380.

The judges dismissed 45 direct civil appeals while citing the absence of "substantial" constitutional questions.

Leave grants in criminal cases are made by individual judges, who do not give their reasons for their decisions.

Kachalsky v. Cacace was brought in 2008 by solo practitioner Alan Kachalsky of Rye Brook after Westchester County Court Judge Susan Cacase denied his request for a full-carry gun permit under Penal Law §400.00[2][f].

A 4-0 Appellate Division, Second Department, panel upheld the denial of Mr. Kachalsky's pistol permit request in September 2009 in *Kachalsky v. Cacase*, 65 AD3d 1045 (2009).

In an interview, Mr. Kachalsky said he wanted to secure the gun to protect himself during possible random onslaughts by deranged individuals, such as the shooting spree by student Seung-Hui Cho at Virginia Tech University in which 35 people died.

"If someone else has a gun, the body count might have been what? Two, three?" Mr. Kachalsky said. "This whole anti-gun anti-Second Amendment lobby, whatever you call it, it is just not reasonable. But with the way New York handles pistol permits, the only people who are able to protect themselves are the criminals."

The attorney said he knew it would have been a long shot to get authorization to carry a concealed weapon through courts in downstate New York or the Court of Appeals, where he contended that an anti-gun philosophy also pervades.

"They are not intellectually honest," Mr. Kachalsky said. "It is not the first time I have experienced an appeals court when they are faced with giving a decision that goes against their political views. They avoid the case in any way that they can."

Mr. Kachalsky said he was examining the potential of appealing his gun case to federal courts.

Judge Smith said he would have found it "perfectly reasonable" had the Court wanted to defer to hear *Kachalsky* until the U.S. Supreme Court rendered its decision in *McDonald*, but said he did not think the Court of Appeals legitimately had the option not to consider the matter based on the issue of whether a "substantial" constitutional question was being posed.

"I would not quarrel with that exercise of discretion, if I thought the discretion existed," Judge Smith wrote. "I think, however, that petitioner has a constitutional right to have us hear this appeal, and that's all there is to it."

About 18,500 New Yorkers held permits in 2008 to carry a handgun, according to the Division of Criminal Justice Services.

The U.S. Supreme Court has a similar rule to the Court of Appeals' on declining to hear cases where "substantial" constitutional questions are not involved. Litigants in Washington, D.C., say the rule is sometimes used by the Supreme Court justices to avoid cases in which they do not want to get involved.

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