COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES D. JOHNSON,

Plaintiff,

vs.

FULTON COUNTY SCHOOLS,

Defendant.

Civil Action File No.
20141CV250660

ORDER DENYING INTERLOCUTORY INJUNCTION AND DISMISSING CASE

BACKGROUND

Plaintiff, a Fulton County resident, is a Georgia weapons carry licensee (a "GWL"). He claims he generally carries a firearm and wishes to exercise his constitutional right to bear arms when he visits his children's Fulton County elementary school. He contends a 2014 amendment to O.C.G.A. § 16-11-127.1 gives him the right to do so.

On August 26, 2014 Plaintiff filed a verified Declaratory Judgment Action against Fulton County Schools ("Defendant") seeking a declaration that, effective July 1, 2014, it is no longer a crime for a GWL to carry a firearm on a school campus.

O.C.G.A. § 16-11-127.1 (the "Statute"), generally, criminalizes the possession of a firearm on school property and at school functions, with certain

exceptions listed in the Statute's subsection (c) ("Subsection (c)"). In the 2013-2014 legislative session, the Georgia General Assembly passed House Bill 826, which, when signed by the Governor, became Act 575 ("HB 826" or "Act 575"). Act 575 became effective by operation of law, on July 1, 2014. Act 575 amended O.C.G.A. § 16-11-127.1 by broadening Subsection (c)'s exception to the Statute's gun carry prohibition. Prior to the 2014 amendment, among other rights, a GWL had the right to have a gun in the car when picking up or dropping off someone from school. Act 575 gives a GWL the unrestricted ability to carry a gun into a school building. Plaintiff seeks this Court's declaration that, pursuant to Act 575, he has the unrestricted right to carry his gun on school property, including carrying it to teacher conferences, to school functions, to join his children in the school cafeteria and for any other school-related business.

In an unverified Amended Complaint, filed October 7, 2014, Plaintiff cites Defendant's policy KG(III)(J)(13), prohibiting weapons in school facilities or on school property and claims that, even after the 2014 change to O.C.G.A. § 16-11-127.1, Defendant's officials, and later Defendant's attorney, stated publically it was still a crime to carry a firearm on Fulton County school property. Plaintiff seeks a declaration that Act 575 makes it lawful for GWLs, such as himself, to carry weapons into schools and an injunction prohibiting Defendant from arresting,

citing, fining or prosecuting Plaintiff for doing so while this Declaratory Judgment Action is pending.

Before the Court is Plaintiff's Motion for Interlocutory Injunction (the "Motion"). Having considered the Motion, the parties' briefing, argument of counsel, and all matters of record, the Court hereby conducts the following analysis and issues the following conclusions of law.

STANDARD OF REVIEW

> Injunction is an extraordinary process, and the most important one which courts of equity issue; being so, it should never be granted except where there is grave danger of impending injury to person or property rights, and a mere threat or bare fear of such injury is not sufficient. And it is error for the court to grant an interlocutory injunction in a case where the plaintiff has an adequate remedy at law.

City of Willacoochee v. Satilla Rural Elec. Membership Corp., 283 Ga. 137, 138 (2008) (internal citations omitted).

> In deciding whether to issue an interlocutory injunction, the trial court should consider whether:
>
> (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted;
> (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined;
> (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and
> (4) granting the interlocutory injunction will not disserve the public interest.

SRB Inv. Services, LLLP v. Branch Banking and Trust Co., 289 Ga. 1, 5 (2011) (internal citations omitted).

"In determining whether to issue an interlocutory injunction, the trial court must balance the conveniences of the parties pending final adjudication." Cherokee County v. City of Holly Springs, 284 Ga. 298, 300 (2008) citing Univ. Health Services v. Long, 274 Ga. 829 (2002). Consideration should be given to "whether greater harm might come from granting the injunction or denying it." Univ. Health Services, supra, at 829. "Although the merits of the case are not controlling, they nevertheless are proper criteria for the trial court to consider in balancing the equities." Id. at 301 (punctuation and citation to authority omitted).

ANALYSIS

Sovereign Immunity

Citing Ga. Const. Art. I, § II, ¶ IX(e), Defendant contends sovereign immunity bars this action because Defendant is a political subdivision of the State.

Ga. Const. Art. I, § II, ¶ IX(e) provides as follows:

> Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

Declaratory Judgment Actions are entitled to a waiver of sovereign immunity only in limited contexts, not applicable here. DeKalb County School District v. Gold, 318 Ga. App. 633, 637 (2012). Furthermore, sovereign immunity bars claims for injunctive relief unless the party seeking the injunction can identity a legitimate legislative waiver applicable to its claim. Georgia Dept. of Natural Resources v. Center for a Sustainable Coast, Inc., 294 Ga. 593 (2014).

Ga. Const. Art. IX, § 2, ¶ IX allows the General Assembly to "waive the immunity of counties, municipalities, and school districts by law." In his Amended Complaint, Plaintiff brings his Declaratory Judgment Act pursuant to O.C.G.A. § 16-11-173, which reserves for the General Assembly the regulation of firearms and other weapons and prohibits certain governmental units from regulating them.

O.C.G.A. § 16-11-173 provides, in relevant part, as follows:

> (a)(1) It is declared by the General Assembly that the regulation of firearms and other weapons is properly an issue of general, state-wide concern.
>
> . . .
>
> (b)(1) Except as provided in subsection (c) of this Code section, no county or municipal corporation, by zoning or by ordinance or resolution, nor any agency, board, department, commission, or authority of this state, other than the General Assembly, by rule or regulation shall regulate in any manner:
>
> . . .
>
> (B) The possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of

> firearms or other weapons or components of firearms or other weapons;

Plaintiff cites the following subsection of this statute as providing a soveriegn immunity waiver.

> Any person aggrieved as a result of a violation of this Code section may bring an action against the person who caused such aggrievement. The aggrieved person shall be entitled to reasonable attorney's fees and expenses of litigation and may recover or obtain against the person who caused such damages any of the following:
>
> > (1) Actual damages or $100.00, whichever is greater;
> > (2) Equitable relief, including, but not limited to, an injunction or restitution of money and property; and
> > (3) Any other relief which the court deems proper.

O.C.G.A. § 16-11-173(g).

The Court agrees that O.C.G.A. § 16-11-173 provides a sovereign immunity waiver for actions brought against a "county or municipal corporation" and against "any agency, board, department, commission, or authority of [the State]" for regulating firearms, including their possession. The question before the Court is whether O.C.G.A. § 16-11-173's sovereign immunity waiver applies to school districts such as the Defendant.

Defendant argues O.C.G.A. § 16-11-173 does not apply to school districts, because it does not expressly reference them. In support, Defendant cites a number of statutes where the General Assembly expressly included school districts in

listing the political subdivisions to which the respective laws applied. See O.C.G.A. § 28-5-48(4) (Financial Affairs, State and Local Government Partnership Act); O.C.G.A. § 36-82-61 (Revenue Bond Law); O.C.G.A. § 50-14-1 (Open Meetings Act); O.C.G.A. § 50-21-22 (State Tort Claims Act).

Plaintiff bears the burden of pointing to a legislative act that explicitly waives sovereign immunity and describes the extent of the waiver. Williamson v. Department of Human Resources, 258 Ga. App. 113, 115 (2002). "[S]tatutes providing for a waiver of sovereign immunity are in derogation of the common law and are strictly construed against a finding of waiver." Gwinnett County v. Sargent, 321 Ga. App. 191, 197 (2013). "[I]mplied waivers are not favored." Id.

The statutes cited by Defendant demonstrate the General Assembly states affirmatively and specifically when it intends to include school districts, along with other governmental units, within the scope of an Act. Unlike the statutes Defendant highlights, the Statute does not mention school districts. Furthermore, the Statute fails to use a more general term, such as "political subdivision of the State" or "unit of local government" which could be read to encompass a school district. Moreover, none of the categories of governmental entities mentioned in O.C.G.A. § 16-11-173(b)(1) can be read to include school districts.

When the General Assembly intends to include school districts within the scope of a statute, it does so explicitly. When waiver of sovereign immunity is at

stake, the need for specificity is heightened. The Court assumes the General Assembly is mindful of the burden a plaintiff bears in overcoming the State's sovereignty. Therefore, the Court concludes the General Assembly's failure to include school districts in O.C.G.A. § 16-11-173(b)(1)'s sovereign immunity waiver was intentional.

Accordingly, the Court finds sovereign immunity bars this lawsuit. Nevertheless, for the purpose of completeness, the Court will address the merits of Plaintiff's request for Interlocutory Injunction.

Likelihood of Plaintiff Prevailing on the Merits

Although not controlling, in balancing the parties' equities, the Court must consider the likelihood that Plaintiff will convince the Court he is entitled to carry a weapon onto school property without restrictions. Cherokee County, *supra*. Defendant contends Act 575 was repealed by implication when the General Assembly passed House Bill 60, which became Act 604, also effective on July 1, 2014 ("HB 60" or "Act 604").

Act 604 also broadens Subsection (c)'s exception to the Statute's general prohibition against carrying guns on school property. However, Act 604 does not go as far as Act 575. Act 604, in relevant part, allows a GWL to carry a gun into a school only when the GWL carries or picks up a student. Conceivably, under Act 604, Plaintiff could carry his gun into the school when accompanying his child to

his or her classroom, but not for a teacher conference or when having lunch in the cafeteria.

Defendant points out the Governor signed Act 604 on April 23, 2014, one day after he signed Act 575. Defendant contends the two laws are irreconcilably conflicted because Act 604 makes illegal what Act 575 deems legal. Relying on Rutter v. Rutter, 294 Ga. 1 (2013) and earlier Georgia cases discussing this issue, Defendant argues, under the "repealed by implication" doctrine, Act 604, the later signed Act, effectively repeals Act 575. The Court agrees Defendant has accurately stated the approach Georgia Courts use in dealing with irreconcilable legislation passed in the same legislative session.

However, as Defendant concedes, repeals by implication are not favored. Concerned Citizens of Willacooche v. City of Williacoochee, 285 Ga. 625 (2009). "[O]nly where the later of two acts is clearly repugnant to the former and so inconsistent with it that the two cannot stand together, or where it is manifestly intended to cover the same subject-matter of the former and operate as a substitute for it that [repeal by implication] will be held to result." Board of Public Ed. and Orphanage for Bibb County v. Zimmerman, 231 Ga. 562, 566-567(1974).

Plaintiff argues Act 575 and Act 604 do not meet the test for repeal by implication. The Court agrees, but not by applying the mechanism embodied in O.C.G.A. § 28-9-5(b), as Plaintiff urges. The Court does not read O.C.G.A. § 28-

9-5(b) as a statutory construction statute. Instead, when viewed in context of the Code's Chapter 9, where it resides, O.C.G.A. § 28-9-5(b) serves only to give direction to the Code Revision Commission ("CRC") and does not dictate how two statutes, covering the same subject matter and passed during the same legislative session, should be reconciled. The conclusion is buttressed by Rutter, 294 Ga. at 2 (rejecting CRC's publication of a statute as playing a role in that statute's validity).

The General Assembly has spoken through O.C.G.A. § 1-3-1, directing the Courts to interpret statutes by "look[ing] diligently for the intention of the General Assembly." Both the House and Senate passed HB 826, now Act 575, by wide margins. Furthermore, the Senate voted to pass HB 826 after it voted to pass HB 60. Without legislative history to the contrary, this is evidence the General Assembly intended to allow GWLs to carry guns in schools within restrictions.

Moreover, the Court cannot say, at this juncture, that Act 604 is clearly repugnant to Act 575. Both Acts provide exceptions to the general rule against carrying guns in school and therefore describe legal activity. In reaching this conclusion, the Court rejects Defendant's argument that the Acts describe irreconcilable illegal activity. When laid side by side, Act 575 provides GWLs unrestricted school access while carrying a weapon. The later passed Act 604 provides GWL's school access to pick up and drop off a student while carrying a weapon. Thus the scope of Act 604's permitted activity falls within the scope of

Act 575's permitted activity. Consequently, Act 604 is not "clearly repugnant" to Act 575. Furthermore, Act 604 does not manifest the General Assembly's intent to cover the same subject-matter of Act 575 or operate as a substitute for it, unlike the legislation in Rutter. The Court finds Rutter distinguishable, because Rutter explicitly strikes the language of an earlier statute and substitutes contrary language, manifesting the Legislature's intent to cover the same subject matter and eliminate the curtilage exception from the former bill. Id.

Balancing the Equities

The State of Georgia has licensed Plaintiff to carry a weapon. Presumably, before issuing this license, the State determined Plaintiff can be trusted to do so safely and responsibly. At stake is Plaintiff's Second Amendment right to bear arms. In passing Act 575 and Act 604, the General Assembly has determined Second Amendment rights should not be circumscribed in the elementary school setting.[1] Without legal authority to do otherwise, the Court is bound to apply the

[1] At oral argument, Defendant cited District of Columbia v. Heller, 554 U.S. 570 (2008) as supporting the notion that the Supreme Court recognizes schools as sensitive places in which firearms should be prohibited. Heller is a case in which the Supreme Court struck down a Washington D.C. ordinance prohibiting usable handguns in the home. In Heller, the Supreme Court said "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Id. at 626-27. The Court interprets this comment as non-binding *dicta* that simply recognizes the

law as written. Therefore, the Court finds Plaintiff's interest in exercising his constitutional right outweighs the school's interest in protecting teachers and students from having a GWL possess a firearm in close proximity.

The Public Interest

The Court finds the public interest would be served by protecting Plaintiff's constitutional rights while the ultimate issue of the enforceiblity of Act 575 is adjudicated.

Irreparable Injury

While Plaintiff meets three of the four prongs necessary to obtain an interlocutory injunction, he has not shown irreparable injury if the injunction is denied.

The Amended Complaint attempts to cure any purported deficiencies that the Complaint may have contained in efforts to state a claim for irreparable injury. It relies not only on Defendant's public statements regarding the illegality of guns on school property but also on Defendant's policy prohibiting weapons on school property. Based on the Defendant's policy and the public positions taken by school spokesmen, Plaintiff claims to be in fear of arrest and prosecution for carrying a weapon at school, even though it is purportedly no longer illegal to do so.

States' police powers.

In the absence of contrary authority,[2] the Court relies on cases holding an interlocutory injunction is inappropriate under threat of arrest. Sarrio v. Gwinnett County, 273 Ga. 404 (2001); Arnold v. Mathews, 226 Ga. 809 (1970); City of Douglas v. South Ga. Grocery Co., 178 Ga. 657 (1934) ("Neither a threat of arrest nor threats of repeated arrests will take the case out of the general rule forbidding the interference of equity in criminal prosecutions.") Furthermore, in defense of criminal prosecution, Plaintiff can challenge the validity of the Statute. Therefore, he has an adequate remedy at law without resort to a court of equity. Mather Bros. v. City of Dawson, 188 Ga. 450 (1939) (special concurrence).

CONCLUSIONS OF LAW

Because Plaintiff cannot show irreparably injury, his Motion for Interlocutoary Injunction is **DENIED**. Moreover, because sovereign immunity bars this lawsuit, it is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED this 17th day of October, 2014.

Kelly Lee Ellerbe

Kelly Lee Ellerbe
Judge, Fulton County Superior Court

[2] The Court has considered Johnson v. Randolph County, 301 Ga.App. 265 (2009), submitted by Plaintiff after oral argument as authority to find irreparable injury for deprivation of a constitutional right, and finds it non-binding *dicta*.

Copies:

John R. Monroe
[jrm@johnmonroelaw.com]

Brandon O. Moulard
[brandon.moulard@nelsonmullins.com]