Docket No. 06-15404-G

The United States Court of Appeals
For the Eleventh Circuit

James Camp, Appellant
v.
Betty B. Cason
and
Bill Hitchens, Appellees

Appeal from the United States District Court
For the Northern District of Georgia
The Hon. Charles A. Pannell, Jr.

Reply Brief of Appellant

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(A) Summary of Arguments

Appellees' argument is essentially that once they were enjoined to issue Camp his license without requiring the disclosure of his social security account number ("SSN"), the lawsuit was moot in spite of their past and present violations of the Privacy Act and state law regarding firearms licenses. As but one example, it is undisputed both in the District Court and this Court that Appellees were and currently are violating section 7(b) of the Privacy Act. Because Appellees issued Appellant Camp his license, *Appellees argue*, the determination of the 7(b) issues (and presumably all the other issues in the case) must await another plaintiff in another case. Of course, if Appellees' argument is to be accepted, a subsequent applicant could sue for Appellees' section 7(b) violations but still have his case cleverly mooted by the hasty issuance of a license to the applicant. The cases cited by the government Appellees in this appeal simply do not support such a ridiculous mootness argument.

Appellees make an additional argument, that Hitchens changed the Firearms License Application to comply with the Privacy Act and therefore the case is moot. First, this is not a ground relied upon by the District Court in its Order dismissing the case for mootness. Second, as stated above, it is

undisputed that the current form *still* violates section 7(b). There is no "change in circumstances" on this issue. Hitchens does not even attempt to argue that he has complied with the warning requirements of section 7(b) because he knows that, absent any authority for the SSN request, he cannot request the SSN and still comply with section 7(b).

The Appellees filed response briefs in this Court but failed to address their past and continuing violations of Section 7(b) of the federal Privacy Act. The reason for this is that they cannot deny the violations, they cannot defend them, and they cannot explain them away. The best they can hope for is that this Court will mistakenly overlook the violations as well. The District Court's complete failure to address the 7(b) issue is alone reason enough to reverse the judgment of the District Court.

Cason and Hitchens also fail to rebut effectively Appellant Camp's other arguments, most of which Cason and Hitchens fail even to mention. Apparently unable to respond to the eight issues Camp raised on appeal, Cason and Hitchens created and argued in their briefs their own three issues. Cason and Hitchens have not cross-appealed in this case, and are not permitted to raise their own issues on appeal. Camp is the Appellant, and he alone determines what issues he chooses to raise with this Court. *Jones v.*

Campbell, 436 F.3d 1285 (11th Cir. 2006) ("the appellants may control the issues they raise on appeal").

The District Court did not order any relief relating to the forced disclosure of employment information, but in the order dismissing the case for mootness, the District Court recited as one basis for dismissal the mistaken belief that the court had already enjoined the Appellees from collecting this information. R2-47-8. Had the District Court included such a provision in its preliminary injunction, this issue would conceivably be moot, but the Court did not order such relief. Other than Appellees' frank admission that they demanded and collected employment information from Appellant, Brief of Hitchens, p.10 n.3, neither Appellee makes any argument on appeal related to this issue.

Because the District Court did not address several aspects of relief sought by Camp, incorrectly concluding as a result that the case was moot upon the grant of one request for relief, and because Cason and Hitchens have not even attempted to rebut Camp's arguments, this case must be reversed and remanded to the District Court.

(B) Past and Continuing Violations of Section 7(b) of the Privacy Act Present a Live Controversy

Camp raised as the third issue in his Appellate Brief Cason's and Hitchens' violations of Section 7(b) of the Privacy Act. Brief of Appellant, p. 18. Section 7(b) of the Privacy Act states:

> Any federal, state, or local government agency which requests an individual to disclose his Social Security Account Number shall inform that individual whether that disclosure is mandatory or voluntary, by which statutory or other authority such number is solicited, and which uses will be made of it.

It is undisputed that Cason and Hitchens are state or local government agencies that requested Camp disclose his SSN. R1-6-1, R2-39-Affidavit-2. It also is undisputed that the disclosure was mandatory. R2-39-Affidavit-2; Brief of Appellee Cason, p. 5 ("Appellant declined to furnish his SSN as then required in the application…"). Finally, it is undisputed that Cason and Hitchens did not inform Camp "by which statutory or other authority such number [was] solicited, and which uses [would] be made of it." R2-39-Affidavit-2.

Neither Cason nor Hitchens attempted to argue in the District Court or in their Appellate Briefs that the requirements of Section 7(b) were met at the time of application, and neither Appellee attempted to argue that they are

complying with the requirements of section 7(b) even today. There is nothing "hypothetical" or "academic" about this controversy.

There is simply no dispute that both Defendants violated and insist on continuing to violate section 7(b) of the Privacy Act. The preliminary injunction issued by the District Court did not mention this issue, so it remains unresolved. Camp is entitled to have this issue resolved, and the issuance of his license does not change the fact that he suffered an injury in fact, a harm that is concrete and particularized, when Appellees violated section 7(b) of the Privacy Act. No intervening action by Hitchens regarding the application form has eradicated the section 7(b) violation, nor does Hitchens contend so. Rather, Hitchens contends that he made the SSN line "Optional," thus addressing section 7(a). There are no changed circumstances relating to section 7(b) at all.

It is undisputed that Camp had standing at the beginning of the lawsuit to bring his section 7(b) claims. The issue is whether subsequent events mooted his section 7(b) claims. No argument has been raised by either Appellee that they now comply with section 7(b). Thus, there is no genuine act of self-correction in which the District Court could justifiably place its confidence that Appellees intended to follow the law in the future. Even the "new" application form in the record violates section 7(b), and there is no

other evidence of compliance with the section 7(b) warnings. Absent any evidence of current compliance with the law or any intention to comply with the law in the future, Camp's claims pursuant to section 7(b) were not rendered moot by any voluntary or involuntary act of the government. The District Court's judgment must be reversed, and this case remanded to the District Court with instructions to find that Section 7(b) was violated and continues to be violated, by both Cason and Hitchens, and to fashion appropriate remedies.

(C) <u>A Case is Not Moot upon the Grant of Partial Relief</u>

(C)(1) Camp's Requested Relief Has not Been Fully Addressed

Cason and Hitchens both rely almost entirely on the theory that the case is moot because Camp's Georgia Firearms License ("GFL") application was processed under an injunction that required that it be processed without requiring his SSN. The essence of Cason's and Hitchens' mootness argument is that, after the District Court ordered them to process Camp's renewal GFL application without his SSN, they were absolved of all past and future violations of the Privacy Act. Under this logic, no plaintiff that receives a preliminary injunction ever could continue to prosecute his case. More specifically, no firearms license applicant in Georgia could ever get a review of section 7(b) violations because the government defendants could

forever evade the issue simply by issuing the license to the applicant. A case does not fall under the mootness doctrine if the issues are capable of repetition, yet evading review. *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004).

Things might be different if the relief Camp had requested had been only the preliminary injunction that he received. If (and only if) that were the case, it could be said accurately that Camp could not be afforded additional relief. But, these are not the circumstances that are present in this case.

Camp requested declaratory and injunctive relief in many forms, at least some of which is not addressed at all by the fact that Appellees were enjoined to issue his renewal GFL application without demanding his SSN, leaving several claims remaining. Cf. *Wong v. Department of State*, 789 F.2d 1380, 1384 (9th Cir. 1986) (case not moot when appellants afforded "only a portion of the remedy sought"). For example, as discussed above, the preliminary injunction did not have any effect at all on Cason's and Hitchens' violations of Section 7(b) of the Privacy Act. The other relief Camp requested will be discussed in more detail in separate sections below, but each particular claim for relief should receive a separate determination of

mootness. First, a deeper examination of Appellees' mootness argument is in order.

(C)(2) Mootness Cannot be Based on Involuntary Cessation of Illegal Behavior

Cason and Hitchens rely on several cases to support their argument of mootness for Appellant's entire case. *See*, for example, *National Advertising Company v. City of Miami*, 402 F.3d 1329 (11th Cir. 2005), *Troiano v. Supervisor of Elections*, 382 F. 3d 1276 (11th Cir. 2004), *Jews for Jesus v. Hillsborough County Aviation Authority*, 162 F.3d 627 (11th Cir. 1998). These cases all have something in common. They base a finding of mootness on the ***voluntary*** cessation of illegal behavior. In the case at bar, however, Cason and Hitchens were ***ordered*** to cease their behavior relating to section 7(a). By virtue of the preliminary injunction (R1-13), Cason was ***involuntarily*** required to process Camp's renewal GFL application without his SSN, and Hitchens was ***involuntarily*** prevented from requiring the use of his application form requiring the applicant's SSN.

The difference between the voluntary-cessation mootness cases, and the involuntary cessation of the case at bar, is an important one. When the defendant voluntarily changes his behavior, one might reasonably infer that there is an "absence of some reasonable basis to believe that the policy will

be reinstated if the suit is terminated." *Troiano,* 382 F. 3d at 1285. Thus, the court applies a presumption that the offending behavior will not continue. On the other hand, when the defendant is forced, under penalty of the contempt powers of the court, to change his behavior, such an inference is not reasonable. Quite the contrary. One who is forced to change his behavior can reasonably be expected to revert to the prohibited conduct at the earliest opportunity.

In this case, Cason and Hitchens both ***insist*** upon ***continuing*** to violate section 7(b) of the Privacy Act. In addition, Cason and Hitchens refuse to expunge any information illegally collected. Appellee Cason even insisted in the District Court that she needs to collect employment information to determine the applicant's "good moral character." R1-23-3. Thus, the instant case is very different from a case where the government defendants voluntarily cease all illegal behavior and demonstrate their willingness to comply with the law in the future.

(D) Even the New Application Violates the Privacy Act

Cason and Hitchens also claim that, although the District Court relied on the issuance of its injunction (R1-13) as the basis for finding the case moot, the case also is mooted by Hitchens' filing of a revised GFL application form. Hitchens' Brief (adopted by Cason), p. 12. At best,

Hitchens' revised application form could moot only Camp's request for relief pertaining to ***future*** violations of Section 7(a) of the Privacy Act. It could not address ***past*** violations of Section 7(a), any violations of Section 7(b),[1] or violations of other laws. Hitchen's action would, at best, moot one particular ***claim***, not Appellant's entire ***case***. A claim may be dismissed as moot while leaving other claims remaining in the case in which the litigant has a personal stake. See, *e.g.*, *Smith v. Marsh*, 194 F.3d 1045, 1048-49 n.2 (9th Cir. 2002); *Wong v. Department of State*, 789 F.2d 1380, 1384 (9th Cir. 1986) (holding that because the acts of government "afford appellants only a portion of the remedy sought . . . this appeal is not moot.").

To be clear, however, Camp does not concede that any claims are moot. Appellee Hitchens filed a different form with the District Court ostensibly addressing section 7(a) violations only ***after*** Appellees lost the hearing for a preliminary injunction related to section 7(a).

(D)(1) A Revised Form Does Not Moot Camp's Privacy Act Claim

Based on the new and different form, Cason and Hitchens assert without citation to the record that the GFL application form of which Camp

[1] Indeed, the ostensibly "current" application form in the record is a blatant violation of section 7(b) of the Privacy Act.

complains "no longer exists" and that therefore Camp's case is "moot." Hitchens' Brief (adopted by Cason), p. 13, note 4. This is almost the ***exact*** same argument counsel for Hitchens used, ***unsuccessfully***, two years ago in another Privacy Act case. *See Schwier v. Cox*, 412 F.Supp.2d 1266, 1275 (N.D.Ga. 2005).

> Defendant argues that since the state registration ***form has been modified*** during the course of the litigation, plaintiff's original section ***7(b) claims have been mooted*** . . .

Id. (emphasis added).

Camp is shocked and dismayed to discover the Office of State Attorney General claiming in the present case that Camp's reliance on *Schwier* is misplaced because, Hitchens disingenuously claims,, "**At no point did the state contend that the case was moot**." Hitchens' Brief (adopted by Cason), p. 13. As can be seen from the quote above, this is blatantly untrue. The Office of State Attorney General argued not only mootness, but also argued mootness ***because of a modification to the form***. The argument also related to section 7(b) of the Privacy Act, and the Court made it clear that the government had to comply with section 7(b).

Nowhere does Hitchens' Brief mention, in its discussion of *Schwier v. Cox* (on pp. 13-14), this issue of the government modifying its form and the

government's contention of mootness. Nor does Hitchens' Brief mention the extensive discussion of section 7(b) of the Privacy Act and the District Court's directions to the government ordering it to comply with section 7(b). *Id*. at 1275-76. Hitchens' brief instead claims that *Schwier v. Cox* is "not similar" to the instant case and that the Court's analysis focused upon the grandfather clause. Although the opinion in *Schwier v. Cox* does address the grandfather issue, the absence of any grandfather issue in the present case and the absence of any discussion of the grandfather issue in the pinpoint cites provided by Camp, 412 F.Supp.2d at 1275-76, can lead only to the discouraging conclusion that Hitchens' misrepresentation is intentional.

(D)(2) Nothing in the Record Indicates the Official Form Changed

It also bears repeating that with respect to the "revised" form filed below, neither Hitchens nor Cason filed testimony, affidavits, or other competent evidence in the District Court to support the existence of a revised application that complies with section 7(a) of the Privacy Act (though not section 7(b)). There simply is no evidence in the record below to support their claim that the "prior" application form "no longer exists." The record contains a modification to the GFL application form, but this form was "filed" without so much as an affidavit testifying to its creation, authenticity, or use. The record is devoid of any evidence revealing whether

this is an additional form, a proposed form, or (as Hitchens' now suggests) a replacement form. Although invited to do so on multiple occasions, Hitchens declined to file an affidavit explaining the significance of this revised form.

While it may be tempting to give the benefit of the doubt to the head of a state agency and jump to the conclusion that the revised form must have replaced the prior form, it would be wrong to do so. Camp filed sworn testimony from two witnesses, ***after Hitchens filed his revised form,*** showing that the revised form had not, in fact, been implemented. R1-28 and R1-30. Thus, Camp presented evidence that the revised form had not been implemented, and Cason and Hitchens' provided no evidence that it had been. Under these circumstances, this Court should not accept Cason's and Hitchens' bald assertion that the "prior" form "no longer exists."

Furthermore, even if the "revised" form is indeed a replacement form, it does ***nothing*** to demonstrate Hitchens' compliance with section 7(b) of the Privacy Act. Rather, even a cursory examination of the form shows that it violates section 7(b) by failing to inform applicants of the statutory or other authority for requesting the applicant's SSN and failing to disclose "all uses contemplated for the SSNs." *Cf. Schwier v. Cox*, 412 F. Supp. 2d at 1276 (holding that these warnings are required even when the disclosure is

voluntary). "The Court agrees with plaintiffs that section 7(b) requires that applicants be informed as to how defendant will use their SSNs. The Court directs defendant to revise the voter registration forms and instructions so as to comply with section 7(b)." *Id*. at 1275 n. 9. Defendant "must consider the language of section 7(b) in drafting the new forms and instructions." *Id*. at 1276. Cason and Hitchens offer no argument below or in this Court relating to their form's lack of compliance with section 7(b), other than to assert that a potential compliance with section 7(a) (attempted by typing in the word "Optional") moots Camp's entire case and to argue that *Schwier v. Cox* did not involve any contention by the state "that the case was moot." Hitchens' Brief, p. 13 ("At no point did the state contend that the case was moot.").

None of the above issues were mooted by the District Court's grant of a preliminary injunction on one issue relating to section 7(a), and none of the above issues were mooted by Hitchen's filing of a modified application form, even if this court is inclined to accept that there is competent evidence in the record of such a modification. The District Court's Order should be reversed.

(E) Expungement of Camp's SSN Presents a Live Controversy

(E)(1) Cason Still Has Camp's SSN

The District Court held that Camp did not provide his SSN on his GFL application, and therefore was not entitled to have it expunged. R2-47-8, 9. This holding was in error because the allegations, undisputed facts, and Cason's admission all demand a finding that Cason possesses Camp's unlawfully collected SSN. Camp submitted a sworn affidavit in which Camp testified that Cason personally informed him that none of this litigation mattered because she possessed his SSN from his previous GFL application. R2-39-Affidavit-3. Cason does not deny that she possesses Camp's SSN. The District Court never addressed the affidavit or Cason's admission.

In the face of this omission by the District Court, Cason obliquely argues that Camp is not entitled to expungement because she asserts that the Georgia Open Records Act has an exception that presumably would prohibit her from disclosing Camp's SSN pursuant to a request under the Open Records Act. Cason Brief, p. 13. This argument entirely misses the boat. Cason is arguing that she may illegally collect SSNs from GFL applicants and maintain records of the SSNs wrongfully collected based on nothing more than the fact that state law does not require her to release them when

requested under the Open Records Act. The exception to the state Open Records Act does not override federal law.

Cason's argument fails on multiple other levels. First, it should be noted that Cason did not raise this or any other argument against expungement of her records of Camp's SSN, in the trial court. Arguments raised for the first time on appeal are not considered by this Court. *Narey v. Dean,* 32 F.3d 1521, 1526-27 (11th Cir. 1994).

Second, even if this Court does consider Cason's argument, it defies logic that Cason should be permitted to retain illegally collected data just because one state law scheme may prevent dissemination of those data ***under certain circumstances.*** The state law cited by Cason, O.C.G.A. § 50-18-72(d), exempts GFL applications and associated records from mandatory disclosure under the state Open Records Act. It continues, however, by stating, "This subsection shall not preclude law enforcement agencies from obtaining records relating to licensing and possession of firearms as provided by law." Furthermore, Cason does not even attempt to argue that she would not have to disclose Camp's SSN if she were subject to a lawful subpoena, search warrant, or other court order.

(E)(2) Further Dissemination of Camp's SSN is not at Issue

Cason's argument about dissemination is a red herring. Her further dissemination of Camp's SSN would constitute a separate violation of a different section of the Privacy Act that is not at issue in this case. The Privacy Act prohibits the collection and recording of SSNs even without dissemination, and case law has provided for the remedy of expungement. *Hobson v. Wilson,* 737 F. 2d 1, 64 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843 (1985). It is absurd for her to defend against a remedy for her past violation of one section of the Privacy Act, section 7(a), by claiming state law precludes her from certain future violations of a ***different*** section of the federal Privacy Act. To the extent she possesses Camp's SSN in her records, it should be expunged. *Hobson,* 737 F. 2d at 64 (recognizing "it is now well-established that an order for expungement of records is, in proper circumstances, a permissible remedy for an agency's violation of the Privacy Act.").

It is also absurd to argue that Camp's case is "moot" while Cason continues to keep and maintain Camp's SSN. This presents a live controversy involving Camp's SSN, but Cason claims that Camp cannot suffer an injury resulting from her illegal collection of his SSN solely because she does not have to release Camp's SSN under Georgia's Open

Records Act. What Cason overlooks is that ***Camp already has suffered an injury.*** The Privacy Act forbids collection of SSNs, with certain exceptions (none of which Cason claims she meets). This Court has ruled that a violation of the Privacy Act is itself actionable under the Civil Rights Act. *Schwier v. Cox*, 340 F. 3d 1284 (11th Cir. 2003). It is not necessary for Camp to suffer ***further*** injury in the form of a release of his SSN to unauthorized persons in order for Camp to maintain an action against her. He already has been injured, the collected SSN remains in Cason's records even today, and he is entitled to a remedy.

This case should be reversed and remanded with instructions for the District Court to order Cason to ***expunge*** Camp's SSN from her records. The issuance of Camp's license does not mitigate Camp's personal stake in the outcome of a dispute over whether she may retain information collected in violation of the Privacy Act.

(F) The Other Relief Sought by Camp Presents a Live Controversy

In addition to the expungement of Camp's SSN from Cason's records, Camp requested other forms of relief not addressed by the District Court[2]. The Complaint contains numerous other requests for relief. Camp listed

[2] Camp listed these forms in his initial Brief, p. 12 (including footnote 3).

most of these remedies in his initial Brief to this Court, showing how the District Court failed to address this relief. Appellees have completely failed to address these issues in their Briefs, relying instead on the argument that, once they were enjoined from violating ***one*** section of the Privacy Act, their other, continuing violations of the Privacy Act and state law should not be heard by the District Court. The District Court failed to address any request for relief in the Complaint, concluding that by ordering Appellees to issue Camp's firearms license without requiring his SSN, the Court had granted all the relief requested. In fact, in granting the preliminary injunction, the District Court addressed relief only under section 7(a) of the Privacy Act, and then only in part.

The District Court did not address Camp's request for an injunction prohibiting Appellees from requiring employment information from GFL applicants. R1-1-16. The District Court did not address Camp's request that they be ordered to purge his employment information from their records. R1-1-16. The court did not address Camp's request for a declaration that the process they used violated Section 7(b) of the Privacy Act. R1-1-14. The court did not address Camp's request for an injunction requiring them to comply with Section 7(b) of the Privacy Act. R1-1-14. The court did not address Camp's request for declaratory relief relating to whether Appellees'

actions violated the Constitutions of the United States and the State of Georgia. R1-1-15. Appellees have not addressed any of these issues, either in the court below or on appeal. The District Court's Order should be reversed, and the case should be remanded with instructions to address the live controversies presented by each request for relief.

Conclusion

The government's position in this case is clear. Once Appellees were ordered to issue Camp a license, they believe that all was well with Camp and that he cannot challenge their continued violations of the law nor request that they expunge information unlawfully demanded and collected. Under such a theory, these live controversies could ***never*** be addressed once the government issued a license, whether voluntarily or under court order. Given that the Georgia licensing statute ***demands*** that probate judges issue licenses "[n]ot later than 60 days after the date of application," O.C.G.A. § 16-11-129(d)(4), it is highly unlikely that these issues could ever make it to trial as Appellees' argument would always render the issues "moot" after 60 days.

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Certificate of Compliance

I certify that this Brief of Appellant complies with Rule 32(a)(7)(B) length limitations, and that this Brief of Appellant contains 3,342 words as determined by the word processing system used to create this Brief of Appellant.

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Certificate of Service

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