Docket No. 14-11225

The United States
Court of Appeals
For
The Eleventh Circuit

GeorgiaCarry.Org, Inc., *et.al.*, Appellants
v.
Brian Kabler, Appellee

Appeal from the United States District Court
For
The Southern District of Georgia
The Hon. Lisa G. Wood, District Judge

Brief of Appellants

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Certificate of Interested Persons

Appellants certify that the following persons are known to Appellants to have an interest in the outcome of this case:

GeorgiaCarry.Org, Inc.

Kabler, Brian

Monroe, John R., Esq.

Strickland, Richard, Esq.

Wood, The Hon. Lisa G.

Appellants further certify that GeorgiaCarry.Org, Inc. has no parents or subsidiaries and is not publicly traded.

Statement on Oral Argument

Appellants in this case request oral argument. The appeal involves the exercise of important fundamental Constitutional rights of the Appellants, namely, their ability to be free to exercise their Second Amendment rights to keep and carry arms in case of confrontation without detention by police for doing so. The appeal is not frivolous and the dispositive issue has not been authoritatively determined.

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Statement on Jurisdiction

The District Court had removal jurisdiction of this case, according to Defendant-Appellee[1], because the case involved federal questions under 28 U.S.C. § 1331, as the Plaintiffs-Appellants sought redress for civil rights violations pursuant to 42 U.S.C. § 1983.

The District Court action was dismissed on February 27, 2014**.** Doc. 28. The Clerk of the District Court entered a judgment against Plaintiffs-Appellants on February 28, 2014. Doc. 29. Appellants filed a notice of appeal on March 21, 2014 [Doc. 30], so this appeal is timely. F.R.A.P. § 4(a)(1)(A).

[1] Plaintiffs-Appellants have not objected to the exercise of jurisdiction by the federal courts in this case, but if this Court should find a lack of jurisdiction, the proper recourse would be to remand back to the District Court with instructions to remand back to the Superior Court of McIntosh County, Georgia.

Statement of the Issues

1. The District Court erred in ruling that Defendant-Appellee had arguable reasonable suspicion to detain Plaintiff-Appellant Theobald when Theobald was seen entering a convenience store with a handgun in a holster on his belt.
2. The District Court further erred in ruling that Defendant-Appellee was entitled to qualified immunity for such detention.

Statement of the Case

Nature of the Case

This is a civil rights case. Plaintiffs-Appellants Georgia Carry.Org, Inc. ("GCO") and Mahlon Theobald ("Theobald") seek declaratory and injunctive relief and Theobald seeks damages against Defendant-Appellee Brian Kabler ("Kabler"), a deputy with the McIntosh County, Georgia Sheriff's Office.

The case arose when Kabler, having observed Theobald carrying a firearm, performed a traffic stop on Theobald to determine if Theobald had a license to carry the firearm. Plaintiffs sued, on various theories that Kabler's detention of Theobald for that purpose violated Georgia law and the 4th Amendment.

Proceedings Below

GCO and Theobald commenced this case by filing a complaint in the Superior Court of McIntosh County, Georgia against Kabler. Kabler removed the case to the District Court and filed an Answer. GCO and Theobald filed a motion for judgment on the pleadings, which was denied. After discovery, Kabler and Theobald both moved for summary judgment. The District Court granted Kabler's motion and denied Theobald's. GCO and Theobald timely filed a notice of appeal. Thereafter, the Georgia

General Assembly, partially in response to the District Court's opinion, passed a statute prohibiting law enforcement officers from detaining a person for the purpose of checking to see if the person has a weapons carry license.

Statement of the Facts[2]

1. Brian Kabler is a deputy with the McIntosh County, Georgia Sheriff's Office. Doc. 20, p. 4.

2. Kabler was on duty in the early morning hours of August 3, 2012. *Id.,* pp. 6-7.

3. Kabler was standing in a convenience store speaking to two other officers. *Id.,* p. 8.

4. The other two officers were driving separate squad cars. *Id.*, p. 25.

5. A total of three squad cars were parked in the parking of the convenience store. ***Fair inference from the fact that each officer was driving his own squad car.***

6. Kabler observed Theobald enter the convenience store. *Id.,* pp. 9-10.

7. As Theobald entered the store, Kabler observed a gust of wind blow open Theobald's outer garment, revealing a handgun on Theobald's waistband. *Id.,* pp. 11-12.

8. Kabler further observed Theobald grab the outer garment and close it. *Id.,* p. 12.

9. Kabler thought Theobald's actions were "suspicious." *Id.,* p. 15.

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[2] The District Court granted Kabler's Motion for Summary Judgment. In reviewing such an order, this Court must consider the facts in the light most favorable to the nonmoving parties (i.e., GCO and Theobald).

10. Kabler thought it was suspicious because "if you have nothing to be concerned about, … there is no reason to make an attempt to conceal you firearm." *Id.*, pp. 15-16.

11. Kabler had this thought despite his belief that a person is prohibited from wearing a firearm openly, even with a weapons carry license. *Id.*, p. 32.

12. Theobald had a transaction with the cashier of the store and left. *Id.,* p. 12.

13. Kabler followed Theobald out of the store, then followed Theobald onto Interstate 95 where he activated his emergency lights and initiated a traffic stop on Theobald. *Id.,* pp. 18.

14. Prior to activating his emergency lights, Kabler did not see Theobald commit any traffic offenses. *Id.,* p. 18.

15. Kabler did not see Theobald do anything that made Kabler suspicious that Theobald had committed or was committing a crime. *Id.,* p. 19.

16. Kabler did not observe anything at the store that made him believe that Theobald did or did not do anything that constituted a crime. *Id.*

17. Kabler did not suspect, based on everything that he saw, including the firearm, that Theobald had committed, was committing, or was about to commit a crime. *Id.*

18. Kabler approached Theobald's car, asked for Theobald's driver's license, and asked Theobald if he had any weapons in the car. *Id.,* p. 22.

19. Theobald handed Kabler his driver's license and asked Kabler if Theobald had to answer the question pertaining to weapons. *Id.,* p. 22.

20. Kabler responded, "Yes, pretty much. I'm going to ask if you have a weapon on you. Do you or do you not have a weapon on you?" Doc. 1, ¶ 17; Doc. 8, ¶17.

21. Theobald responded that he had a Florida concealed weapons permit.

Doc. 20, p. 22.

22. Kabler asked to see it, and Theobald asked if he had to show it to Kabler. *Id.,* p. 23.

23. Kabler told Theobald that Theobald did have to show Kabler Theobald's Florida concealed weapons permit. *Id.,* p. 23.

24. Theobald provided Kabler Theobald's Florida concealed weapons permit. *Id.*

25. Kabler checked Theobald's drivers license and examined his Florida concealed weapons permit. *Id.,* p. 24.

26. Theobald's drivers license was valid and his Florida concealed weapons permit appeared to be in order. *Id.,* p. 25.

27. Kabler's understanding was that Georgia recognized Florida's concealed weapons permit as the equivalent of a Georgia permit. *Id.*

28. Kabler told Theobald that the reason Kabler stopped Theobald was that Kabler had seen Theobald's firearm at the convenience store. Doc. 1, ¶19; Doc. 8, ¶ 19.

29. Kabler told Theobald that Theobald's permit was a concealed weapons permit, "which means concealed," but that Theobald's weapon had been "in an open position." Doc. 1, ¶ 20; Doc. 8, ¶20.

30. Kabler asked Theobald, "Why are you being evasive? I'm just asking you random questions. You're being real evasive." Doc. 1, ¶ 23; Doc. 8, ¶23.

31. After Kabler checked Theobald's licenses, Kabler said, "For future reference, at any time I see a weapon, I can ask for your permit, OK?" Doc. 1, ¶27; Doc. 8, ¶ 27.

32. Kabler said, "I can ask at any time. It is a concealed weapons permit, not an open carry permit. There is a difference in the State of Georgia." Doc. 1, ¶ 29; Doc. 8, ¶29.

33. Theobald asked Kabler for his name and department name, and Kabler responded, "What seems to be the problem?" Doc. 1, ¶ 34-35; Doc. 8, ¶35.

34. Theobald travels frequently for his work and intends to travel through McIntosh County on a regular basis. Doc. 1, ¶ 43.

35. Theobald generally carries a firearm with him as he travels. Doc. 1, ¶ 44.

36. Theobald wants to avoid detention and harassment by Kabler on account of carrying firearms. Doc. 1, ¶ 45.

Statement on the Standard of Review

"We review a district court's grant of summary judgment de novo and apply the same legal standards as the district court, construing the facts and drawing all reasonable inferences therefrom in the light most favorable to the non-moving party. We affirm a district court's grant of summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c) (2009) (amended 2010)." *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292 (11th Cir. 2011). The Court also must review the District Courts' interpretations of state law *de novo. Mega Life & Health Co. v. Pieniozek*, 516 F.3d 985, 989 (11th Cir. 2008).

Summary of the Argument

The District Court erred by granting Kabler's Motion for Summary Judgment. The Court failed to draw reasonable inferences of fact in GCO's and Theobald's favor, and the Court erred in finding Kabler had reasonable suspicion to detain Theobald. The District Court further erred by finding that Kabler is entitled to qualified immunity. Even if Kabler is entitled to qualified immunity on Theobald's damages claim, qualified is in applicable in a claim for prospective relief.

Argument and Citations of Authority

1. Kabler's Stop of Theobald Was Not Justified

In Georgia, with limited exceptions not applicable to this case, a person may not carry a pistol unless that person has a Georgia weapons carry license ("GWL"). O.C.G.A. § 16-11-126. A person who holds a GWL is "authorized to carry a weapon … in every location in this state not listed in [O.C.G.A. § 16-11-127(b)]." O.C.G.A. § 16-11-127(c). Georgia recognizes concealed weapons licenses issued by Florida as valid in Georgia as GWLs. http://law.ga.gov/firearm-permit-reciprocity; O.C.G.A. § 16-11-126(e). Georgia has no crime of "carrying a concealed weapon," so it is immaterial whether one carries a handgun openly or concealed. Either is permissible with a GWL and neither is permissible without one.

It therefore would have been a crime for Theobald to have carried the gun in the convenience store unless Theobald had a GWL (or, in this case, a license issued by a reciprocal state such as Florida)[3]. In much the same way, it is illegal to drive a car in Georgia without a driver's license. O.C.G.A. § 40-5-20(a).

[3] For the remainder of this Brief, any license that is accepted by Georgia will be called generically a "GWL."

If Kabler had had reasonable suspicion to believe that Theobald did not have a GWL, Kabler would have been justified in detaining Theobald. The problem for Kabler is that he did not have reasonable suspicion, or even "arguable reasonable suspicion." If fact, Kabler did not have ***any suspicion*** that Theobald did not have a GWL, or that Theobald was engaged in any other criminal activity:

> Q: And prior to activating your emergency lights had you seen him commit any traffic infractions?
> A: No, sir.
> Q: Had you seen him do anything that made you suspicious that he had committed or was committing a crime?
> A: No, sir.
> Q: With regard to what you observed about his firearm at the store, did you believe that anything he did or didn't do constituted a crime?
> A: No.
> Q: Did you suspect, based on everything that you say, including the firearm, that he had committed or was committing or was about to commit a crime:
> A: No, sir.

Doc. 20, p. 19.

> Q. So prior to the time that you stopped him you hadn't formed any kind of opinion or belief or suspicion that he did or didn't have a weapons permit?
> A. I didn't form any opinion on that.
> Q. You didn't have any idea at all?
> A. I had no idea.

Doc 20, p. 34.

Thus, even though Kabler had no suspicion Theobald did not have a

GWL, had no idea about that at all, Kabler performed a traffic stop on Theobald. And that stop, according to Kabler, was for the express purpose of determining if Theobald had a GWL. Doc. 20, p. 35.

The District Court ruled that Theobald's pulling his "blown open" coat over his gun "generated reasonable suspicion to perform a traffic stop to investigate whether [Theobald] possessed a license to carry the firearm." Doc. 28, p. 10. The District Court did not elaborate on why it is that even though Kabler did not believe reasonable suspicion existed, an objectively reasonable officer (apparently not Kabler) would have had such a belief. In other words, the District Court determined that Kabler was not objectively reasonable (Because Kabler did not form the reasonable suspicion the District Court ruled he should have). Despite Kabler's blundering into the incident, he nevertheless receives qualified immunity because a reasonable officer would have had reasonable suspicion (even though Kabler did not).

Kabler's sergeant, Robert Myles, signed an affidavit in which Myles stated that Myles had told Kabler that Myles was "concerned" that Theobald may not have a GWL. Doc. 17-2. Kabler apparently does not recall Myles saying that. After Kabler asked Myles if Myles had seen the gun and if Kabler could "make contact" with Theobald, Kabler testified that he had no

further conversation with Myles. Doc. 20, p. 13. Even Myles only had a "concern," however, that he failed to articulate into a reasonable suspicion.

Of course, even if Myles did express his "concern" to Kabler, that concern does not translate into the reasonable articulable suspicion necessary for Kabler to detain Theobald. And, as already shown above, Kabler did not have any such suspicion. After all, an officer may be "concerned" about a lot of things, but in order to perform a stop, there must be more than an "inchoate and unparticularized suspicion or hunch." *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

In the process of describing what facts constituted reasonable suspicion, the District Court made significant statement of facts that are not in the record:

> ***After*** he saw the three officers inside the convenience store, Theobald concealed the firearm by closing his outer garment.

Doc. 28, p. 10 [emphasis supplied]. The record does not indicate that Theobald closed his garment ***after*** he saw the officers. The District Court apparently inferred this fact from others, breaking the cardinal rule that all inferences should be drawn in favor of the non-moving party. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150 (2000).

First, the record indicates that when Theobald entered the store, his firearm was concealed. Doc. 19, p. 18. He did not, therefore, only conceal it after he entered the store. It is clear instead that Theobald went into the store intending to conceal his firearm and that intention never changed.

In addition, the record does not indicate whether the closing of the garment occurred before or after Theobald's observation of the officers. Theobald answered "yes" to the question, "Did you notice when you went into the convenience store to get snacks law enforcement officers inside the store?" Doc. 19, p. 19. Theobald was not asked if he saw the officers "as" he entered or "immediately upon entering."

Consider a question such as, "When you went into your house, did you watch television?" An affirmative answer certainly does not necessarily mean that television was watched immediately upon entering. At most, the wording of the question places two events in chronological order (going into the house and watching television), without reference to the time interval between the two. The record is therefore silent on how long after entering the store Theobald saw the officers.

Moreover, it was Kabler, not Theobald, that testified about the closing of Theobald's outer garment in the wind. Doc. 20, p. 11. Nevertheless, the District Court inferred, improperly, that Theobald entered the store, saw the

officers, was treated to a gust of wind, and then closed his outer garment, all in that order. The record simply does not indicate such an order, and it was error for the District Court to draw a negative inference against Theobald. None of the officers testified that they made eye contact with Theobald prior to the closing of the garment, or otherwise gave any indication that Theobald knew of their presence before the closing of the outer garment.

Because Theobald entered the store with his firearm concealed, and continued to strive to maintain that status throughout his time in the store, it simply strains reasonableness to say that Kabler was justified to stop Theobald solely on Theobald's decision to carry his firearm in a perfectly legal manner, both before and after Theobald saw the officers.

Consider the analogy of a motorist, driving down the street. He puts on his turn signal to turn at the next intersection, and squad car pulls out in front of him from a driveway. He continues with his already-stated intention of turning at the intersection. Can a reasonable officer pull over the motorist to see if the motorist has a driver's license, on the theory that the motorist turned after he saw the squad car (the inference being that the motorist was trying to stay away from police)? Such a result would be absurd.

2. *Kabler is Not Entitled to Qualified Immunity*

The District Court also ruled that, even if Kabler violated Theobald's constitutional rights, Kabler is entitled to qualified immunity. The sole reason for this ruling is that the District Court declared that there was no binding precedent from the Supreme Court, this Court, or the Supreme Court of Georgia to inform Kabler that "stopping Theobald to determine whether he possessed a valid weapons license was an unreasonable seizure." Doc. 28, p. 13.

In fact, Theobald cited many cases, some binding, some persuasive, to show that Kabler had "fair warning" that his treatment of Theobald was unconstitutional. *See Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002).

The Supreme Court ruled in *Delaware v. Prouse*, 440 U.S. 648 (1979) that traffic stops cause a "physical and psychological intrusion [to be] visited upon the occupants of a vehicle," and that they "interfere with freedom of movement, are inconvenient, and consume time." They also "may create substantial anxiety." *Id.* at 657. The Court concluded that stopping a motorist just to see if the motorist has a driver's license, absent reasonable suspicion to believe he does not, violates the 4th Amendment. Even with no other cases, Kabler had "fair warning from *Prouse* that random stops for

license checks are unconstitutional. And Kabler told Theobald on the scene that Kabler was "just asking random questions." Doc. 1, p. 9, ¶ 23.

The District Court did not discuss *Prouse* at all, even though both Parties included it in their briefs below. Instead, the District Court said Theobald had failed to cite any cases in support of his position that Kabler's detention of him was illegal. Further cases cited by Theobald (and not discussed by the District Court) addressed Kabler's evolving theories for his reason for stopping Theobald:

Throughout this case, Kabler has presented a moving target of what he thinks justified his stop of Theobald. He started with a straightforward claim that Theobald was carrying a concealed weapon:

> Under Georgia law, a *prima facie* case of a charge of carrying a concealed weapon or of possessing a weapon without a license, is stated solely by proof that the plaintiff carried a pistol in a public place, and it is a citizen's burden to prove he has a valid license. As such, a law enforcement officer is entitled to inquire further upon observation of a weapon.

Doc. 8, Par. 12.

Kabler's position represents an incorrect view of the law. First, the crime of carrying a concealed weapon was abolished in Georgia in 2010, some two years before the incident. 2010 Ga. Act 643. Obviously, Kabler cannot have a *prima facie* case for a non-existent crime. Likewise, there is no crime of "***possessing*** a weapon without a license."

There is, however, a similarly-worded crime of ***carrying*** a weapon without a license, O.C.G.A. § 16-11-126(h)[4]:

> (1) No person shall carry a weapon without a valid weapons carry license unless he or she meets one of the exceptions to having such license as provided in subsections (a) through (g) of this Code section.
> (2) A person commits the offense of carrying a weapon without a license when he or she violates the provisions of paragraph (1) of this subsection.

Assuming *arguendo* that Kabler was referring to ***carrying*** a weapon without a license, rather than ***possessing*** a weapon without a license, Kabler still is wrong about the application of that statute. Kabler asserts, without authority, that "it is a citizen's burden to prove he has a valid license." There simply is no basis for that assertion.

It is clear from Georgia and binding federal appellate case law that carrying a weapon without a license has, as an element of the crime, the lack of a license:

> [T]he State introduced no evidence which shows appellant did not have a license for the pistol.... Therefore, the trial court's judgment of conviction ... must be reversed.... Those cases ... which hold that whether an accused has a license to carry a pistol is a matter of defense and not an element of the offense

[4] The former O.C.G.A. § 16-11-128 provided "A person commits the offense of carrying a pistol without a license when he or she carries on or about his person ... any pistol or revolver without having on his person a valid license...." O.C.G.A. § 16-11-128 was repealed in 2010 Ga. Act 643 and replaced with O.C.G.A. § 16-11-126(h), the current crime of carrying a weapon without a license.

> are hereby overruled.

Head v. State, 235 Ga. 677, 679 (1975).

> [T]he state does not make out a *prima facie* case of carrying a pistol without a license by merely showing that the accused carried the pistol, ***but must also show that she did not have a license*** for the pistol....

Fleming v. State, 138 Ga.App. 97, 98 (1976). [Emphasis supplied]. One of the cases overruled by the Supreme Court of Georgia in *Head* was *Johnson v. State,* 230 Ga. 196 (1973), in which the Court had approved a jury instruction that the burden was on a criminal defendant to prove that he had a license (as opposed to the burden being on the State to show that the defendant did not have a license). The Fifth Circuit condemned this holding of the Supreme Court of Georgia as a violation of due process, improperly shifting the burden of proof to a criminal defendant to disprove an element of the crime. *Johnson v. Wright,* 509 F.2d 828 (5th Cir. 1975). ("We hold that the trial court's instruction violated appellant's right to due process in permitting the jury to infer that his pistol was unlicensed from evidence that he possessed one, and also in shifting to him the burden of proof on an essential element of the offense.")[5]

Thus, there is 37-year-old binding precedent that the lack of a license

[5] The opinions of the Fifth Circuit issued prior to October 1, 1981 have been adopted by the Eleventh Circuit and are therefore binding on this Court. *Bonner v. City of Pritchard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

is an element of the crime, contrary to Kabler's assertion. Kabler admits that, until Theobald presented his Florida license to Kabler, Kabler had no idea whether (or not) Theobald had a license. Because Kabler had no way of knowing whether Theobald had a license, Kabler had no basis to stop and detain Theobald.

Kabler resists discussion of the foregoing line of cases on the theory that it doesn't matter whether Theobald could have been convicted; it only matters whether Kabler had reasonable suspicion. Kabler just invented his suspicion, however, for under his argument an officer could always have unparticularized suspicions that an armed citizen did not have a license. If he had no valid reason for suspecting Theobald lacked a license, Kabler's immunity vanishes.

Apparently conceding defeat on the non-existent carrying a concealed weapon crime, Kabler now focuses exclusively on the carrying a weapon without a license crime. He therefore asserts that he has legal authority to forcibly detain a person he sees conceal a weapon to see if the person has a license to carry a weapon at all.

The Supreme Court has ruled that there is no "firearms exception" to the Fourth Amendment. *Florida v. J.L.*, 529 U.S. 266 (2000). Other courts around the country likewise have ruled that possessing a firearm in a

jurisdiction where such possession is legal (even if a license is required) is not grounds for stopping a person seen carrying a firearm:

> [Officer] Martin's impetus to investigate the Dudleys was a radio call alerting him to the presence of two people at the truck stop in possession of some guns. Of course the possession of firearms is not, generally speaking, a crime unless you happen to be a convicted felon, the firearms are otherwise illegal, ***or you are not licensed to possess the gun.*** Martin, presumably not clairvoyant, could not have known, and did not know, the Dudleys and their guns met all three of these criteria…. A telephone report of citizens possessing guns or merely engaging in "suspicious" activity, standing alone, cannot amount to reasonable suspicion of a crime.

United States v. Dudley, 854 F.Supp. 570, 580 (S.D. Ind. 1994). [Emphasis supplied].

> For all the officers knew, even assuming … that Ubiles possessed a gun, Ubiles was another celebrant lawfully exercising his right under Virgin Island law to possess a gun in public…. [T]he authorities in this case had no reason to believe that Ubiles was engaged in or planning or preparing to engage in illegal activity due to his possession of a gun. Accordingly, ***in stopping him and subsequently searching him, the authorities infringed on Ubiles' Fourth Amendment Rights.***

United States v. Ubiles, 224 F.3d 213, 218 (3rd Cir. 2000). [Emphasis supplied].

> The undisputed facts establish that Mr. St. John's seizure was unreasonable. Defendants lacked a justifiable suspicion that Mr. St. John had committed a crime, was committing a crime or was about to commit a crime. Indeed, Officer McColley conceded that he did not observe Mr. St. John committing any crimes and that he arrived at the theater with the suspicion that Mr. St. John was merely "showing a gun," which is not illegal in the State of New Mexico.

St. John v. McColley, 653 F.Supp.2d 1155 (D. N.M. 2009).

> In a state such as New Mexico, which permits persons to lawfully carry firearms, the government's argument [that the officer's investigatory detention of defendant was justified by concern for his safety and the safety of bystanders] would effectively eliminate the Fourth Amendment protections for lawfully armed persons.

United States v. King, 990 F.2d 1552, 1559 (10th Cir. 1993).

Quite recently, the Fourth Circuit decided a case arising from North Carolina where officers detained a person on account of an openly carried firearm. The officers said that until they stopped the person to see if he was a felon, they had no way of knowing if he carried the firearm legally. The Court said:

> Being a felon in possession of a firearm is not the default status. More importantly, where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate *Fourth Amendment* protections for lawfully armed individuals in those states.

United States v. Black, 707 F.3d 531 (4th Cir., 2013).

Given *Prouse*'s general prohibition on stops for license checks, *Johnsons*'s admonition that lack of a license is an element of the crime, and *J.L.*'s pronouncement that there is no firearms exception to the 4th Amendment (all three cases are binding precedent), plus a host of other

cases condemning stopping people for being armed, Kabler had "fair warning" that his stopping of Theobald was illegal.

Qualified immunity only applies in damages claims, and not in claims for prospective relief. *See, e.g., Pearson v. Callahan,* 555 U.S. 223, 242 (2009). Kabler made specific threats to Theobald that have a chilling effect on Theobald's and GCO's other members' ability to carry firearms in McIntosh County. Kabler told Theobald that he can stop a person "any time I see a weapon." Regardless of Kabler's justification for his stop of Theobald in the present case, Kabler made a generalized threat that he can stop Theobald any time Theobald goes armed. This clearly is not the law. Kabler's threats are sufficient to maintain an action for declaratory relief and to enjoin Kabler from carrying out his threat. Regardless of Kabler's entitlement to qualified immunity for Theobald's damages claim, immunity is not available in the claims for prospective relief (which the District Court did not rule upon but which nonetheless were dismissed).

3. Notice to Court of State Law Changes.

GCO and Kabler would be remiss if they did not point out to the Court that there has been a substantive change in Georgia law that has some relationship to this case. Beginning July 1, 2014, it will be illegal, as a matter of statutory law in Georgia, for a law enforcement officer to detain a

person for the purpose of checking to see if the person has a GWL. 2014 Ga. Act 604 (House Bill 60). That law creates a new Code section, O.C.G.A. § 16-11-137(b), which reads, "(b) A person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license."

At first glance, one might conclude that the new Code section moots all claims for prospective relief. When those claims are considered in context, however, it is clear they are not moot. GCO and Theobald are seeking prospective relief under the 4th Amendment. A state statutory prohibition does not amount to a constitutional prohibition. Either the 4th Amendment forbids Kabler's conduct, or it does not. Georgia cannot change that.

Admittedly, the foregoing sentence is a bit of an oversimplification. For example, Georgia repealed the crime of carrying a concealed weapon. The 4th Amendment therefore no longer supports any kind of detention based on suspicion of committing that crime (as Kabler found out early in this case). But a law limiting law enforcement action is not the same as a repeal of a criminal law altogether. A state limit on law enforcement action generally will not affect 4th Amendment analysis of such action, while a state repeal of a criminal law certainly can.

Conclusion

GCO and Theobald have shown that Kabler had no reasonable suspicion that Theobald lacked a GWL. They have further shown that Kabler is not entitled to qualified immunity because Kabler violated Theobald's 4th Amendment rights and the law was clearly established.

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Certificate of Compliance

I certify that this Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Brief of Appellants contains 5,437 words as determined by the word processing system used to create this Brief of Appellants.

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Certificate of Service

I certify that I served a copy of the foregoing Brief of Appellants via U.S. Mail on May 30, 2014 upon:

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I also certify that I filed the foregoing Brief of Appellants by mailing it via U.S. Mail to the Clerk on May 30, 2014.

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