VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of December, 2021.

Present: All the Justices

George Patrick Gobble, Appellant,

against Record No. 201503
Circuit Court No. CL18000992-00

Virginia Department of State Police, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Roanoke County.

George Patrick Gobble contends that the Circuit Court of Roanoke County erred when it dismissed his complaint against the Virginia Department of State Police (the "VSP") based on the defense of sovereign immunity. Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no error in the judgment of the circuit court.

I. BACKGROUND

On June 1, 2018, Gobble attempted to purchase several firearms from a licensed firearms dealer in Vinton, Virginia. Gobble was required to fill out certain federal and state forms in order to complete the firearms transaction. After Gobble completed the pertinent forms, the firearms dealer submitted Gobble's personal information to the VSP for the verification of Gobble's criminal history. Upon reviewing Gobble's criminal history, the VSP determined that Gobble was prohibited from purchasing and possessing firearms. Therefore, the VSP did not approve the firearms transaction and Gobble was prevented from purchasing the firearms at issue.

The VSP determined that Gobble was not eligible to purchase or possess firearms because he was previously convicted of misdemeanor assault and battery in the Juvenile and Domestic Relations District Court of Montgomery County on May 3, 2018. The VSP found that

Gobble's assault and battery conviction constituted a "misdemeanor crime of domestic violence" under federal law. Thus, the VSP concluded that Gobble was prohibited from purchasing or possessing firearms under 18 U.S.C. § 922(g)(9).[1]

On June 27, 2018, Gobble filed a complaint for injunctive relief against the VSP. With leave of the circuit court, Gobble filed an amended complaint on May 26, 2020. Gobble's amended complaint was based on the provisions of Code §§ 18.2-308.2:2 and 9.1-135,[2] and the "Second Amendment of the United States Constitution."

Gobble asserted that the VSP had incorrectly classified his prior assault and battery conviction as a "misdemeanor crime of domestic violence." Although Gobble acknowledged that he was initially charged with assault and battery of a family member, in violation of Code § 18.2-57.2, Gobble maintained that he was only convicted of misdemeanor assault and battery, in violation of Code § 18.2-57(A), on May 3, 2018. Accordingly, Gobble claimed that he was never convicted of a "misdemeanor crime of domestic violence." Gobble argued that, consequently, he was not prohibited from purchasing or possessing firearms under federal law.

The VSP filed a demurrer to Gobble's complaint, arguing that Gobble's claim was barred by the doctrine of sovereign immunity. The VSP emphasized that Gobble's complaint was filed pursuant to Code §§ 18.2-308.2:2 and 9.1-135. The VSP observed that Code § 18.2-308.2:2 does not expressly waive the defense of sovereign immunity. Moreover, the VSP noted that Code § 9.1-135 expressly reserves that defense.

Gobble responded that Code § 18.2-308.2:2(D)[3] waives the defense of sovereign immunity. Gobble observed that Code § 18.2-308.2:2(D) expressly authorizes an individual to

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[1] In pertinent part, 18 U.S.C. § 922(g)(9) provides that:

> It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm or ammunition . . . or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[2] The amended complaint also referenced "Code §§ 19.2-387, *et seq.*," the statutes pertaining to the Central Criminal Records Exchange.

[3] When Gobble filed his initial complaint in 2018, Code § 18.2-308.2:2(E) set forth the cause of action at issue in this case. The General Assembly subsequently amended Code § 18.2-308.2:2 in 2020, and the statutory provisions set forth in Code § 18.2-308.2:2(E) were moved to Code § 18.2-308.2:2(D). *See* 2020 Acts chs. 887, 888, 991, 992, 1111, 1112, 1173. The present

pursue a civil action to address the wrongful denial of a firearms transaction. Gobble argued that individuals who are improperly denied the right to purchase a firearm by the VSP would be without a remedy if the defense of sovereign immunity applies to actions that are filed pursuant to Code § 18.2-308.2:2(D).

The circuit court sustained the VSP's demurrer, concluding that Gobble's claim was barred by the doctrine of sovereign immunity. The circuit court recognized that Code § 18.2-308.2:2(D) "permits a person who has been denied the right to purchase firearms to initiate a civil action under [Code] § 9.1-135 for certain limited purposes." Nevertheless, the circuit court explained that the defense of sovereign immunity can only be waived by an express statutory provision. The circuit court observed that Code § 18.2-308.2:2(D) does not expressly waive the defense of sovereign immunity and that Code § 9.1-135 explicitly reserves the defense. Under these circumstances, the circuit court determined that the defense of sovereign immunity barred Gobble's claim against the VSP.

On September 16, 2020, the circuit court entered a final order that dismissed Gobble's amended complaint with prejudice. Gobble noted a lengthy objection to the order, asserting that Code § 18.2-308.2:2(D) waives the defense of sovereign immunity despite the express reservation of that defense in Code § 9.1-135. This appeal followed.

II. ANALYSIS

Gobble presents two primary arguments on appeal. First, Gobble argues that the defense of sovereign immunity does not apply to claims that are based on self-executing constitutional provisions. Second, Gobble contends that Code § 18.2-308.2:2(D) waives the defense of sovereign immunity in the present context.

A. GOBBLE'S CONSTITUTIONAL ARGUMENT

Quoting *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137 (2011), Gobble maintains that "sovereign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia or claims based on federal law." This argument is procedurally defaulted and not properly before the Court for appellate review.

Code § 18.2-308.2:2(D) is identical to the 2018 version of Code § 18.2-308.2:2(E). *See* Code §§ 18.2-308.2:2(D) (2021) and 18.2-308.2:2(E) (2018). For clarity, the Court will refer to Code § 18.2-308.2:2(D) as the operative statutory provision in this case.

Gobble's amended complaint vaguely referenced the "Second Amendment of the United States Constitution." Additionally, a memorandum that Gobble filed in opposition to the VSP's demurrer stated that the "doctrine of sovereign immunity does not apply to prospective injunctive relief to prevent future violations of federal law." Gobble's argument in the circuit court, however, focused on the alleged statutory waiver of the defense of sovereign immunity.[4]

During the circuit court proceedings, Gobble repeatedly argued that Code § 18.2-308.2:2(D) waives the defense of sovereign immunity. Accordingly, the circuit court based its decision on the text of Code §§ 18.2-308.2:2(D) and 9.1-135, the two relevant statutes at issue in this case. The circuit court did not address Gobble's constitutional argument, and Gobble's objections to the circuit court's decision only encompassed his statutory argument.

Significantly, Gobble's sole assignment of error on appeal does not address his constitutional argument. In pertinent part, Gobble's assignment of error argues that:

> [t]he Circuit Court erred in granting the [d]emurrer of the [VSP] on the basis of the defense of sovereign immunity and finding that the defense has not been explicitly waived by statute when the General Assembly has waived that defense in [Code §] 18.2-308.2:2(D) by explicitly providing for a remedy of a civil action when an individual is denied his right to purchase a firearm[.]

Pursuant to Rule 5:25, "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Furthermore, the Court only considers appellate arguments that are the subject of a proper assignment of error. *See, e.g.*, *Russ v. Destival*, 267 Va. 458, 461 (2004); *Wright v. Commonwealth*, 261 Va. 1, 1 (2000).

While Gobble's pleadings contain vague references to the constitutional argument that he now presents on appeal, the circuit court's decision was based on Gobble's statutory argument.[5]

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[4] Gobble failed to cite *Digiacinto* or any related cases to support his argument. He also did not argue that the defense of sovereign immunity is inapplicable to claims that are based on "self-executing" constitutional provisions.

[5] The purpose of Rule 5:25 is to "afford the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals." *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010) (quoting *Weidman v. Babcock*, 241 Va. 40, 44 (1991)).

Moreover, Gobble's constitutional argument is not encompassed by his assignment of error. Under these circumstances, the Court will not consider the merits of Gobble's constitutional argument on appeal.

Although Rule 5:25 permits the Court to consider matters that are not preserved for appeal in order to attain the "ends of justice," we decline Gobble's invitation to apply the "ends of justice" exception of Rule 5:25 in this case.

"This Court considers two questions when deciding whether to apply the ends of justice exception: '(1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice.'" *Commonwealth v. Bass*, 292 Va. 19, 27 (2016) (quoting *Gheorghiu v. Commonwealth*, 280 Va. 678, 689 (2010)). The ends of justice exception is applied in "very limited circumstances." *Williams v. Commonwealth*, 294 Va. 25, 28 (2017) (quoting *Gheorghiu*, 280 Va. at 689). "The presence of a constitutional error is a relevant, though not necessarily dispositive, consideration when determining whether to apply the ends of justice exception." *Bass*, 292 Va. at 28 n.5.

The ends of justice exception of Rule 5:25 applies when a party fails to present a particular argument to the circuit court or other tribunal. *See* Rule 5:25. In the present case, however, Gobble's sole assignment of error does not address his constitutional argument. The Court will not apply the ends of justice exception of Rule 5:25 to address an argument that is not encompassed by a proper assignment of error. Such an argument is simply not before the Court for appellate review.

Furthermore, in the present case the Court's refusal to apply the ends of justice exception will not lead to a grave injustice. Gobble acknowledges that he was convicted of assault and battery in the Juvenile and Domestic Relations District Court of Montgomery County on May 3, 2018. While Gobble contends that he was not convicted of a "misdemeanor crime of domestic violence," the written statement of facts in this case indicates that the victim of the assault and

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> In analyzing whether a litigant has satisfied the requirements of Rule 5:25, this Court has consistently focused on whether the trial court had the opportunity to rule intelligently on the issue. "If [the] opportunity [to address an issue] is not presented to the trial court, there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal."

Id. (quoting *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 526 (2006)).

battery was Gobble's wife. Therefore, Gobble may properly be prohibited from purchasing or possessing firearms under federal law. *See United States v. Hayes*, 555 U.S. 415, 418 (2009).

B. GOBBLE'S STATUTORY ARGUMENT

Unlike his constitutional argument, Gobble's statutory argument is properly before the Court for appellate review. The Court reviews issues of statutory interpretation de novo. *See Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007).

"As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action." *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007) (quoting *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 455 (2005)). "Sovereign immunity may also bar a declaratory judgment proceeding against the Commonwealth." *Id.*

"Only the General Assembly, acting in its capacity of making social policy, can abrogate the Commonwealth's sovereign immunity."[6] *Alliance to Save the Mattaponi*, 270 Va. at 455. "A waiver of sovereign immunity will not be implied from general statutory language but must be explicitly and expressly stated in [a] statute." *Id.* "[T]here can be no waiver of sovereign immunity by implication." *Hinchey v. Ogden*, 226 Va. 234, 241 (1983).

Before a firearms dealer finalizes certain firearms transactions, the dealer must request the criminal history record information of the prospective buyer or transferee from the VSP. *See* Code § 18.2-308.2:2(B)(1). When a firearms dealer requests such information, the VSP must:

> (a) review its criminal history record information to determine if the buyer or transferee is prohibited from possessing or transporting a firearm by state or federal law, (b) inform the dealer if its record indicates that the buyer or transferee is so prohibited, and (c) provide the dealer with a unique reference number for that inquiry.

Id.

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[6] Gobble argues that the "website of the [VSP] . . . advises the public that if denied the purchase of a firearm they may exercise their right to institute a civil action pursuant to [Code §] 9.1-135." As the defense of sovereign immunity can only be waived by the General Assembly, *see Alliance to Save the Mattaponi*, 270 Va. at 455, Gobble's reliance on the statements published on the VSP's website is misplaced.

Code § 18.2-308.2:2(D) provides certain remedies to individuals who are denied the right to purchase a firearm. *See* Code § 18.2-308.2:2(D). In its entirety, Code § 18.2-308.2:2(D) states:

> If any buyer or transferee is denied the right to purchase a firearm under this section, he may exercise his right of access to and review and correction of criminal history record information under [Code] § 9.1-132 or institute a civil action as provided in [Code] § 9.1-135, provided any such action is initiated within 30 days of such denial.

Code § 9.1-135 addresses civil remedies that are available for certain statutory violations. *See* Code § 9.1-135. Significantly, Code § 9.1-135(B) states, "This section shall not be construed as a waiver of the defense of sovereign immunity."

Gobble maintains that Code § 18.2-308.2:2(D) waives the defense of sovereign immunity in the present context. Code § 18.2-308.2:2(D), however, does not contain any language that expressly waives the defense. As sovereign immunity cannot be waived by general statutory language or by implication, Code § 18.2-308.2:2(D) does not waive the defense of sovereign immunity. *See Alliance to Save the Mattaponi*, 270 Va. at 455; *Hinchey*, 226 Va. at 241.

Moreover, Code § 18.2-308.2:2(D) authorizes an individual to file a civil action to challenge the denial of a firearms transaction "as provided in [Code] § 9.1-135." *See* Code § 18.2-308.2:2(D). Code § 9.1-135(B) explicitly reserves the defense of sovereign immunity. *See* Code § 9.1-135(B). Therefore, the defense of sovereign immunity applies in civil actions that are filed pursuant to Code § 18.2-308.2:2(D). *See* Code §§ 18.2-308.2:2(D) and 9.1-135. The language of Code § 9.1-135(B) provides an express indication of the General Assembly's intent to reserve the defense of sovereign immunity in the present context.[7]

Accordingly, we conclude that the circuit court did not err when it determined that the defense of sovereign immunity barred Gobble's claim for injunctive relief. Therefore, the circuit court properly sustained the VSP's demurrer on the basis of sovereign immunity.

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[7] "The judiciary is not to substitute its own judgment in place of the General Assembly's; rather than inferring the intent of legislation, our role is to ascertain the intent of the General Assembly as evidenced by the words used by it." *City of Charlottesville v. Payne*, 299 Va. 515, 532 (2021). The authority to amend Code § 18.2-308.2:2(D) to expressly waive the defense of sovereign immunity lies with the General Assembly, not the Court. *See Christian v. State Corp. Comm'n*, 282 Va. 392, 401 (2011).

III. CONCLUSION

For the reasons stated, the Court affirms the judgment of the circuit court.

This order shall be certified to the Circuit Court of Roanoke County.

A Copy,

Teste:

Clerk