IN THE SUPREME COURT OF GEORGIA

PHILLIP EVANS, Appellant, v. GWINNETT COUNTY PUBLIC SCHOOLS, Appellee	)))))))))	Case No. S15A1619

Brief of Appellant

Appellant Phillip Evans states the following as his opening Brief.

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Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Session Laws

Part One – Statement of Facts and Proceedings Below

A – Introduction

Appellant Phillip Evans is a resident of Gwinnett County, whose child attends school at Centerville Elementary School ("CES") in Snellville, Gwinnett County, Georgia. R168.[1] CES is owned by the Gwinnett County Board of Education and operated by Appellee Gwinnett County Public Schools (the "School System"). *Id.* Evans possesses a validly issued Georgia Weapons Carry License ("GWL") issued to him pursuant to O.C.G.A. § 16-11-129. *Id.* CES is a "school safety zone," as that term is defined by O.C.G.A. § 16-11-127.1. R169.

It is generally a crime to carry a firearm within a school safety zone. *Id.* During the 2013-2014 legislative session, the General Assembly passed House Bill 826, which was enrolled as Act 575. *Id.* Act 575 provides, *inter alia*, that GWL holders are exempt from the provisions against carrying a weapon in a school safety zone. *Id.* After Act 575 was passed, Evans contacted the Schools System to point out the change in the law and to inquire if, as a GWL holder, Plaintiff would

[1] This case comes to the 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).

be recognized by the School System as lawfully permitted to carry a firearm in the School System's schools. *Id.*

On or about July 28, 2014, Jorge Gomez, the Executive Director of Administration and Policy for the School System, responded via email to Evans inquiry. *Id.* Gomez told Evans that it would be a crime for Evans, even as a GWL holder, to carry a firearm in the School System's schools. *Id.* Gomez also told Evans that if Evans carried a firearm at a School System school, the School System would seek to have Evans prosecuted. *Id.* Gomez further told Evans that the School System may issue a criminal trespass warning against Evans "from entering all Gwinnett County School District property." *Id.*

Evans visits CES, in conjunction with his child's education, on a frequent basis. R170. Evans desires to carry a weapon at CES in case of confrontation, and he would do so if it were legal for him to do so. *Id.* As a result of Gomez' response to Evans, Evans is in fear of arrest and prosecution for carrying a weapon at CES. *Id.*

B – Proceedings Below

Evans commenced this action on September 2, 2014. R3. In his Amended Complaint, he sought damages and declaratory and injunctive (both interlocutory

and permanent) relief for violations of state and federal law. R171. On February 5, 2015, the trial court issued a written opinion and order dismissing Evans' claims. R 183-187. In its order, the trial court ruled that declaratory relief is not available to test whether proposed conduct is legal, that an injunction cannot be issued against future criminal prosecution, and that Gomez did not violate the 4th Amendment (Evans' federal claim) by threatening an arrest and prosecution. *Id.* The trial court also ruled that the School System enjoys sovereign immunity from Evans' state law claims. *Id.* Evans filed a Notice of Appeal on February 12, 2015. R1.

C – Preservation of Issues on Appeal

Evans preserved his issues for appeal by obtaining the trial court's order dismissing all of his claims (and explicitly finding no constitutional violation). The final order from which Evans appeals was entered February 5, 2015. He filed a notice of appeal on February 12, 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 the School System has sovereign immunity against state law claims.***

C. ***The trial court erred by ruling that a threat of arrest cannot constitute a 4th Amendment violation.***

D. ***The trial court erred by failing to consider the availability of damages as a remedy.***

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, Evans sought and was denied both interlocutory and permanent injunctive relief. In addition, Pursuant to Art. 6 § 6, ¶ 2 (subp. 1) of the Georgia Constitution, this Court has exclusive appellate jurisdiction over "All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States….." In this case, Evans brought a claim for violation of his 4th Amendment rights under 42 U.S.C. § 1983, and the trial court ruled that no constitutional violation occurred.

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 the School System is entitled to sovereign immunity, because such immunity has been waived. The trial court also erred by ruling that a threat of arrest to deter future conduct cannot constitute a 4th Amendment violation. Finally, the trial court erred by failing to consider the availability of damages.

1. – Declaratory Judgment Actions May Test Proposed Future Conduct

The trial court ruled, "A declaratory judgment action is an improper mechanism to test whether a proposed plan of action violates a criminal statute." R148. The trial court relied primarily on *Butler v. Ellis*, 203 Ga. 683, 47 S.E.2d 861 (1948). The court also found that (apparently all) declaratory judgment

actions seeking interpretation of criminal statutes lack an "actual controversy." R148. Starting with the second point, it is not at all clear how the trial court drew that conclusion. The court did not elaborate on the ruling.

It seems somewhat obvious that there was and still is an actual controversy between Evans and the School System. Evans says he can lawfully carry a firearm at CES, and the School System insists that he cannot. It does not appear that "actual controversy" is a term of art, and no definition is supplied by the statute. The Court must therefore apply the ordinary meaning of the word. The *Merriam-Webster Online Dictionary* defines a controversy to mean "a discussion marked especially by the expression of opposing views; dispute." Evans and Gomez had a written discussion, in which they expressed opposing views, resulting in this dispute. It is difficult to imagine how this is not a controversy.

Returning to the first issue raised by the trial court, *Butler* does not appear to be good law for the proposition stated. 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 stress 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].[2]

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

[2] 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.

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 resulted 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 the 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). Given that Evans has a federal claim in this case, he should be able to obtain a declaratory judgment as a remedy if appropriate.

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 was drawing 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 above in *Ross*, 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 CES could not be the subject of his declaratory judgment action.

2. The School System Does Not Have Sovereign Immunity

The trial court also ruled that the School System has sovereign immunity, and that Evans failed to "plead any valid waiver of sovereign immunity for his claims under O.C.G.A. § 16-11-173, his declaratory judgment action, or his equitable claims seeking an injunction." R184. Pretermitting whether Evans was

required to affirmatively claim a waiver in his pleadings, he did correctly point out the waiver in his brief opposing the School System's Motion to Dismiss. R152.

Before addressing the waiver, however, Evans notes that declaratory judgment and injunction are ***remedies,*** not ***claims.*** It is somewhat awkward in a motion to dismiss to analyze only the remedies and ignore the merits of the claims, as the trial court did. That was especially troublesome given that the trial court failed to address Evans' damages claims, but then dismissed the case based, apparently, on the unavailability of remedies.[3]

Evans' brought both state and federal claims. Evans maintains that he is entitled to declaratory and injunctive relief for both his state and federal claims. His federal claim needs no waiver from sovereign immunity, as the trial court noted. R 184. Evans therefore turns to the waiver of his state claims.

The trial court relied on several cases as grounds for sovereign immunity applying to the School System. Those cases found sovereign immunity for school systems generally based on somewhat varying theories. In *Thigpen v. McDuffie County Board of Education,* 255 Ga. 59 (1985), this Court ruled that a county is

[3] O.C.G.A. § 16-11-173 contains minimum statutory damages of $100 for violations of its provisions.

included within the definition of "the state and any of its department and agencies" that have sovereign immunity, and that the county board of education was included. In *Hunt v. City of Atlanta*, 245 Ga.App. 229 (2000), the Court of Appeals stated that "school districts are political subdivisions of this State" and therefore entitled to sovereign immunity. *Davis v. Dublin City Board of Education*, 219 Ga.App. 121 (1995) had the same result. School systems are, then, departments, agencies, or political subdivisions of the state and as a result entitled to sovereign immunity as a general proposition.

Sovereign immunity can only be waived by an act of the General Assembly (or by the constitution). Ga. Const., Art. I, Sec. II, Par. IX. Implied waivers of immunity are not favored, but that does not mean that the legislature must use "specific magic words such as 'sovereign immunity is hereby waived' in order to create a specific statutory waiver of sovereign immunity." *Georgia Department of Corrections v. Couch*, 259 Ga. 469, 473-474 (2014).

The creation of a right of action and damages against state agencies, departments, political subdivisions and school systems in O.C.G.A. § 16-11-173 is dispositive:

> [W]here, as here, the Legislature has specifically created a right of action against the government that would otherwise be barred by sovereign immunity, and has further expressly stated that an aggrieved party is entitled to collect money damages from the government in connection with a successful claim under the statute, there can be no doubt that the Legislature intended for sovereign immunity to be waived with respect to the specific claim authorized under the statute.

Colon v. Fulton County, 294 Ga. 93, 95 (2013).

Evans brought a claim under O.C.G.A. § 16-11-173(b)(1), the state preemption of regulation of weapons. That Code section provides:

> Except as provided in subsection (c) of this Code section, no county or municipal corporation, by zoning, by ordinance or resolution, or by any other means, nor any ***agency***, board, ***department***, commission, ***political subdivision***, ***school district***, or authority of this state, other than the General Assembly, by rule or regulation or by any other means 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….

[Emphasis supplied]. The Code section goes on to create a private right of action for violations. O.C.G.A. § 16-11-173(g). Such actions may include damages, equitable relief, and "any other relief which the court deems proper." *Id.* The trial court failed to explain why that Code section does not constitute a waiver of

immunity. There can be no doubt that the School System's sovereign immunity is waived for Evan's claim.

3. A Threat of Arrest Can Be a Fourth Amendment Violation

The trial court ruled that a threat of arrest cannot constitute a 4th Amendment violation giving rise to a civil rights claim under 42 U.S.C. § 1983. As grounds for this position, the trial court cited an unpublished U.S. District Court opinion from New York. *Bodek v. Bunis*, 2007 U.S. Dist. LEXIS 37580, 2007 WL 1526423, No. 06-CV-6022L (W.D.N.Y., May 23, 2007). In *Bodek*, a court security officer allegedly threatened to arrest a litigant at a "pre-warrant screening hearing." The opinion does not say what the threat of arrest was for, but in the context of the rest of the opinion, it apparently was for conduct that had occurred some two months previously (the opinion gives no indication that there was any kind of incident during the in-court hearing). The litigant sued the court security officer for violating her 4th Amendment rights. The District Court rejected the claim on the grounds that the threat of arrest (for conduct that already had occurred) did not give rise to a 4th Amendment violation.

Ironically, this very case upon which the trial court relied pointed out by way of contrast that a threat of arrest ***can*** constitute a 4th Amendment violation if

the threat is made to coerce future action (or inaction). 2007 U.S. Dist. LEXIS 37580, at 29, *citing Bennett v. Town of Riverhead*, 940 F.Supp. 481, 488 (E.D.N.Y. 1996); *Svitlik v. O'Leary,* 419 F.Supp.2d 189, 190 (D.Conn. 2006). The difference noted by the District Court in *Bodek* is that threats to arrest for previous conduct change nothing and can be ignored without adverse consequences, whereas threats to arrest for future action or inaction cannot be ignored. A "seizure" has occurred if a threat of arrest is used a means to deter future conduct.

Looking at cases a little closer to home, Evans observes that threats of arrest to influence future conduct often give rise to 4th Amendment claims. In *Reed v. Giarrusso,* 462 F.2d 706 (5th Cir. 1972), the Court ruled that threats of arrest for future violations of a municipal ordinance gave rise to a valid 4th Amendment claim.[4] In *Reed*, the plaintiffs were threatened with arrest for carrying "bush combs," on the grounds that such combs could be used as dangerous weapons.

[4] The Eleventh Circuit has adopted as binding precedent all case law of the former 5th Circuit as of September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

It is well-settled that threats of arrest or prosecution can give rise to a valid § 1983 claim. *Steffel v. Thompson*, 415 U.S. 452 (1972). As the 11th Circuit has said:

> This court has held that a risk of prosecution is sufficient if the plaintiff alleges (1) that an actual threat of prosecution was made, (2) that prosecution is likely, or (3) that a credible threat of prosecution exists based on the circumstances. To show that a prosecution is likely or a credible threat exists, a plaintiff must show that there is "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." We look to see "whether the plaintiff is seriously interested in disobeying, and the defendant seriously intent on enforcing the challenged measure.

GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1251 (11th Cir. 2012). In the present case, Evans has indicated he is seriously interested in carrying a firearm to CES and the School System has indicated it is seriously interested in prosecuting him if he does so.

4. The Trial Court Erred In Failing to Consider Evans' Damages Claim

As already noted, O.C.G.A. § 16-11-173, authorizes private rights of action against departments, agencies, political subdivisions, and school systems. For aggrieved persons, there are minimum statutory damages of $100. Thus, Evans, if he proves a violation of § 16-11-173, is entitled to at least $100 in damages. The trial court dismissed the case based on its conclusion that Evans was not entitled to

remedies of declaratory judgment or injunction, but it made no finding regarding Evans' entitlement to damages.

The trial court did, as discussed above in Section 2, rule that the School System was entitled to sovereign immunity. If, however, the School System has no sovereign immunity, then there is no ruling regarding Evans' right to damages. Because the trial court failed to address the merits, the case must be remanded for a determination of the merits and Evans' right to damages.

CONCLUSION

Evans has 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.

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CERTIFICATE OF SERVICE

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