IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

GEORGIA CARRY ORG., INC. and MAHLON THEOBALD,	*
Plaintiffs	*
v.	* Case Number: 2:12-cv-171-LGW-JEG
BRIAN KABLER,	*
Defendant	*

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Defendant Brian Kabler, and hereby files his Reply Brief in Support of Motion for Summary Judgment and Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment, and shows the Court as follows:

1. Since the Plaintiffs have sued the Defendant in his individual capacity only, the Plaintiffs' claims for declaratory relief should be dismissed.

Plaintiff Theobald seeks money damages and declaratory relief and Plaintiff GeorgiaCarry.Org seeks declaratory relief only. (Complaint, ¶¶ 1, 52-55). Initially, the claims for declaratory relief are due to be dismissed because the Plaintiffs have failed to establish a constitutional violation. Further, the claims for declaratory relief are due to be dismissed because, as discussed in this section, declaratory relief may not be awarded against an officer sued in his individual capacity, as is the case here.

The Plaintiffs have sued Deputy Kabler in his individual capacity only. *See* Dkt. No. 21, p. 15 explaining that Kabler "was sued in his individual capacity" and that Plaintiff

"Theobald has not sued Kabler in Kabler's official capacity." Deputy Kabler, however, in his individual capacity, is not properly the subject of any declaratory relief. That is, the Court of Appeals for the Eleventh Circuit and District Courts within this Circuit have consistently dismissed claims seeking declaratory relief against defendants sued in their individual capacities:

- Price v. Univ. of Alabama, 318 F. Supp. 2d 1084, 1094-1095 (N.D. Ala. 2003)(dismissing individual capacity claims for declaratory relief because if the defendant was "properly the subject of such relief at all it would only be in his official capacity.");
- Edwards v. Wallace Cmty. Coll., 49 F.3d 1517, 1524, n. 9 (11th Cir. 1995)(stating that "claims for injunctive or declaratory relief...are considered to be official capacity claims against the relevant governmental entity.");
- Santhuff v. Seitz, 385 F. App'x 939, 943, n.3 (11th Cir. 2010)(trial court dismissed claims seeking injunctive relief in Section 1983 lawsuit alleging violations of Fourth and Fourteenth Amendment rights "because the lawsuit was brought against [the officer] only in his individual capacity" and citing Edwards for the proposition that "claims for injunctive or declaratory relief are considered official capacity claims against the relevant governmental entity"); and
- Marshall v. West, 507 F. Supp. 2d 1285, 1304 (M.D. Ala. 2007)(dismissing claims for declaratory relief in Section 1983 lawsuit alleging illegal traffic stop, false arrest, and unlawful search against two deputies because the plaintiff brought individual-capacity claims against the deputies, not official-capacity claims)

Since the Plaintiffs have sued Kabler in his individual capacity only, the Plaintiffs' claims for declaratory relief are subject to summary judgment.[1]

[1] Since GeorgiaCarry.Org's claims are solely injunctive/declaratory in nature, that defendant is out of the case entirely on that basis alone

2. The Defendant is entitled to qualified immunity.

A. An overview of qualified-immunity law.

The Defendant moved for summary judgment arguing, among other things, that qualified immunity barred the Plaintiff's claims. Dkt. No. 17, pp. 13-15. Kabler was acting within his discretionary authority as a law-enforcement officer at all times relevant in this case, and the Plaintiffs have made no challenge otherwise. *See* Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). As a result, the burden shifts to the Plaintiffs to demonstrate that Kabler's conduct violated the Plaintiff's clearly established rights. Keating v. City of Miami, 598 F.3d 753, 762 (11th Cir. 2010).

For the law to be clearly established, the law "must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." Sherrod v. Johnson, 667 F.3d 1359, 1363 (11th Cir. 2012) (internal citations and quotations omitted). Stated differently, qualified immunity affords complete protection to government officials sued individually "unless the law preexisting the defendant official's supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in the defendant's place would be on notice that what the defendant official was doing would be clearly unlawful given the circumstances." Terrell v. Smith, 668 F.3d 1244, 1250 (11th Cir. 2012) (internal citations and quotations omitted).

The purpose of qualified immunity is to protect officials from the chilling effect that a fear of personal liability would create in carrying out their discretionary duties, "protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." Id. (internal citations and quotations omitted).

Before addressing the Plaintiffs' qualified-immunity arguments, the Defendant points out that the reasonable suspicion standard, which governs this case, makes the Plaintiffs' burden especially difficult. This is so because "reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules." United States v. Sokolow, 490 U.S. 1, 7 (1989).

B. The Plaintiff's argument regarding qualified immunity.

The Plaintiff has not shown that any of Kabler's conduct violated clearly established law. Deputy Kabler noted that it did not appear that any Georgia court, or courts within the Eleventh Circuit, have addressed the parameters of inquiry allowed with regard to O.C.G.A. § 16-11-126(h)(2). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." Alexander v. University of N. Fla., 39 F.3d 290, 291 (11th Cir. 1994) The Plaintiff has not pointed to any such case. Instead of demonstrating that any of the conduct alleged violates clearly established law, the Plaintiff relies solely on "general rules or abstract rights," which are insufficient to strip a § 1983 defendant of his qualified immunity. *See* Jackson v. Sauls, 206 F.3d 1156, 1165 (11th Cir.

2000) (noting that a "reasonable officer's awareness of the existence of an abstract right, such as a right to be free of excessive force or an investigatory stop without reasonable suspicion, does not equate to knowledge that his conduct infringes that right"). More specifically, the Plaintiffs make the following argument regarding how, procedurally, a firearms criminal trial would proceed in a court of law in front of a jury:

> Georgia law is clear that the burden is on the state to show that someone seen carrying a firearm does not have a license – it is an element of the crime. The Supreme Court of Georgia so ruled in [Head v. State, 235 Ga. 677 (1975)], and the 5th Circuit [in Johnson v. Wright, 509 F.2d 828 (5th Cir. 1975)], which at the time included Georgia, ruled the same year that to hold otherwise would violate the Constitution. Dkt. No. 21, pp. 17-18

The Plaintiff further argues that "the Supreme Court of the United States ruled in [Delaware v. Prouse,] that stopping a person just to see if he had a license was unconstitutional. The law was clearly established." Id. As detailed in the following paragraphs, these three cases do not demonstrate that Kabler violated the Plaintiff's clearly established rights.

The Plaintiff argues that Head v. State and Johnson v. Wright stand for the proposition that 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." Dkt. No. 21, pp. 7-8. The Plaintiff then offers the following quote from Head,

> "the 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 are hereby overruled." Dkt. No. 21, p. 8

In a similar vein, the Plaintiff argues that in Johnson v. Wright, the Fifth Circuit condemned the Supreme Court of Georgia for approving 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)" because that jury charge improperly shifted the "burden of proof to a criminal defendant to disprove an element of the crime," and, as such, that jury instruction violated the defendant's "due process" rights. Dkt. No. 21, p. 8

How any criminal trial of Plaintiff Theobald would proceed in a court of law (and specifically, whether the District Attorney or Theobald's criminal defense lawyer had the burden of proving a firearm license to the jury) has no role in determining whether Kabler is entitled to qualified immunity. The "inquiry in qualified-immunity analysis is whether the government actor's conduct violated clearly established law and not whether an arrestee's conduct is a crime or ultimately will result in conviction. Police officers are not expected to be lawyers or prosecutors." Scarbrough v. Myles, 245 F.3d 1299, 1303, fn. 8 (11th Cir. 2001). After all, it is "unfair and impracticable to hold public officials to the same level of knowledge as trained lawyers." Id. Thus, whether carrying a weapon without a license is "an element of the crime," as the Plaintiffs argue, or a matter of defense, plays no role in determining whether qualified immunity is stripped. Id. at 1302-03 (For purposes of determining qualified immunity, an officer does not have to "prove every element of a crime or to obtain a confession before making an arrest, which would negate the concept

of probable cause and transform arresting officers into prosecutors.") Head v. State and Johnson v. Wright, therefore, are insufficient to discharge the Plaintiff's burden. See Jones v. Cannon, 174 F.3d 1271, 1282–83 (11th Cir.1999)(plaintiff cannot discharge her burden of showing that a right is clearly established by referring to general rules and abstract rights in order to strip the defendant of his qualified immunity)

Delaware v. Prouse, the final case that the Plaintiffs rely upon in arguing that the law was clearly established, does not salvage the Plaintiffs' case, either. In Prouse, an officer stopped an automobile for no reason other than to check the driver's license and registration. The officer confiscated marijuana that he saw on the floor of the car. The evidence of marijuana was suppressed because the patrolman "testified that prior to stopping the vehicle he had observed neither traffic nor equipment violations **nor any suspicious activity**, and that he made the stop only in order to check the driver's license and registration." The Delaware Supreme Court affirmed. The state of Delaware appealed claiming that discretionary spot checks, such as the one made by the officer, were reasonable under the Fourth Amendment because they promoted safety on the roads.

The United States Supreme Court granted certiorari, and affirmed the Delaware Supreme Court. The Supreme Court found that the practice of discretionary spot checks by officers for public safety reasons was not "a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests ..."The Court stressed that there was nothing which distinguished the vehicle stopped from any other vehicle on the highway.

As to whether Prouse clearly established the law governing a Terry stop to check for a firearms license, Banks v. Gallagher, a District Court opinion from the Third Circuit is instructive. 3:08-CV-1110, 2011 WL 718632 (M.D. Pa. Feb. 22, 2011). In that case, which dealt with several family members dining in a restaurant openly carrying firearms, the Plaintiffs tried to argue that Prouse established the unlawfulness of the officer's actions. The district court, however, held that Prouse's rationale did not necessarily apply to a check for a firearms license:

> As an initial matter, Prouse's holding—that random, discretionary automobile stops unsupported by reasonable suspicion of a violation violate the Fourth Amendment—does not necessarily apply to checking gun licenses at random. It is not at all certain that the same balance the Court struck in Prouse, involving a suspicionless stop of an automobile driver, should apply to suspicionless requests to produce one's gun license. It can be argued that the state's interest in ensuring that only properly licensed individuals carry guns is much higher than the state's interest in Prouse, and that the individual's Fourth Amendment's privacy interests in being asked to produce a gun license is much lower. 3:08-CV-1110, 2011 WL 718632 (M.D. Pa. Feb. 22, 2011)

As recognized by Banks, Prouse's rationale does not apply to the facts of this case either.

Moreover, Prouse is factually distinguishable. In Prouse, the officer randomly stopped an automobile for no reason other than to check the driver's license and registration. Before stopping the vehicle, the officer did not observe "any suspicious activity," and the officer "made the stop only in order to check the driver's license and registration."

By contrast, Kabler was not just driving around with nothing to do and decided to pull over a car just to see if the occupant had a firearm's license. Instead, and unlike Prouse, where the officer did not see *"any suspicious activity*," Kabler and Sgt. Myles observed Plaintiff Theobald, in fact, engaged in "suspicious" activity: Plaintiff Theobald entered the side door of a convenience store off of I-95 after midnight with a Glock 9-millimeter pistol in a holster on his side. Dkt. No. 17-1, ¶¶ 3, 7-8, 19. As Theobald entered the store, Kabler observed Theobald's outer garment open, revealing a handgun on Theobald's waistband. Dkt. No. 21-1, ¶ 5. Kabler and Sgt. Myles observed Theobald grab the outer garment and close it, concealing the firearm. Dkt. No. 21-1, ¶ 6; Dkt. No. 17-1, ¶¶ 21-24. Deputy Kabler believed that the concealment of the firearm, early in the morning at a convenience store, upon observing three law enforcement officers was suspicious. Dkt. No. 17-1, ¶ 27. Sergeant Myles, who also saw these events, told Deputy Kabler that he was concerned whether Plaintiff possessed a valid weapons license because the Plaintiff attempted to cover up the gun, making it no longer visible. Dkt. No. 17-1, ¶ 24. Sgt. Myles told Deputy Kabler that he believed it would be appropriate to stop Theobald because the concealing of the weapon upon encountering law enforcement seemed suspicious to Myles. Dkt. No. 17-1, ¶ 26. While in the store, Plaintiff Theobald "kind of, like, browsed around. [He] was a little indecisive [and he] seem[s] to recall [he] was looking around for something for a while . . ."Dkt. No. 17-1, ¶ 12. Thus, Prouse is factually distinguishable.

Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases and the line is not to be found in abstractions but in studying how

these abstractions have been applied in concrete circumstances. Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1149–50 (11th Cir.1994). Prouse, which deals with a random stop, when the officer does not see any suspicious activity, to check for a driver's license and registration, does not apply to the facts of this case, where the Plaintiff was acting suspicious, with a firearm, and a firearm's permit, as opposed to a driver's license is at issue. The Eleventh Circuit has cautioned that "the most common error [it] encounter[s] in qualified immunity cases involves the point that courts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract rights." Hamilton by & ex rel. Hamilton v. Cannon, 80 F.3d 1525, 1531-1532 (11th Cir. 1996). The Court "emphasized that general propositions have little to do with the concept of qualified immunity and that the facts of a case relied upon to clearly establish the law must be materially similar, because public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." Id. As briefed above, the Plaintiffs have failed to carry their burden because these three cases do not "dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what [Defendant was] doing violates federal law in the circumstances." Alexander, 39 F.3d at 291. Thus, summary judgment is warranted. *see also* Jackson, 206 F.3d at 1165 (noting that the "burden of showing that an officer violated clearly established law falls on the plaintiff, and a plaintiff's citation of general rules or abstract rights is insufficient to strip a § 1983 defendant of his qualified immunity").

Based upon the facts detailed herein, a reasonable officer[2] would have possessed arguable reasonable suspicion to support the stop. "When an officer asserts qualified immunity, the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable reasonable suspicion to support an investigatory stop.'" Kilpatrick v. United States, 432 F. App'x 937, 939 (11th Cir. 2011). Arguable reasonable suspicion would exist in this case if a reasonable officer in the same circumstances and possessing the same information as Kabler could have believed that reasonable suspicion existed to stop the Plaintiff. Lee v. Ferraro, 284 F.3d 1188, 1195 (11th Cir. 2002). The Plaintiffs have failed to carry their qualified-immunity burden.

C. The Plaintiffs' argument about the conflict between the Georgia Court of Appeals and the Georgia Supreme Court actually demonstrates that Kabler is entitled to qualified immunity.

The Plaintiffs argue at length that possession of a firearms license is an element of the offense and not a defensive matter. But even if the element-of-the-offense or part-of-the-defense burden shifting were relevant in determining the lawfulness or entitlement to qualified immunity, both of which are false, the Plaintiffs' own brief demonstrates that Kabler is entitled to qualified immunity. As summarized by the Plaintiffs, "Kabler observed in responding to that Motion that the Court of Appeals of Georgia continued to follow the overruled line of cases that unconstitutionally shifted the burden of proof from the state

[2]The Court should objectively review the officer's rationale for the investigatory stop. Whren v. United States, 517 U.S. 806 (1996)"Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis;" courts do not consider an officer's actual motivations. Id. at 813.

to the criminal defendant in carrying weapons without licenses cases," and that Kabler concluded, "Georgia law is not exactly crystal clear regarding the burden of proof." Dkt. No. 21, p. 9. Acknowledging that these cases exist, the Plaintiffs declare these Georgia Court of Appeals rulings "spurious" and in conflict with rulings from the Supreme Court of Georgia and the Fifth Circuit holding that "it would be unconstitutional to shift the burden to the criminal defendant as the cases upon which Kabler relies purport to do." Id. The Plaintiffs argue that Kabler cannot point to these Georgia Court of Appeals cases in the qualified-immunity context:

> Kabler's attempts to show otherwise by citing to Court of Appeals of Georgia opinions is misplaced. First, intermediate state appellate opinions cannot be used to show whether the law was clearly established. Only the highest state court opinions, plus binding federal appellate opinions can be so used. Second, and self-evidently, the Court of Appeals of Georgia cannot have overruled the Supreme Court of Georgia. Dkt. No. 21, p. 18.

The Plaintiffs' arguments miss the mark for several reasons. First, once a Defendant raises the defense of qualified immunity, it is the Plaintiffs' burden to establish that binding clearly established law gave that defendant fair warning that his conduct was a constitutional violation. Second, the fact that these cases exist and conflict with the Georgia Supreme Court or Fifth Circuit actually demonstrates that Kabler is entitled to qualified immunity. The fact that Georgia Court of Appeals judges are "getting it wrong," as the Plaintiffs argue, actually proves that Kabler is entitled to qualified immunity. The Eleventh Circuit has explained that it "cannot realistically expect that reasonable police officers

know more than reasonable judges about the law." Barts v. Joyner, 865 F.2d 1187, 1193 (11th Cir. 1989). Clearly, if the judges on the Court of Appeals are mistaken, Kabler cannot be held to a higher standard. *See* id. ("Even if the state trial judge in Barts' criminal case was mistaken in denying the motion to suppress, if that judge's opinion about the fourth amendment's application to the events was within the range of professional competence (that is, was not an unacceptable error indicating 'gross incompetence or neglect of duty'), the police officer defendants ought not be held liable.")

D. The Plaintiffs' reliance on cases from other circuits is inapplicable to the qualified-immunity analysis.

The Plaintiffs cite numerous cases from other circuits in support of their position. Dkt No. 21, pp. 13-14. For qualified immunity purposes, however, these cases are non-binding and therefore did not provide Kabler fair-warning that his actions would violate the constitutional rights of the Plaintiff. Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011).

3. The Plaintiffs have not established a constitutional violation.

As framed by the Plaintiffs, the "crux of this case is whether a law enforcement officer in Georgia is empowered to make a forcible detention of a citizen seen carrying a firearm for the sole purpose of checking to see if the person possesses a license to do so." Dkt. No. 21, p. 4. The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose,

constitutes a 'seizure' of 'persons' within the meaning of this provision."Whren v. United States, 517 U.S. 806, 809-10 (1996). Consistent with the Fourth Amendment's reasonableness requirement, however, under Terry v. Ohio, 392 U.S. 1 (1968), a police officer may initiate an investigatory stop if he "has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123 (2000).[3]

"Reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules." United States v. Reed, 402 F. App'x 413, 415 (11th Cir. 2010)(citing United States v. Sokolow, 490 U.S. 1, 7 (1989). "On a level-of-suspicion spectrum, 'reasonable suspicion' is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and even falls below the probable cause standard of 'a fair probability that contraband or evidence of a crime will be found.'" Id. However, "the officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or 'hunch.'" Id. "When determining whether reasonable suspicion exists, courts must review the 'totality of the circumstances' to ascertain whether the officer had 'some minimal level of objective justification' to suspect legal wrongdoing. Reed, 402 F. App'x at 415."A series of acts, each of them perhaps innocent in itself taken together can warrant further investigation." Id. (citing Terry v. Ohio, 392 U.S. 1, 22 (1968)).

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[3]The Plaintiffs apparently agree that a Terry stop is at issue here. Dkt. No. 21, p. 17("The only exception conceivably applicable is the "Terry" stop, a brief investigatory detention based on reasonable articulable suspicion that the subject is engage in criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). As already discussed above, Kabler completely lacked the necessary reasonable and articulable suspicion. In fact, Kabler admits that he had no suspicion at all – no reason to believe Theobald had committed, was committing, or was about to commit a crime.")

"Reasonable suspicion analysis is not concerned with 'hard certainties, but with probabilities,' and law enforcement officials may rely on 'inferences and deductions that might well elude an untrained person because the evidence thus collected must be seen and weighed not in terms of library analysis by scholars." Id. (citing United States v. Cortez, 449 U.S. 411, 418 (1981)). Rather, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."Id. (citing Illinois v. Wardlow, 528 U.S. 119, 125, (2000)). "In making these commonsense judgments, 'the stopping officer is expected to assess the facts in light of his professional experience and where there is at least minimal communications between officers, we look to the 'collective knowledge' of all officers in assessing this determination." Reed, 402 F. App'x at 415 (citing United States v. Kreimes, 649 F.2d 1185, 1189 (5th Cir.1981).

"The Supreme Court has identified several factors that might affect officers' reasonable suspicion calculus." Reed, 402 F. App'x at 415. For instance, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." Id. (citing Wardlow, 528 U.S. at 124. Additionally, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." Id. "So too, a bulge in one's outer clothing might indicate the presence of contraband or a weapon." Id. (citing Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) ("The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer.").

Thus, the question here is not whether an individual in Georgia may legally openly carry a firearms. Rather, the question is whether a deputy sheriff has a reasonable suspicion, justifying a stop and a brief inspection of a firearms' license, when the officer and his supervisor see a person enter the side door of a convenience store off of Interstate 95 after midnight, armed with a Glock 9mm pistol, and the person conceals the previously visible firearm with an item of clothing after encountering law enforcement officers?[4] Deputy Kabler believed that the concealment of the firearm, early in the morning at a convenience store, upon observing three law enforcement officers was suspicious, (Dkt. No. 17-1, ¶ 27), which weighs in favor of a finding Kabler's actions to be lawful. Sergeant Myles, who also saw these events, told Deputy Kabler that he was concerned whether Plaintiff possessed a valid weapons license allowing him to possess the weapon in a convenience store because it appeared to Myles that the Plaintiff attempted to cover up the gun, making it no longer visible. Dkt. No. 17-1, ¶ 24. Sgt. Myles told Deputy Kabler that he believed it would be appropriate to stop Theobald because the concealing of the weapon upon encountering law enforcement seemed suspicious to Myles.[5] Dkt. No. 17-1, ¶ 26. All of these facts weigh in favor of a finding of lawfulness. *See* Reed, 402 F. App'x at 415

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[4] Additionally, plaintiff admits that he "kind of, like, browsed around. [He] was a little indecisive [and he] seem[s] to recall [he] was looking around for something for a while . . ." (Deposition of Mahlon Theobald, p. 21).

[5] Defendant recognizes that the pertinent statute allows properly licensed persons to carry a handgun either openly or concealed. However, that does not preclude all reasonable law enforcement officers from developing reasonable suspicion (or at least "arguable" reasonable suspicion) that a person may not possess a license (a crime), when officers observe sudden concealment of a weapon upon encountering law enforcement.

("nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.") Under Georgia law, Theobald would be required to have a license to possess the firearm in a convenience store. *See* O.C.G.A. § 16-11-126(h); 16-11-127(c). Under O.C.G.A. § 16-11-126(h)(2) it is a crime to violate subsection (h)(1) ("No person shall carry a weapon without a valid weapons carry license . . .). Thus, this first inquiry tilts in favor of the Defendant. *See* Reed, 402 Fed. App'x at 417 ("furtive flight or fight eye movements" indicating an intent to merely hide something, without any actual "flight," was sufficient to permit a Terry frisk)

The fact that this occurred, after midnight on a Friday night, in a gas station off of Interstate 95 further weighs in favor of finding reasonable suspicion. *See* Reed, 402 F. App'x at 415 ("officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."). Common sense tells us that a 24-hour convenience store is a target for robberies, particularly in the middle of the night, and a study released by the U.S. Department of Justice Office backs up that common sense. As that study confirms, "[c]onvenience store robberies account for approximately 6 percent of all robberies known to the police." ROBBERY OF CONVENIENCE STORES, U.S. Department of Justice Office of Community Oriented Policing Services, at page 2, available at www.cops.usdoj.gov/Publications/e0407972.pdf "Convenience store employees suffer from high rates of workplace homicide, second only to taxicab drivers." Id. at p. 4. "Operation hours are by far the strongest factor contributing to convenience story robbery,

particularly for stores open 24 hours a day. Late evening to early morning hours carry a greater risk of being targeted,...." Id. at p. 7. "Robbery offenders generally operate at night, when concealment is more likely. Convenience store robberies have been found to be consistent with this time pattern...Fifty percent occurred between 10 PM and 12 AM, generally times when business traffic is minimal. Three days (Friday, Saturday, and Sunday) accounted for 60 percent of the robberies." Id. at p. 13. The characteristics of a convenience store and the time of the encounter weigh in favor of the Defendant. *See* Reed, 402 F. App'x at 415 ("officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."). Further, the fact that the Plaintiff was actually carrying a firearm also weighs in favor of a finding of lawfulness. *See* Reed, 402 F. App'x at 415 ("So too, a bulge in one's outer clothing might indicate the presence of contraband or a weapon.")

Further, as previously briefed, the detention lasted no longer than eight minutes and fifty seconds, and much of that was due to questions being asked by Plaintiff. Dkt. No. 17-4, pp. 9& 11. The Plaintiff was merely questioned and asked to provide his driver's license as well as his weapons permit. Once that information had been obtained and verified, Deputy Kabler informed him that he was free to go. The stop only lasted as long as it did because plaintiff continued to engage Deputy Kabler with questions once Deputy Kabler was done. Courts have upheld Terry stops of much longer duration than this one. *See, e.g.*, United States v. Gil, 204 F.3d 1347, 1350-51 (11th Cir.2000) (upholding reasonable-suspicion detention for approximately 75 minutes); United States v. Cooper, 873 F.2d 269, 275 (11th

Cir.1989) (affirming a 35-minute reasonable-suspicion detention); United States v. Hardy, 855 F.2d 753, 761 (11th Cir.1988) (affirming reasonable-suspicion stop lasting almost 50 minutes).

In sum, Kabler has articulated more than an "inchoate and unparticularized suspicion or 'hunch' of criminal activity," and, therefore, did not violate the Fourth Amendment in dealing with Theobald. See Wardlow, 528 U.S. at 123–25 ("Even in Terry, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation.... Terry recognized that the officers could detain the individuals to resolve the ambiguity.")[6]

Before moving past this issue, Kabler must respond to three arguments advanced by the Plaintiffs. First, the fact that Theobald was, in fact, licensed to carry a firearm does not weigh into the equation. *See* Wardlow, 528 U.S. at 125–26 (in allowing investigatory stops to resolve "ambiguous" circumstances, "Terry accepts the risk that officers may stop innocent people"). Second, and related to the first point, while carrying a firearm in a convenience store is not illegal, nor is shopping past midnight at a convenience store, nor is concealing a firearm with a piece of clothing illegal, innocent behavior may, based on the totality of the circumstances, nonetheless provide an experienced officer with the

[6]As such, Deputy Kabler was only required to possess arguable reasonable suspicion to detain the plaintiff. Jackson v. Sauls, 206 F.3d 1156, 1166 (11th Cir. 2000). "A law enforcement official who reasonably but mistakenly concludes that reasonable suspicion is present is still entitled to qualified immunity." Id. at 1165-66. Deputy Kabler had arguable reasonable suspicion to believe the plaintiff did not possess a license based upon the observations of law enforcement at the convenience store.

requisite reasonable suspicion to conduct a Terry stop. *See, e.g*, United States v. Tinoco, 304 F.3d 1088, 1116 (11th Cir.2002) ("Reasonable suspicion exists, moreover, if the cumulative information of which the detaining officer is aware suggests criminal activity, even if each fact, viewed in isolation, can be given an innocent explanation.").

Third, and finally, the Court should objectively review the officer's rationale for the investigatory stop. Whren, 517 U.S. at 806. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis;" courts do not consider an officer's actual motivations. Id. at 813. Thus, Plaintiffs' arguments about Kabler's intentions are irrelevant.

4. The Plaintiffs have abandoned any state-law claims.

The Defendant argued that the Plaintiffs' state-law claims against Defendant in his individual capacity are barred by sovereign immunity.[7] In response, the Plaintiffs argue that "Theobald seeks damages against Kabler only for Kabler's violations of Theobald's federal constitutional rights, not Theobald's state law rights." Dkt. No. 21, p. 15. Paragraph 51 of the Plaintiffs' complaint, however, asserts a state-law claim for false imprisonment. Thus, to the extent that the Plaintiffs at one time sought state-law claims, such a claim has been abandoned. Resolution Trust Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995)("grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.")

[7]The Plaintiff has made clear that he is not asserting any state law claims against Kabler in his official capacity. Dkt. No. 21, p. 15.

5. Conclusion

Deputy Kabler is entitled to summary judgment on all claims in this action.

This 23rd day of May, 2013.

/s/ Richard K. Strickland
Richard K. Strickland
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/s/ Paul M. Scott
Paul M. Scott
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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

GEORGIA CARRY ORG., INC. and MAHLON THEOBALD,	*
	*
Plaintiffs	*
	*
v.	* Case Number: 2:12-cv-171-LGW-JEG
	*
BRIAN KABLER,	*
	*
Defendant	*

CERTIFICATE OF SERVICE

This is to certify that I have this day served all parties in this case in accordance with the directives from the Court Notice of Electronic Filing ("NEF"), which was generated as a result of electronic filing.

Submitted this 23rd day of May, 2013.

/s/ Richard K. Strickland

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