IN THE SUPREME COURT OF GEORGIA

GEORGIACARRY.ORG, INC., et.al. Appellants,	)	
v.	)	Case No. S16A0294
ATLANTA BOTANICAL GARDEN, INC., Appellee	)	

Brief of Appellants

Appellants GeorgiaCarry.Org, Inc. and Phillip Evans state the following as their opening Brief.

John R. Monroe
John Monroe Law, P.C.
Attorney for Appellants
9640 Coleman Road
Roswell, GA 30075
State Bar No. 516193
678 362 7650
770 552 9318 (fax)
jrm@johnmonroelaw.com

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Part One – Statement of Facts and Proceedings Below

A – Introduction

Appellant Phillip Evans ("Evans") is a resident of Gwinnett County, and member of Appellee Atlanta Botanical Garden, Inc. (the "Garden").[1] R5. The Garden[2] operates a botanical garden open to the public on property leased from the City of Atlanta. R4. Evans has a Georgia weapons carry license ("GWL") issued to him pursuant to O.C.G.A. § 16-11-129. *Id.* R5. On October 5, 2014, Evans and his wife and children visited the Garden for about three hours while Evans was openly carrying a firearm in a holster on his waistband. *Id.* While there, Evans purchased a one-year family membership to the Garden. *Id.* No one on the Garden's staff objected to Evans' firearm. *Id.* On October 12, 2014, Evans and his wife and children visited the Garden again and Evans was again openly wearing a firearm. *Id.* After entering the Garden, Evans was accosted by Jason Diem, of the

[1] This case comes to this Court from the trial court's order dismissing Evan's claims. An appellate court reviewing a trial court's order to dismiss views all of the plaintiff's well-pleaded material allegations as true, and views all denials by the defendant as false. *Barrett v. National Union Fire Insurance Company,* 304 Ga.App. 314, 315 (2010). Therefore the facts stated in this Brief are taken from the Complaint.

[2] For ease of reference, the Appellee itself and the botanical garden that it operates are referred to interchangeably in this Brief as the "Garden."

Garden's management team. R6. Diem called the Garden's security team, and a security officer detained Evans while Atlanta police were called. *Id.* Diem told Evans that Evans could not carry a firearm at the Garden. *Id.* An Atlanta police officer arrived, and the officer escorted Evans off the Garden property at Diem's request. *Id.* After this incident, Evans contacted the Garden CEO, Mary Pat Matheson, who told Evans that only police officers are allowed to have weapons at the Garden. *Id.* Evans intends to continue to visit the Garden and desires to carry a weapon while he does so. *Id.*

Evans is a member of Appellant GeorgiaCarry.Org, Inc. ("GCO"). R5. GCO's mission is to foster the rights of its members to keep and bear arms. *Id.* GCO has other members that visit the Garden, who have GWLs, and who desire to carry weapons while they are at the Garden. R7.

B – Proceedings Below

GCO and Evans commenced this action on November 12, 2014. R4. In their Complaint, they sought declaratory and injunctive (both interlocutory and permanent) relief for violations of state law. R7-8. On May 19, 2015, the trial court issued a written opinion and order dismissing GCO's and Evans' claims. R 67. In its order, the trial court ruled that GCO and Evans "impermissibly asks this

Court to interpret a criminal statute." The trial court further ruled that GCO and Evans impermissibly sought declaratory relief about how the Garden "may or should act." The trial court also ruled that GCO and Evans were seeking an injunction to "restrain or obstruct enforcement of criminal law." The trial court therefore dismissed all claims. GCO and Evans filed a Notice of Appeal on June 2, 2015. R1.

C – Preservation of Issues on Appeal

GCO and Evans preserved their issues for appeal by obtaining the trial court's order dismissing all of their claims (and explicitly ruling that they could not obtain declaratory or injunctive relief). The final order from which they appeal was entered May 19, 2015. They filed a notice of appeal on June 2, 2015. This appeal is therefore timely pursuant to O.C.G.A. § 5-6-38(a).

Part Two – Enumerations of Error

A. The trial court erred by ruling that a declaratory judgment may not issue to test the validity of proposed future action.

B. The trial court erred by ruling that an injunction may not be obtained against a private entity, on the grounds that the injunction against a private entity would restrain or obstruct enforcement of a criminal law.

Statement on Jurisdiction

This Court, rather than the Court of Appeals, has jurisdiction of this appeal. Pursuant to Art. 6, § 6, ¶ 3 (subp. 2) of the Georgia Constitution, this Court has appellate jurisdiction over "All cases involving equity." In this case, GCO and Evans sought and were denied both interlocutory and permanent injunctive relief. The trial court directly addressed the propriety of the grant or denial of injunctive relief, and denied such relief.

Part Three – Argument and Citations of Authority

Standard of Review

The appellate court reviews questions of law *de novo. Luangkhot v. State,* 292 Ga. 423 (2013). An appellate court reviews dismissals of complaints *de novo. Barrett,* 304 Ga.App. at 315.

Summary of Argument

The trial court erroneously concluded that a declaratory judgment may not be issued regarding future conduct. Indeed, that is what declaratory judgments are for. The trial court further erred by ruling that an injunction may not be obtained against a private entity from banning firearms on that entity's property, on the theory that such a ban involved a criminal prosecution.

1. – Declaratory Judgment Actions May Test Proposed Future Conduct

O.C.G.A. 16-11-127(c) states, in pertinent part:

> A [GWL] holder … shall be authorized to carry a weapon … in every location in this state [with exceptions not applicable to this case], provided, however, that … persons in legal control of private property through a lease [or other agreement] shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21…."

The overarching rule, therefore, is that GWL holders such as Evans and other GCO members, may carry a weapon anywhere in the state.[3] The only exception at play in the present case is what persons in legal control of ***private*** property may do. Evans and GCO maintain that the Garden is in legal control of ***public*** property, so

[3] There are exceptions for "off limits" places, such as courthouses, jails, and prisons, but none of those places is involved in this case.

the exception does not apply. The overarching rule therefore applies to the Garden, and GWL holders may carry weapons at the Garden. The trial court declined to reach that issue, however. The trial court ruled that the Complaint "impermissibly asks this Court to interpret a criminal statute." R67. The trial court relied primarily on *Butler v. Ellis,* 203 Ga. 683, 47 S.E.2d 861 (1948).

GCO and Evans have not asked the trial court to interpret a criminal statute. The only basis for the trial court's implicit conclusion that O.C.G.A. § 16-11-127(c) is a criminal statute is that it is "found in Georgia's criminal code." R67. It is clear, however, that Title 16, and even Chapter 11, of the O.C.G.A. contains multiple sections that are not criminal in nature. By way of example, O.C.G.A. § 16-11-129 is the GWL issuing statute. Likewise, O.C.G.A. § 16-11-173 is the weapons statewide preemption statute. Both these code sections provide private rights of civil action to redress certain wrongs at the hands of governments or government officials, but neither section defines a crime or prescribes a punishment.

Moreover, a reading of O.C.G.A. § 16-11-127(c) reveals no criminal definition. Rather than proscribe conduct, that subsection is an affirmative grant of

authority to engage in certain conduct (carrying weapons). It is not a criminal statute.

Even if it were a criminal statute, however, it is clear that a party may seek a declaratory judgment pertaining to a criminal statute in a non-criminal context. In *Calabra v. Liberty Mutual Fire Insurance Company,* 253 Ga.App. 96 (2001), the court evaluated whether certain conduct by a party constituted a theft by taking under O.C.G.A. § 16-8-4. The Court of Appeals did not question the appropriateness of declaring whether a criminal statute had been violated in the civil context of applicability of an insurance policy to a loss. In the present case, the issue is whether the Garden may ban guns from its leasehold interest where the City of Atlanta is the landlord.

Even if this Court considers this case to be about interpretation of a criminal statute in the context of potential prosecution, *Butler* does not appear to be good law for the proposition relied upon by the trial court. In *Butler*, members of a social club that served intoxicating liquor to its members only and not to the general public brought an action to declare that their conduct was not illegal. This Court ruled that they could not bring a declaratory judgment action in those circumstances. This Court did not emphasize in *Butler* the fact that the alleged

conduct had already occurred, but subsequent rulings from this Court make clear that whether the alleged conduct already has occurred is what makes all the difference. *See, e.g.,* this two-sentence opinion from *Clark v. Karrh,* 233 Ga. 851 (1968) that cites *Butler* for this distinction:

> This action for declaratory judgment and injunctive relief shows that the petitioners are charged with a violation of a criminal statute which they seek to have declared unconstitutional and their prosecution restrained and enjoined. Since the purpose of the declaratory judgment procedure is not to delay the trial of cases of actual controversy but to guide and protect the parties from uncertainty and insecurity with respect to the propriety of some ***future*** act or conduct in order not to jeopardize their interest - ***the pleadings showing the alleged criminal act has already occurred*** - and equity will not take part in the administration of the criminal law, the court did not err in denying the prayers for relief and in dismissing the action. *Code* § 55-102; *Butler v. Ellis*, 203 Ga. 683 (47 SE2d 861).

[Emphasis supplied].[4]

Since *Butler*, it remains true that a declaratory judgment may not be used to interfere with a ***pending*** criminal prosecution. *See, e.g., Sarrio v. Gwinnett*

[4] Since the time of *Butler,* this Court has expressly decided that declaratory judgments are legal remedies, available with or without additional relief. *Bond v. Ray,* 207 Ga. 559 (1951); O.C.G.A. § 9-4-2(c). To round out the analysis, declaratory judgments also are not extraordinary remedies. *Felton v. Chandler,* 201 Ga. 347 (1946); *Milwaukee Mechanics Insurance Co. v. Davis,* 204 Ga. 67 (1948). Thus, irreparable harm need not be proven and the availability and adequacy of (other) legal remedies is immaterial.

County, 273 Ga. 404 (2001) (Rejecting declaratory judgment when "the criminal prosecution was pending.") In *Sarrio,* this Court emphasized, "The purpose of a declaratory judgment is not to delay the trial of cases of actual controversy but to guide and protect parties from uncertainty and insecurity with respect to the propriety of some ***future act or conduct*** in order not to jeopardize their interest." 273 Ga. at 406. [Emphasis supplied]. Consider, for example, how *Butler* would have been a different case if the members ***proposed*** to form the club at which they would serve cocktails, and sought to declare such conduct would not be illegal.

It is clear, post-*Butler*, that the subject matter of a declaratory judgment action may be a criminal provision. In *State v. Café Erotica,* 269 Ga. 486 (1998), a business brought a declaratory judgment challenge to a state criminal statute that prohibited admitting persons under 21 to a venue that featured nude or partially nude dancing. This Court had no trouble declaring the statute to be unconstitutional. In *City of Atlanta v. Barnes*, 276 Ga. 449 (2003), *reversed on other grounds by Barnes v. City of Atlanta*, 281 Ga. 256 (2006), the City of Atlanta imposed an occupational tax on the practice of law within the city. Refusal of a practicing lawyer to pay the tax could result in criminal sanctions. Lawyers brought a declaratory judgment action to challenge the constitutionality of the city

tax ordinance. This Court declared the tax unconstitutional, at no point addressing the propriety of bringing a declaratory judgment action to challenge a criminal ordinance. *See also Sexton v. City of Jonesboro*, 267 Ga. 571 (1997) (Deciding identical issue on identical grounds). In *City of Atlanta v. Hotels.com, L.P.*, 285 Ga. 231 (2009), this Court reversed the dismissal of a declaratory judgment action regarding the applicability of a tax ordinance, a violation of which was subject to criminal penalties. This Court found that a declaratory judgment action to test the validity of that ordinance was appropriate, efficient, and proper.

In *Jenkins v. Manry*, 216 Ga. 538 (1961), a plumber was threatened with arrest and prosecution by the Muscogee County Plumbing and Steam Fitting Board of Examiners if he performed certain plumbing work the Board alleged to be illegal. The plumber brought a declaratory judgment action to test the legitimacy of the Board's position regarding the ***criminal*** plumbing code. The trial court sustained the Board's demurrer, but this Court reversed, finding that the plumber stated a valid claim for declaratory relief. In its opinion, this Court asked rhetorically, "Should [the plumber] be forced to violate the law which he thinks unconstitutional, and suffer a criminal prosecution, in order to test the validity of

the law." 216 Ga. at 540. This Court's implicit answer to its own question was "no."

The Court of Appeals has answered that question explicitly. *Total Vending Service, Inc. v. Gwinnett County,* 153 Ga.App. 109 (1980) ("Appellant is not required to violate a law about which there is an actual controversy concerning its enforceability and suffer a criminal prosecution in order to test its validity.") That quotation was cited in *Manlove v. Unified Government of Athens-Clarke County,* 285 Ga. 637, 644 FN 17 (2009) (Sears, C.J., *dissenting*).

At the federal level, the Supreme Court of the United States ruled that a declaratory judgment action can be maintained absent an actual prosecution if there is a threat of arrest. *Steffel v. Thompson,* 415 U.S. 452 (1974). More to the point, the Court has said that a person may challenge a statute without exposing himself to prosecution. *Babbit v. United Farm Workers National Union,* 442 U.S. 289, 298 (1979).

The foregoing cases can be contrasted with one where a person already has been accused (or already convicted) of a crime. In *Ross v. State,* 238 Ga. 445 (1977), this Court stated:

> It has been held that a suit for declaratory judgment cannot be maintained by a person accused of crime where the alleged criminal conduct has already taken place. See *Pendleton v. City of Atlanta*, 236 Ga. 479 (224 SE2d 357) (1976); *Tierce v. Davis*, 121 Ga. App. 31 (172 SE2d 488) (1970). See also *Provident Life &c. Ins. Co. v. United Family Life Ins. Co.*, 233 Ga. 540 (2) (212 SE2d 326) (1975). It necessarily follows that actions for declaratory judgment are not maintainable by persons already convicted of crimes who wish to examine or reexamine aspects of the conviction or sentence….

Clearly this Court has drawn a distinction between declaratory judgment actions where the person has not been accused (or convicted) and those where he has. Otherwise, the discussion of being ***already accused*** or ***already convicted*** would not be necessary.

This Court recently reaffirmed this application in *Magby v. City of Riverdale*, 288 Ga. 128 (2010), where it found that a person could not challenge a prosecution of ***prior conduct*** in a declaratory judgment action. This Court said, "As we previously have explained, declaratory relief is not the proper remedy for attacking the constitutionality of a municipal ordinance where the alleged criminal activity ***has already taken place.***" 288 Ga. at 129 [emphasis supplied]. Again, the strong implication from this Court's language is that declaratory judgments are appropriate where the alleged criminal activity has ***not*** yet taken place.

The same year this Court decided *Magby*, it decided *Braley v. City of Forest Park*, 286 Ga. 760 (2010). In *Braley*, a shopkeeper had filed a declaratory judgment action against the city challenging a criminal ordinance that affected his business operation. On appeal, this Court considered the merits of the shopkeeper's claims regarding the constitutionality of the ordinance (rather than dismiss the appeal on the grounds that a declaratory judgment action cannot be maintained against a criminal ordinance). It likewise appears that the Court of Appeals applies this standard. In the *Tierce* case cited in *Ross, supra,*, the Court of Appeals ruled that a declaratory judgment was not available "Since the alleged criminal activity has already occurred…." 121 Ga.App. 31.

In the present case, the trial court erred by citing *Butler* for the proposition that Evans' desired ***future*** conduct of carrying a firearm at the Garden could not be the subject of his declaratory judgment action.

The trial court also denied declaratory relief on the grounds that the declaration sought would declare how the Garden "may or should act." The trial court did not elaborate on why this is outside the scope of declaratory relief.

Of course, declaratory judgments frequently take the form of declaring how a party should act (without actually ordering the party to do so). For example, it is

common for an insurance company to file a declaratory judgment action to determine if the policy provides coverage based on a certain set of facts. If the court finds coverage, the declaration is that the insurance company is obligated under the policy to cover the loss at issue. Such declarations are not inappropriate merely because they declare what a party's legal obligation is.

2. An Injunction May Issue Against a Private Entity, Especially Where No Prosecution is Pending

The trial court also denied injunctive relief on the grounds that equity will take no part in the administration of the criminal law. What the trial court did not consider, however, is that the Garden is not a governmental entity and it lacks the power to administer the criminal law. It simply is not possible for an injunction against the Garden to interfere with a prosecution.

As an initial matter, there is nothing in the record to indicat that either Evans or any of GCO's members are subjects of any criminal proceedings. An injunction cannot interfere with a prosecution that does not exist. This is in contrast to the cases cited by the trial court:

- *Arnold v. Mathews*, 226 Ga. 809 (1970): This Court refused to order an injunction against a "pending prosecution."

- *Eatonton v. Peck*, 207 Ga. 705 (1951): Two "police cases" already had been brought against a theater owner when he sued to enjoin the application of the ordinance against him. This Court ruled equity could not intervene.
- *Staub v. Baxley*, 211 Ga. 1 (1954): Suit to enjoin pending prosecutions under city ordinance was dismissed.
- *Bainbridge v. Olan Mills, Inc.*, 207 Ga. 636 (1951): Person deliberately violated ordinance to have himself arrested in order to test validity of ordinance. Injunction denied.

Each case cited by the trial court thus involved criminal prosecutions that already were underway. By contrast, in the present case, there is no allegation that Evans or any of GCO's members violated any criminal statute or ordinance. Instead, Evans and GCO seek to enjoin the Garden from having them arrested for something that is not a crime.

CONCLUSION

Evans and GCO have shown that the trial court erred in dismissing his case without addressing the merits. For this reason and based on the arguments presented herein, the judgment of the trial court should be reversed with instructions to consider the case on the merits.

S:/John R. Monroe
John R. Monroe
John Monroe Law, P.C.
Attorney for Appellants
9640 Coleman Road
Roswell, GA 30075
678-362-7650
State Bar No. 516193
jrm@johnmonroelaw.com

CERTIFICATE OF SERVICE

I certify that on November 18, 2015, I served a copy of the foregoing via U.S. Mail upon:

David B. Carpenter
Alston & Bird LLP
1201 W. Peachtree Street
Atlanta, GA 30309

S:/John R. Monroe
John R. Monroe
Attorney for Appellants
9640 Coleman Road
Roswell, GA 30075
678-362-7650
State Bar No. 516193