IN THE COURT OF APPEALS OF GEORGIA

GEORGIACARRY.ORG, INC., et.al., Appellants,	)	
v.	)	Case No. A19A0862
THOMAS C. BORDEAUX, JR., Appellee	)	

Brief of Appellant

Appellants state the following as their opening Brief.

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Part One – Statement of Facts and Proceedings Below

A – Introduction

Appellants GeorgiaCarry.Org, Inc., William Theodore Moore III ("Moore"), and Shane Montgomery ("Montgomery") (collectively, "GCO") appeal the dismissal of their case against Thomas C. Bordeaux, Jr. ("Bordeaux"), the judge of the Probate Court of Chatham County. They filed their case for mandamus and other relief because Bordeaux failed to process applications for Georgia weapons carry licenses ("GWLs") within the time required by law.

B – Proceedings Below

On April 27, 2018, GCO filed a complaint against Bordeaux in the Superior Court of Chatham County, alleging that Bordeaux failed to issue GWLs to Moore and Montgomery within the time required by law, that Bordeaux generally fails to meet the statutory deadlines for processing GWL applications, and that GeorgiaCarry.Org, Inc. has members in Chatham County that are harmed by Bordeaux's failure. On May 31, 2018, Bordeaux filed an answer in which he admitted he sometimes violates the GWL statute and blamed his failure on insufficient funding. On July 23, 2018, GCO filed a motion for partial judgment on the pleadings, based on Bordeaux's admission. On July 27, 2018, Bordeaux

filed a motion to dismiss. The trial court heard argument on August 7, 2018 and on September 4, 2018, the trial court dismissed the case, apparently granting Bordeaux's motion. The trial court supplemented its order on September 12, 2018, and GCO filed a notice of appeal on September 24, 2018.

C – Preservation of Issues on Appeal

GCO preserved the issues for appeal by obtaining the trial court's orders dismissing the case. The orders from which GCO appeals were entered September 4 and 12, 2018 and GCO filed its notice of appeal on September 24, 2018. This appeal is therefore timely pursuant to O.C.G.A. § 5-6-38(a). The orders appealed from are final in that there is no further action to be taken by the trial court and all issues before the trial court were disposed of in those orders.

Part Two – Enumerations of Error

A. The trial court erred by dismissing GCO's case.

Statement on Jurisdiction

This Court, rather than the Supreme Court, has jurisdiction of this appeal. This appeal is not one of the types reserved for the jurisdiction of the Supreme Court.

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). The appellate court reviews a trial court's grant of a motion to dismiss *de novo*. *Viola E. Buford Family Limited Partnership v. Britt*, 283 Ga.App. 676, 642 S.E.2d 383 (2007). A motion to dismiss may be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim. *Id.*

Summary of Argument

The trial erred in dismissing the case by ruling 1) the claims of Moore and Montgomery were moot; 2) GeorgiaCarry.Org, Inc. does not have standing; 3) Bordeaux in his official capacity has sovereign immunity; 4) Bordeaux in his individual capacity has judicial immunity; and 5) GWLs are issued by probate judges in their judicial capacity. GCO will address each point in turn.

1. – The Individual Claims Were Not Moot

The trial court ruled that Montgomery's and Moore's claims were moot because they received their GWLs after they filed the Complaint. The trial court failed, however, to address two reasons why the claims were not moot: 1) GWLs

are valid for only five years, so both Moore and Montgomery have a continuing interest in the process; and 2) this is a classic case of being capable of repetition yet evading review.

A. Continuing Interest

The implication of the trial court's order is that Moore and Montgomery have a one-time interest in the GWL process, and after they obtain their GWLs they have no longer have a dog in the race. That conclusion is incorrect. A GWL is valid for only five years. O.C.G.A. § 16-11-129(a). Even though Moore and Montgomery have received their GWLs, those GWLs will expire in just over four years and Moore and Montgomery will have to apply again. They therefore still have an interest in the process and the timely issuance of GWLs.

The trial court stated during oral argument that, in order to prevail on this argument, they would have to prove what the conditions would be in five years. Tr., p. 13, ll. 11-14. This idea misses the point. Either Moore's and Montgomery's claims are moot or they are not. Mootness cannot be determined based on what future conditions might be.

B. Capable of Repetition Yet Evading Review

This case deals with the statutory deadlines for issuing a GWL set forth in O.C.G.A. § 16-11-129(d)(2) and (4). Under O.C.G.A. § 16-11-129(d)(2), the judge of the probate court must request an applicant's background check within five days of the date of the application. Under O.C.G.A. § 16-11-129(d)(4), the law enforcement agency must return the background check to the probate judge within 20 days, and the probate judge must issue the GWL to an applicant within 10 days after receiving the background check, unless the probate judge finds the applicant is not eligible. Thus, the maximum amount of time it should take for a probate judge to issue a GWL is 35 days from the date of application. In the present case, Montgomery applied on October 13, 2017 and Moore applied on February 2, 2018. R., p. 6, ¶¶ 8, 11. Montgomery swore on April 23, 2018 that he had not received his license. *Id.*, p. 9. Moore similarly swore on April 17, 2018. *Id.*, p. 10. The record does not reflect on what dates Moore and Montgomery received their GWLs, but Bordeaux's counsel asserted at the August 7, 2018, hearing that Moore and Montgomery had received them. Tr., p. 6, ll. 1-2. Thus, in the case of Montgomery, he signed an affidavit that after 192 days he had not received a GWL, but Bordeaux issued it within 106 more days. In the case of

Moore, he signed an affidavit that after 74 days he had not received a GWL, but Bordeaux issued it within 112 more days.

The common theme is that regardless of whether Bordeaux exceeded the statutory deadline by 157 days or 39 days, when the applicants commenced a legal action against him, it took the same amount of time to "rush" their applications through. Even if it took the full 100 or so days after complaint for Bordeaux to issue the GWLs, one thing that is clear is that a delayed applicant has little chance of having his claims adjudicated prior to receiving his GWL. If all it takes to moot a case such as the present one is for the probate judge to move a plaintiff's application to the top of the stack, the plaintiff's case will be moot every time.

This is a classic case of capable of repetition yet evading review. When a case ostensibly becomes moot, but the matter is one that will likely be repeated and still will not be reviewable, the case is not moot. *Owens v. Hill*, 295 Ga. 302, 758 S.E.2d 758, 798 (2014), *Babies Right Start v. Georgia Department of Public Health*, 293 Ga. 553, 556 (2013).

A closely related doctrine is the "voluntary cessation" doctrine. When a challenged action (or inaction, in the present case) becomes moot by the voluntary cessation on the part of the defendant, the case is not moot because the defendant

could resume the challenged action after dismissal. *WMW, Inc. v. American Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269, 273 (2012). ("An appellee's voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.") The courts have a strong public interest in settling the legality of the practices at issue and so may militate against a finding of mootness in a particular appeal. *Id.* A narrow exception applies to the voluntary cessation doctrine, in which "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id* . This is a heavy burden lying with the party asserting mootness. *Id.* However, the courts grant governmental entities and officials more leeway than private parties in the presumption that they will not resume illegal conduct. *Sweet City Landfill, LLC v. Elbert Cty.*, 347 Ga. App. 311, 316-17, 818 S.E.2d 93, 98 (2018).

Bordeaux's issuing GWLs upon receiving a complaint is the equivalent of voluntary cessation, in that unilateral action on his part is the sole factor that made the claims ostensibly moot. Moreover, although Bordeaux voluntarily ceased the offending conduct *as to Moore and Montgomery only*, Bordeaux's Answer makes it clear that he has long-term issues that cause him to violate the statue on a chronic

basis. He says he has budgeting issues the prevent him from complying with the statute. Issuing GWLs to two applicants will not and does not make the problem go away..

2. Standing of GeorgiaCarry.Org, Inc.

The trial court found GeorgiaCarry.Org, Inc. did not have standing. The trial court did not provide any analysis to support this conclusion, other than to cite *GeorgiaCarry.Org, Inc. v. Allen*, 299 Ga. 716, 791 S.E.2d 800 (2016) and to state, "Petitioner GeorgiaCarry.Org is not an authorized person to seek a writ of mandamus." R., p. 148.

There are multiple reasons why *Allen* is inapposite. First, *Allen* was not a mandamus case, but was a case in the nature of quo warranto. The *Allen* court concluded that "the legislature did not intend for a nonprofit corporation such as Georgia Carry to be considered a "person" for the purposes of pursuing a writ of quo warranto." 299 Ga. At 717. This is because quo warranto is only available to someone "who is capable of claiming the public office…" and "only individual natural persons can hold or claim to hold a public office…." *Id.* Thus, the Court concluded, GeorgiaCarry.Org, Inc. had no standing in its own right.

In the present case, GeorgiaCarry.Org, Inc. is not seeking a writ of mandamus, only Moore and Montgomery were. GeorgiaCarry.Org, Inc. is seeking a declaratory judgment. There is no logical reason to expand the holding of *Allen* to a declaratory judgment sought in the present case. Clearly corporations have standing generically to seek such relief.

Second, in *Allen*, the court analyzed the test for an entity such as GeorgiaCarry.Org, Inc. to have "associational standing." "An association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 299 Ga. At 718. The *Allen* court found that GeorgiaCarry.Org, Inc. probably could satisfy the first and third prongs, but not the second. The Court noted that GeorgiaCarry.Org, Inc.'s purpose is focused on self defense and gun laws, and therefore public office (and therefore quo warranto) was not germane to its purpose. *Id.*

In the present case, the sole reason for denying GeorgiaCarry.Org, Inc. associational standing, germaneness of purpose, is surely not an issue. The present

case deals with licenses to carry weapons, clearly within the scope of GeorgiaCarry.Org, Inc.'s organizational purpose. That brings us to the first and third prong. Moore and Montgomery had standing to sue, and they both swore they were members of GeorgiaCarry.Org, Inc. R., p. 5, ¶ 5. Moreover, GeorgiaCarry.Org, Inc. alleged that it had other members in the same boat as Moore and Montgomery. R., p. 6, ¶¶ 15-17. It is therefore clear that GeorgiaCarry.Org, Inc. meets the first prong. Because the participation of individual members is not necessary for the declaratory judgment that GeorgiaCarry.Org, Inc. sought, GeorgiaCarry.Org, Inc. also meets the third prong. Thus, it meets all three prongs and has associational standing.

3. Sovereign Immunity

The trial court also found that Bordeaux in his official capacity had sovereign immunity. The trial court failed to consider, however, that sovereign immunity does not apply when the legislature waives it. Sovereign immunity protects the state, its departments and officials (in their official capacities) from suits of all kinds, unless immunity has been waived by the legislature. *Fulton County v. Colon*, 730 S.E.2d 599 (Ct.App. 2012). An act of the General Assembly must specifically provide that sovereign immunity is waived, but the Constitution

"does not require that the Act of the General Assembly expressly state 'sovereign immunity is hereby waived.'" *Id*. at 601. "Where a legislative act creates a right of action against the state … and the state otherwise would have enjoyed sovereign immunity from the cause of action, the legislative act must be considered a waiver of the state's sovereign immunity…." *Id*. [emphasis in original].

In the present case, O.C.G.A. § 16-11-129(j) creates a private right of action for an eligible GWL applicant who does not receive a GWL within the time required by law. ("When an eligible applicant fails to receive a license … within the time period required by this Code section … the applicant may bring an action in mandamus or other legal proceeding ….") The establishment of a private right of action constitutes a waiver of sovereign immunity.

Moreover, the law in this State is that when an official fails or refuses to perform an official duty requiring no exercise of discretion, any person who sustains personal inquiry thereby is entitled to mandamus relief. *Stanley v. Sims*, 185 Ga. 518, 525-26, 195 S.E. 439, 443 (1938). Such an action is not within the rule that a State cannot be sued without its consent. *Id*. Clearly, an applicant either meets the requirements for a GWL under O.C.G.A. § 16-11-129 or he does not, and Bordeaux has no discretion to deny an applicant who "checks the boxes." As

he performs only a ministerial function, Bordeaux had no sovereign immunity in his official capacity.

4. Judicial Immunity

The trial court next found that Bordeaux had judicial immunity in his individual capacity. There are multiple reasons why judicial immunity does not apply.

"Judicial officers have been shielded from civil actions for acts done in their judicial capacity from the earliest dawn of jurisprudence." *West End Warehouses, Inc. v. Dunlap,* 233 S.E.2d 284, 141 Ga.App. 333 (1977). But, judicial immunity is foreclosed and a judge is not immune from liability for nonjudicial functions, i.e., actions not taken in the judge's judicial capacity. *Mireless v. Waco,* 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). The trial court found, without support, that Bordeaux was acting in a judicial capacity when processing GWL applications.

A judicial act is one that is "normally performed by a judge" when the plaintiff "dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107 (1978). The issuance of licenses, especially licenses to carry weapons, is not "normally performed by a judge." In the five states bordering

Georgia, licenses to carry concealed weapons are issued by sheriffs (Alabama[1] and North Carolina[2]), the state Department of Safety (Tennessee[3]), the state Department of Agriculture (Florida[4]), and the state Law Enforcement Division (South Carolina[5]). In fact, of the 49 states that issue licenses to carry concealed firearms,[6] only New York and New Jersey have provisions for judges to be involved at all in the licensing process. No state besides Georgia actually requires that applicants apply to a judge for a license. It cannot be said that issuing licenses is "normally performed by a judge."[7]

The Court of Appeals has ruled that there is no judicial immunity for non-damages cases seeking declaratory and injunctive relief, and has applied this ruling to suits against probate judges for issuance of firearm licenses (now called GWLs). *Moore v. Cranford,* 285 Ga. App. 666, 647 S.E. 2d 295 FN 2 (2007), *cert. denied, abrogated by statute on other grounds*.

[1] Alabama Code 13A-11-75
[2] North Carolina Statutes 14-415
[3] Tennessee Code Annotated 39-17-1351
[4] Florida Statutes 790.06
[5] South Carolina Code 23-31-215
[6] Vermont does not issue licenses, but does not prohibit carrying a concealed firearm without a license.
[7] Bordeaux argued below that it does not matter what the other 49 states do, but to argue that is to overlook the test of what is "normally" performed by a judge. The point is, issuing licenses to carry weapons is not normally performed by a judge in any state but Georgia.

5. Judicial Capacity

In addition, the act of issuing a license is ministerial and not judicial. When what we now call a probate judge was referred to as the "county ordinary," the Supreme Court of Georgia noted that issuing licenses by probate judges is not a judicial act:

> The ordinary, under our laws, is an official charged with the performance of duties judicial, ministerial, and clerical. Not by his title, but only by his acts, can the exact capacity in which he appears ever be known upon any special occasion. In admitting a will to probate, he acts as a judicial officer… In issuing a marriage license, he for the moment becomes a ***ministerial*** officer.

Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). [Emphasis supplied]. *Comer* was decided some 13 years before the General Assembly created a licensing requirement and assigned the task of issuing Georgia firearms licenses (the predecessor to the current GWLs) to the probate judges ("ordinaries"). 1910 Ga.L. 134. Presumably, the General Assembly knew from *Comer* that it was assigning yet another ministerial task to the probate judges.

It would be difficult to explain why issuing a GWL is a judicial function, when issuance of a marriage license is not. It is clear in O.C.G.A. § 15-9-30(b)(11) that probate judges "[p]erform such other judicial and ***ministerial*** functions as may be provided by law." (Emphasis supplied).

Moreover, judicial acts involve discretion and ministerial acts do not. The GWL statute itself, O.C.G.A. § 16-11-129, does not appear to confer any discretion upon the probate judges. This is one of the main distinctions between a "shall issue" state like Georgia and a "may issue" state like New Jersey. A probate judge is required to issue a license to all eligible applicants. *Moore* ("The use of the term 'shall' means that the probate judge has no discretion…."); Op.Atty.Gen. U89-21 ("Generally speaking, the current statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit").

In addition, it must be kept in mind that the General Assembly made a provision for mandamus to obtain a GWL for an eligible applicant. Mandamus is intended to compel ministerial acts. It is not available to compel discretionary ones. *Duty Free Air & Ship Supply Co. v. City of Atlanta*, 282 Ga. 173, 174 (2007) ("It is axiomatic that mandamus is a remedy designed to compel the doing of ministerial acts. Mandamus is not an appropriate remedy to … compel the exercise of official discretion.")

The General Assembly is presumed to be aware of existing law when it enacts a new law. *United States Bank National Association v. Gordon*, 289 Ga. 12, 14

(2011). It is therefore safe to say that the General Assembly knew when it enacted the language providing for mandamus to compel issuance of a GWL that mandamus is available for ministerial functions and not discretionary ones. The General Assembly can thus be presumed to know that issuance of GWLs is a ministerial function (consistent with the Supreme Court's pronouncement in *Comer* that issuance of marriage licenses is a ministerial function).

A. This is Not a Damages Case

Even if the Court somehow concludes that Bordeaux's processing of a GWL application is a judicial function, judicial immunity still does not apply. GCO did not sue Bordeaux for damages. GCO sued in mandamus and for declaratory relief. It is well settled that the doctrine of judicial immunity does not apply for declaratory and injunctive relief. *Earl v. Mills*, 275 Ga. 503, 504 (2002). Moreover, the attorney's fees sought by Plaintiff are not an item of damages. This is distinguishable from a case for attorney's fees under O.C.G.A. § 13-6-11, in which attorney's fees are an item of damages (and explicitly called so). *Earl, Id*. GCO is unable to find a case where Georgia courts have disallowed attorney's fees, under a public policy fee-shifting statute, on the grounds of judicial immunity.

At least one other court in this state has explicitly considered the issue of whether the processing of a GWL is a judicial function. In 2010, the Superior Court of Gwinnett County, in deciding a mandamus case similar to the present case, said:

> It cannot be said that processing a firearms license application is an exercise of "judicial powers." This Court finds that the processing of firearms license applications is not a judicial function.

Hill v. Clarke, Case No. 09-A-07488-2, Order Granting Plaintiff's Motion for Summary Judgment (Superior Court of Gwinnett County, August 3, 2010) ("*Hill 1*"). A copy of the Order in *Hill 1* is in the record at pp. 29-40.

The *Hill* case is a close parallel to the present case. In *Hill*, the plaintiff sued the probate judge of Gwinnett County for refusing to issue him a GWL. The Superior Court of Gwinnett County ruled in the plaintiff's favor, entered a writ of mandamus to issue the GWL, but denied the plaintiff's motion for attorney's fees pursuant to O.C.G.A. § 16-11- 129(j), on the grounds that it was not "appropriate" to do so. The Court of Appeals reversed, but ordered the trial court to consider the issue of judicial immunity. *Hill v. Clarke,* 310 Ga.App. 799, 714 S.E.2d 385 (2011) ("*Hill 2*"). On remand, the trial court decided there was no judicial immunity and awarded fees and costs of $20,545.50. *Hill v. Clarke*, Case No. 09-A-07488-2, Order Awarding

Attorney's Fees and Costs (Superior Court of Gwinnett County, March 2, 2012) ("*Hill 3*"). A copy of *Hill 3* is in the record at p. 41.

In another closely paralleled case, the Superior Court of Clayton County entered a writ of mandamus against the Probate Judge of Clayton County for failing to issue a GWL to an eligible applicant. *Perry v. Ferguson,* Case No. 2010CV-1196-6, Order on Motions for Summary Judgment (Superior Court of Clayton County, March 30, 2012) ("*Perry 1"*). A copy of *Perry 1* is in the record at pp. 42-45. The Supreme Court of Georgia affirmed, without any mention of judicial immunity. *Ferguson v. Perry*, 292 Ga. 666 (2013) ("*Perry 2"*). After affirmance in that case, the Superior Court of Clayton County awarded fees and costs in the amount of $32,910. *Perry v. Ferguson*, Case No. 2010CV-1196-6, Final Order Awarding Plaintiff's Costs and Fees (Superior Court of Clayton County, September 9, 2013) ("*Perry 3"*). A copy of *Perry 3* is in the record at p. 46.

Finally, if issuing GWLs is a judicial act, then it is done in violation of the Canons of Judicial Conduct. Rule 2.9 prohibits judges from receiving *ex parte* information, or considering factual information not part of the record. Part of the GWL process is the probate judge asks a local law enforcement agency to conduct a background check on the applicant and submit a report to the judge. The judge does

not share this report with the applicant. Either the probate judge violates Rule 2.9 every time he processes a GWL application, or the process is not done in a judicial capacity.

Bordeaux argued that he must be acting in a judicial capacity because O.C.G.A. § 16-11-129 empowers GWL applicants to request hearings before the probate judge (it does not empower probate judges to require hearings on their own). Bordeaux mistakenly believes that "hearings" are the exclusive province of the judiciary. They are not. It is regularly part of the legislative process, at least at the state level, to conduct hearings. Virtually every bill introduced in the legislature is assigned to a committee, which then holds a hearing on the bill. Does Bordeaux suggest that legislative hearings are a judicial function?

It is also well known that the executive branch conducts hearings. Indeed, there is nothing stopping an executive officer from conducting a hearing on any topic within his province. A county development official can hold a hearing on a building permit application. Zoning hearings are commonplace. And if he chose to do so, the Commission of Driver Services could hold a hearing on a driver's license application.

CONCLUSION

GCO has shown why each reason relied upon by the trial court for dismissing the case was erroneous and therefore the judgment of the trial court should be reversed.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I certify that on December 7, 2018, I served a copy of the foregoing via U.S. Mail upon:

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