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 BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Brian Kabler, defendant in the above-styled action, by and through his undersigned counsel, and files this his Brief in Support of Motion for Summary Judgment, and shows the Court as follows:

I. INTRODUCTION

At the outset, defendant is compelled to note the somewhat odd procedural route taken by this case. Plaintiff filed a Motion for Partial Judgment on the Pleadings (Doc. # 9). In that Motion, plaintiffs asked this Court to grant relief to plaintiff on a claim that appears nowhere in the four corners of the plaintiffs' Complaint. Defendant pointed out to plaintiff that no such claim was set forth in the four corners of plaintiffs' Complaint. At the time, the case was in such a posture that plaintiff had time to amend the Complaint and allege a viable claim. However, that time has now passed pursuant to the Court's scheduling order. Rather than amend the Complaint, plaintiffs took the rather odd approach of acknowledging that their Complaint only alleged violations of the Fourteenth Amendment, but that defendant was somehow confused by plaintiffs' approach (Doc. # 14, pp. 1 - 2).

Defendant's counsel will acknowledge a bit of confusion by plaintiff's approach. Simply, the only federal claim asserted in this action is one under the Due Process clause of the Fourteenth Amendment to the Constitution, which is wholly inapplicable to the facts in this case. Further, as the time to amend plaintiffs' Complaint has long since passed, and a plaintiff may not raise new claims in response to a Motion for Summary Judgment, this action appears procedurally doomed.

As will be shown more fully in the argument portion of this brief, plaintiffs cannot simply thumb their nose at the pleading requirements in this Court. *See* Williams, et a. v. Bryan County, U.S.D.C., Southern District of Georgia, Case Number CV409-107, Order dated December 22, 2009, Smith, G.R., Magistrate (attached as Exhibit A hereto). As plaintiffs chose to plead a Fourteenth Amendment claim, the case will be treated as such. Failing to properly plead the case, they do so at their peril.

Beyond the procedure, defendant notes that summary judgment is appropriate in this case in any event, for various reasons. First, even if this Court were to evaluate this case under the Fourth Amendment standard, defendant's actions were lawful, but at a minimum any damages claims would be barred by qualified immunity.[1]

Finally, as previously pointed out, in response to plaintiffs' Motion for Partial Judgment on the Pleadings, plaintiffs are not entitled to declaratory relief in this action. Further, it appears that the plaintiffs are actually asking for declaratory relief with respect to persons or entities that are not parties to this lawsuit. The only party defendant is Brian Kabler and any declaration made could

[1] In his official capacity, defendant Kabler would not be deemed as "person" for purposes of a damages claim under federal law.

only be applicable to defendant Kabler. Regardless, plaintiffs have not shown that declaratory relief is appropriate.[2]

With regard to the state law claims, Deputy Kabler simply did not violate either of the statutes referenced in Counts II or III in the plaintiffs' Complaint. Regardless, based upon the admissions made by plaintiff Theobald in his deposition, it is clear that Deputy Kabler would be entitled to official immunity from suit with regard to plaintiffs' state law claims.

II. LEGAL STANDARD

The moving party's burden in a motion for summary judgment may be discharged by showing the District Court that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden then shifts to the non-movant to establish that there is a genuine issue as to facts material to the non-movant's case. Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1583 n.16 (11th Cir. 1991). If the non-moving party's response contains nothing more than conclusory allegations, the Court must enter summary judgment in favor of the movant. Peppers v. Coates, 887 F.2d 1493, 1498 (11th Cir. 1989).

In evaluating this case, the plaintiff's version of the facts are what this court should consider. *See*, Evans v. Stephens, 407 F.3d 1272, 1278 (11th Cir. 2005) (*en banc*) ("when conflicts arise between the facts evidenced by the parties, we credit the nonmoving party's *version*. Our duty to read the record in the nonmovant's favor stops short of not crediting the nonmovant's testimony in

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[2] Further, as discussed more fully in the argument section, it may be that defendant Georgia Carry.Org does not have standing, as there is no evidence that any member of Georgia Carry.Org was affected in the past, or will be affected in the future, by Deputy Kabler. As noted in the fact statement, plaintiff Theobald was not a member of Georgia Carry.Org at the time of the events at issue in this case.

whole or part: the courts owe a nonmovant no duty to disbelieve his sworn testimony which he chooses to submit for use in the case to be decided") (italics in original; underline added).

III. ARGUMENT AND CITATION OF AUTHORITY

A. The Fourteenth Amendment is Inapplicable to the Facts of this Case.

Plaintiffs' Complaint contains only one claim under federal law, a Fourteenth Amendment claim. *See*, Plaintiffs' Complaint, p. 7, Count I (Violations of the Fourteenth Amendment).

There is no Fourth Amendment claim in the plaintiffs' complaint. However, the plaintiffs' allegation does not really fall within purview of the Fourteenth Amendment and would be, therefore, be "analyzed under the Fourth Amendment and its 'reasonableness' standard." Graham v. Connor, 490 U.S. 386, 396 (1989). Nevertheless, the only pleading filed by the plaintiffs to this point claims violation of plaintiff Theobald's Fourteenth Amendment rights. Presumably, the plaintiffs are referring to the Fourteenth Amendment's Due Process clause. However, Graham considered whether alleged excessive force used during arrest could constitute a deprivation of the arrestee's due process rights. The Supreme Court held:

> [A]ll claims that law enforcement officers have used excessive force - - deadly or not - - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than a 'substantive due process' approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.

Graham, 490 U.S. at 395 (emphasis added).

The Supreme Court subsequently made clear that Graham's holding not only applied in force cases, but also in any case wherein a more specific constitutional provision exists. "The 'more

specific provision' rule of Graham v. Connor . . . requires that if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under substantive due process." County of Sacramento v. Lewis, 523 U.S. 833 (1998).

Simply, since the only federal claim in plaintiffs' complaint is a claim under the Fourteenth Amendment, plaintiffs' claim should be subject to summary judgment.

It is clear that in the Eleventh Circuit plaintiffs must identify the appropriate source of their legal claim in their Complaint. *See* Bloom v. Alvereze, 498 F.Appx. 867, 876 (11th Cir. 2012)("[plaintiff] does not allege a violation of his Fourth Amendment right to be free from unreasonable seizure and, consequently, fails to state a claim for which relief can be granted."). In Bloom, the plaintiff alleged various claims under 42 U.S.C. § 1983, including a specific claim of arrest without probable cause, false arrest, and malicious prosecution. Id. at 872. Nevertheless, because the plaintiff did not allege that such violated the Fourth Amendment, the Eleventh Circuit held that plaintiff had not even stated a claim. Similarly, a Florida Federal District Court dismissed a complaint "because the supporting factual basis of plaintiff's claims . . . did not actually support any of his legal claims . . .." Delor v. Clearwater Beach Development, LLC, 2008 Westlaw 1925264 (S.D. Fla. 2008). The court went on to note that "even a cursory review of the complaint reveals that plaintiff has failed to allege facts *which actually support* any of his four counts. . .." Id. at 3. (Emphasis supplied).

As made clear by the order of Magistrate Judge G. R. Smith, in the Southern District of Georgia, it does matter what claims are set forth in the plaintiff's Complaint.

In the order attached as Exhibit A, when presented with an almost identical procedural situation, Judge Smith made clear that it is not sufficient to plead a Fourteenth Amendment claim if such claim is governed by the Fourth Amendment. In that case, the plaintiffs specifically alleged that their detention and false arrest claims were brought "under the provisions of the Fourteenth Amendment . . .." (Exhibit A, Order at p. 2). Judge Smith went on to note that a proposed amended complaint still made no mention of the Fourth Amendment. Id. at 4.

As in the instant case, plaintiffs were made aware of the need to amend their Complaint and assert such a claim, but failed to do so prior to the expiration of the deadline for such amendments.

Based upon other Eleventh Circuit authority, now that this case has proceeded to the summary judgment stage, it is too late for the plaintiffs to correct that shortcoming. In Gilmore v. Gates, McDonald & Company, 302 F.3d 1312 (11th Cir. 2004), the court held that the plaintiff could not raise a new claim in response to a summary judgment motion. Id. at 1315 - 1316. "A plaintiff may not amend her complaint through argument in a brief opposing summary judgment." Gilmore, 302 at 1315.

Simply, as the only federal claim set forth in plaintiffs' Complaint is one arising under the Fourteenth Amendment to the United States Constitution, summary judgment is required. Graham v. Conner, supra.

B. Georgia Carry.Org, Inc. does not have standing.

"[A] plaintiff must establish standing, which requires a showing that

> (1) [He] had suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;

> (2) The injury is fairly traceable to the challenged action of the defendant and
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> (3) It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Georgia Carry.Org, Inc. v. Georgia, 687 F.3d 1244, 1251 (11th Cir. 2012).

"The 'injury' in this pre-enforcement context is the well founded fear that comes with the risk of subjecting oneself to prosecution for engaging in allegedly protected activity." Id. at 1252.

The Eleventh Circuit "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. [Cit.] 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.'" Id.

In Georgia Carry.Org, Inc. v. Georgia, supra, the plaintiff was making a facial challenge to a portion of the Georgia Weapons License statutes that dealt with the possession of a firearm in a church. In the instant case, the plaintiff is not making a facial challenge to a statute, but is really complaining about Deputy Kabler's application of O.C.G.A. § 16-11-126(h)(1) and 16-11-127(c).

Under the particular circumstances here, defendant Kabler submits that plaintiff Georgia Carry.Org does not have standing. It is undisputed that plaintiff Theobald was not a member of Georgia Carry.Org at the time of his interaction with Deputy Kabler. It is further clear that there is no evidence in the record that either plaintiff Theobald or any other member of Georgia Carry.Org is in realistic danger of having another interaction with Deputy Kabler. In fact, there is no evidence that Deputy Kabler, since he now knows Mr. Theobald possesses a weapons license, would stop plaintiff in the future.

It is also worth noting that standing is based upon risk of "prosecution," something that did not occur in this case, and which is not a risk for either plaintiff in the future because they contend they are in fact properly licensed to carry weapons. Under such circumstances, they are not subject to prosecution.

Georgia Carry.Org, Inc. does not have standing in the instant matter.

C. Even if Plaintiffs had Properly Placed a Fourth Amendment Claim before the Court, Summary Judgment is Required.

"The Fourth Amendment protects individuals from unreasonable search and seizure. U.S. Constitutional Amendment IV. A traffic stop is a seizure within the meaning of the Fourth Amendment. United States v. Purcell, 236 F.3d 1274, 1277 (11th Cir. 2001)(citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)). However, because a routine traffic stop is only a limited form of seizure, it is more analogous to an investigative detention than a custodial arrest. *See*, Berkemer v. McCarty, 468 U.S. 420, 439 (1984). In this context, the duration of a traffic stop must be limited to the time necessary to effectuate the purpose of the stop. United States v. Pruitt, 174 F.3d 1215, 1219 (11th Cir. 1999)." Belt v. Nolen, U.S.D.C., Southern District of Georgia, Brunswick Division, 2:10-cv-146, Docket Number 36, p. 18 (emphasis supplied) (Attached hereto as Exhibit B).

In the instant case, it is undisputed that the plaintiff was stopped for a period of eight minutes and 50 seconds after he was observed by law enforcement officers taking action which appeared to result in him concealing his firearm. Not only was the firearm initially observed by Deputy Kabler, but also by his supervisor, Sergeant Myles. Myles was suspicious that plaintiff may not have a license for the firearm since it appeared to Myles that plaintiff concealed it upon encountering law enforcement officers. Under Georgia law, plaintiff 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 . . .).

As a result of the officers' observations, deputy Kabler contends that he was authorized to make a brief detention of plaintiff, as is illustrated by the video of the entire stop.[3] It is noteworthy that plaintiff's firearm was not taken from him. 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. Deputy Kabler contends that Georgia law does allow a law enforcement officer to inquire about a license of a person carrying a firearm, particularly under the circumstances of this case, i.e., it appeared that plaintiff attempted to conceal the weapon. However, even if there is not a specific permission for such an inquiry, neither Georgia law nor the Constitution appear to clearly prohibit such an inquiry. This encounter did not rise to anything beyond the level of a Terry v. Ohio, 392 U.S. 1 (1968) stop.

In any event, even if plaintiff's actions had not been deemed suspicious by at least two law enforcement officers, this encounter did not violate the Constitution. "But, as the Supreme Court has also made crystal clear, individualized suspicion is not an absolute prerequisite for every constitutional search or seizure. Id. at 1306 (emphasis supplied). [Cit.] "'The touchstone the Fourth

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[3] It is undisputed in the record that by the time deputy Kabler finished speaking with Sgt. Myles, plaintiff was already in the process of leaving the parking lot. Otherwise, he would have questioned him outside the store. Regardless, due to the limited nature of the stop (and short duration) the incident is not converted to something beyond a Terry stop.

Amendment is reasonableness not individualized suspicion.' [Cit.] . . .. "'[W]hile this court's jurisprudence has often recognized that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, we have also recognized that the Fourth Amendment imposes no irreducible requirement of such suspicion.'" [Cit.] "'The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, and therefore its proper application requires careful attention to the facts and circumstances of each particular case . . ..'" United States v. Lewis, 674 F.3d 1298, 1306 (11th Cir. 2012) (Observing that officers could lawfully detain an individual in order to inquire further regarding weapon officers had observed).

Though it does not appear that any case is exactly on point with the instant case, this case does have some noteworthy similarities to United States v. Upshaw, 2009 WL 1172707 (S.D. Fla. 2009). Though Upshaw involved a criminal prosecution, according "to the detective, defendant's attempt to hide his gun when police officers arrived on the scene was suspicious because any person with a concealed weapons permit would not have attempted to hide his weapon merely upon sighting police officers." Upshaw at 5. The court noted that "police encounters with citizens generally fall within one of three categories: (1) a consensual voluntary encounter; (2) a detention, or Terry stop; or (3) an arrest." Upshaw at 3. "Under Terry police officers are allowed to conduct a brief, investigatory stop 'when the officer has a reasonable, articulable suspicion that criminal activity is afoot.'" Id.

Defendant Kabler notes that plaintiff does not want to accept the basic premise that it would be a violation of O.C.G.A. § 16-11-126(h) for a person to possess a weapon in the state of Georgia inside a convenience store if they did not possess a weapons license. However, such would

constitute a crime. Accordingly, based upon the observations of Deputy Kabler and his supervisor, they had reasonable suspicion to investigate further. Though plaintiff attempts to question why he was not stopped immediately at the store, both Deputy Kabler and Sergeant Myles explained that they had a conversation about whether an inquiry should be made and that by the time Deputy Kabler got outside plaintiff was already preparing to leave the convenience store parking lot.

The brief detention of plaintiff at the traffic stop was not unconstitutional. "The Eleventh Circuit has articulated four factors that may be considered when evaluating whether a Terry stop has evolved from a detention to an arrest: (1) the law enforcement purposes served by the detention; (2) the diligence with which the officers pursued the investigation; (3) the scope and intrusiveness of the detention; and (4) the duration of the detention." Upshaw at 4.

The detention in this case was appropriate under all four prongs. First, Deputy Kabler was trying to determine if plaintiff was properly licensed, based upon Myles' and his suspicion. Next, Deputy Kabler spoke with his supervisor, who concurred that an inquiry should be made and he immediately proceeded after plaintiff. However, he did utilize a traffic stop because plaintiff was leaving the parking lot. On the third prong, plaintiff was never even asked to step out of his car. He was simply asked for his driver's license and about whether he possessed a weapon. Instead of responding that he did have a weapon, plaintiff simply responded that he had a concealed weapons permit. Nevertheless, the situation did not escalate after that evasiveness. Deputy Kabler still simply checked his driver's license and determined that he had a valid weapons permit.

As previously noted, the detention lasted no longer than eight minutes and fifty seconds, and much of that was due to questions being asked by plaintiff. Simply, the inquiry in this case did not violate the Constitution. In addition to Upshaw, supra, defendant Kabler believes that the guidance

provided by United States v. Lewis, 674 F.3d 1298 (11th Cir. 2012) requires judgment in Deputy Kabler's favor. "We begin with this observation: under controlling law the officers could lawfully detain McCrae in order to inquire further into a possible concealed weapons violation." United States v. Lewis, 674 F.3d at 1306. Though the instant case does not involve a concealed weapons violation, Deputy Kabler believes that it is certainly close enough to come within the reasonableness standard of the Fourth Amendment. In Lewis, the court determined that "the defendant's admission to carrying a concealed weapon was sufficient to justify briefly stopping him before inquiring further about whether he had an affirmative defense in the form of a valid concealed weapons permit." Id. at 1304.[4] It is still noteworthy, as noted by the court in Lewis that the "Supreme Court has made it abundantly clear that, although an individual may ultimately be engaged in conduct that is perfectly lawful - - as turned out to be the case with McCrae - - officers may 'detain the individual to resolve the ambiguity.'" Id.

Finally, deputy Kabler contends that, regardless of the amendment to Georgia's Carry Laws in 2010, neither the U. S. Constitution, nor Georgia law, are violated by the mere inquiry about a weapons license when a person is observed with a visible firearm, then appears to conceal it, while in a location where the person must possess a license to be in compliance with the law (such as being in a convenience store). Admittedly, there does not appear to be any, directly on point, case law going either way. Neither the Georgia statutes at issue, nor the U. S. Constitution guarantee unfettered access to firearms in public. With rights come responsibility. Simply producing a copy of a valid license, in the circumstances presented herein, is not a violation of applicable law.

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[4] Defendant understands that Florida and Georgia law differ with respect to their treatment of concealed weapons. But, that does not merit ignoring Lewis.

In the instant case, because of the apparent concealment, deputy Kabler had probable cause, or at least reasonable suspicion (based on his or Sgt. Myles' observations), to be concerned about a violation of O.C.G.A. § 16-11-126(h)(2).

Accordingly, deputy Kabler is entitled to summary judgment.[5]

D. Deputy Kabler Is Entitled to Qualified Immunity.

"When a plaintiff sues a[n] . . . officer in the officer's individual capacity for alleged civil rights violations, the plaintiff seeks money damages directly from the individual officer. If sued 'individually,' a[n] . . . officer may raise an affirmative defense of good faith, or 'qualified,' immunity." Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (citation omitted). The policy rationale for qualified immunity has been described as follows:

> Claims for money damages against government officials in their individual capacity involve substantial costs not only for the individual official– who incidentally may be innocent– but for society in general. The social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.

Foy v. Holston, 94 F.3d 1528, 1532 (11th Cir. 1996).

The Supreme Court has set forth a two-part test for the qualified immunity analysis. The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning

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[5] Further, to the extent Deputy Kabler is sued in his official capacity, he is not liable for the damages claim because (a) he is entitled to Eleventh Amendment immunity from suit, Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003); and (b) he is not considered to be a "person" for purposes of such damages claim. Manders, supra and Will v. Michigan Dept. of State Police, 491 U. S. 274, 280 (1989).

qualified immunity. However, if a constitutional right would have been violated under the plaintiff's version of the facts, the next, sequential step is to ask whether the right was clearly established." Wood v. Kesler, 323 F.3d 872, 877 -878 (11th Cir. 2003) (internal cites omitted). Notably, "plaintiffs bear the burden of showing that the federal rights allegedly violated were clearly established." Foy at 1532.

Here, the Court must consider Deputy Kabler's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Oliver v. Fiorino, 586 F.3d 898, 905 (11th Cir. 2009). The plaintiff appears to claim that Deputy Kabler violated his right to due process by detaining and questioning him without sufficient reason. The Fourth Amendment, not the Fourteenth, prohibits arrests without probable cause, Deloach v. Bell, 2008 U.S. Dist. LEXIS 25432, 5 (S.D. of Ga 2008), though no arrest was involved here, so arguable reasonable suspicion is all that is required.

The facts set forth in the record show that the subject incident was an investigative stop due to its limited duration, scope, and purpose. United States v. Street, 472 F.3d 1298, 1306 (11th Cir. 2006). 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.

Here, the pertinent facts known to Deputy Kabler were that the plaintiff entered a convenience store along Interstate-95, after midnight, with weapon at least partially exposed.

However, it appeared to at least 2 law enforcement officers that plaintiff then made an effort to conceal the weapon by covering it up in the presence of those officers. Deputy Kabler also knew that his supervisor believed that plaintiff had attempted to conceal the weapon, and that the supervisor, Sgt. Myles, was suspicious that plaintiff may not possess a license due to the concealment.

Deputy Kabler possessed at least arguable reasonable suspicion to briefly detain the plaintiff for the purpose of investigating whether plaintiff possessed a license. Further, as noted in the preceding section, it does 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). In fact, the statute having only been effective since 2010, it is not surprising that no case law has fleshed out the parameters of permissible investigation of possible violations of the Georgia Carry statutes. Under such circumstances, it cannot be said that deputy Kabler violated "clearly established" law.[6] Deputy Kabler is entitled to qualified immunity on the plaintiff's Fourteenth or Fourth Amendment claim.

E. Plaintiffs Are Not Entitled to Declaratory or Injunctive Relief.

Plaintiffs seek, in various forms, declarations that Kabler's actions were improper in this case. (Docket Number 9, p. 7; Complaint, Prayers for Relief).

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[6] There is some law analyzing what constitutes a *prima facie* case with respect to **former provisions** (since replaced) of Georgia's Weapon Carry statutes, as well as the evidence necessary for conviction under those statutes. *Compare* Head v. State, 235 Ga. 677 (1975) (lack of license is element of offense, rather than affirmative defense); and Patterson v. State 196 Ga. App. 754 (1990) (defendant must produce license to overcome *prima facie* case established by carrying of pistol). As noted, those cases dealt with prior versions of Carry Laws, but illustrate the lack of clarity regarding Georgia law on this issue previously. Currently, there does not appear to be even one published decision addressing of the 2010 version of O.C.G.A. § § 16-11-126(h)(1) and (2).

The Federal Declaratory Judgment Act states: "In a case of actual controversy . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201 (emphasis supplied). Based upon the facts revealed by discovery, there is no "actual controversy" of "sufficient immediacy and reality" to provide declaratory relief. Golden v. Zwickler, 394 U.S. 103, 108 (1969). Simply, at this point, plaintiffs have not established that the threshold for obtaining declaratory relief has been met, even if they had standing. See, Smith v. Montgomery County, Md, 573 F.Supp. 604 (D. Md. 1983). It is clear in the record that plaintiff Theobald has no reason to believe that Deputy Kabler would stop him in the future, or if he did, that he would ask to see his weapons' license (Depo. of Theobald, p. 35)

Under such circumstances, defendant suggests that plaintiffs' request for declaratory and injunctive relief should be treated as a similar request by one of these same plaintiffs in Georgia Carry.Org. v. Marta, U.S.D.C., Northern District of Georgia, Atlanta Division, Case Number 109-CV-594, Docket Number 55 (Attached hereto as Exhibit C). Therein, Judge Thrash noted, as follows:

> It is not, however, necessary to decide whether MARTA'S firearms policy as applied to any person openly carrying a firearm is unconstitutional. In addition to standing, the court must also determine for itself whether declaratory and injunctive relief are appropriate remedies. For this case they are not. C. L. Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 498, n. 11 (1st Cir. 1992); Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948). First, to grant the plaintiff's declaratory and injunctive relief would require the court to decide uncertain questions of state and constitutional law. C. L. Dia, 963 F.2d at 494 ('declaratory judgments concerning the constitutionality of government conduct will almost always be inappropriate when the constitutional issues are freighted with uncertainty and the underlying grievance can be remedied for the time being without gratuitous exploration of unchartered constitutional terrain.') State Auto Ins. Companies v. Summy, 234 F.3d 131, 135

> (3rd Cir. 2000)('where the applicable state law is uncertain or undetermined, district courts should be particularly reluctant to entertain declaratory judgment actions.') Second, plaintiffs never clearly distinguish their claims for compensatory damages from their claims for declaratory and injunctive relief so the parties have not adequately discussed the issues of general declaratory and injunctive relief. *See* Eccles, 333 U.S. at 434 ('judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous.') Third, because case law interpreting the Fourth Amendment requires highly case specific determinations of reasonableness of particular searches and seizures, general declaratory and injunctive relief may not provide significant guidance to any party. C. L. Dia, 963 F.2d at 494, ('courts should withhold declaratory relief as a matter of discretion if such redress is unlikely to palliate, or not needed to palliate, the fancied injury . . ..'). Fourth, if any members of Georgia Carry.Org suffer a constitutional violation in the future, they will have an adequate remedy at law under § 1983, just as [plaintiff] would have had if his constitutional rights had been violated. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983); Daniels v. Southfort, 6 F.3d 484, 486 (7th Cir. 1993). Taken as a whole, these four reasons demonstrate that declaratory and injunctive relief are not appropriate remedies for this case.

Georgia Carry.Org. v. Marta, supra at 16 - 17.

Further, in Rizzo v. Goode, 423 U.S. 362 (1976), the Supreme Court noted that "the principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances." Rizzo, 423 U.S. at 379. The court noted that considerations of federalism should preclude federal court intervention "where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments...." Rizzo, 423 U.S. at 380. The Supreme Court in Rizzo also expressed serious doubts about whether individuals in the plaintiffs' position could even establish the requisite Article III case or controversy to seek injunctive relief. The court noted that "while 'past wrongs are evidence bearing on the whether there is a real and immediate threat of repeated

injury', the attempt to anticipate under what circumstances the [plaintiff] would be made to appear in the future before [defendants] 'takes us into the area of speculation and conjecture.' [cit.]. . . . Thus, we think plaintiffs lack the requisite 'personal stake in the outcome....'" Rizzo, 423 U.S. at 372.

"Where injunctive relief is at issue, moreover, 'to have standing . . . a plaintiff must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future.'" Powell v. Barrett, supra, 376 F.Supp.2d at 1357. "Indeed, the Supreme Court has appeared singularly unwilling 'for purposes of assessing the likelihood that state authorities will reinflict a given injury . . . to assume that the party seeking relief will repeat the type of misconduct that would once against place him or her at risk of that injury.'" Id. Simply, injunctive relief is not appropriate in this action.

F. State Law Claims

1. O.C.G.A. 16-11-173 was not violated.

Plaintiff contends Deputy Kabler violated O.C.G.A. 16-11-173**.** In pertinent part, it provides: "No county or municipal corporation, by zoning, or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows; the possession, ownership, transport, carrying, transfer, sale, purchase, licensing or registration of firearms . . . ." (Emphasis supplied).

The record is clear that Deputy Kabler is neither a county nor a municipal corporation. Simply, the statute does not apply to him. Further, plaintiff admits he has no evidence that Deputy Kabler has enacted any "zoning, [ ] ordinance, resolution, or other enactment" in McIntosh County, Georgia (Depo. of Theobald, pp. 35-36). Simply, the statute has not been violated by the actions alleged in this case.

2. **O.C.G.A. 51-7-20 was not violated**.

"False imprisonment is the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty." O.C.G.A. § 51-7-20. However, an "arrest and search, legal under federal law, are legal under state law." Manzione v. State, 194 Ga. App. 227, 228 (1990)). Thus, this claim fails because the detention was permissible under federal law.

3. Deputy Kabler is protected by state law immunity in any event.

a. Sovereign Immunity

The plaintiff may be suing Deputy Kabler both individually and in his official capacity. The "official capacity" claims are clearly precluded by sovereign immunity. *See*, Article I, § II, ¶ IX of the Constitution of the State of Georgia; Gilbert v. Richardson, 264 Ga. 744 (1994) and Woodard v. Laurens County, 265 Ga. 404 (1995).

Suits against deputy sheriffs in their official capacity are deemed to be suits against the entity they represent.

> . . . this court has ruled that a deputy who is sued in his official capacity . . . is entitled to the county's sovereign immunity ... Nichols v. Prather, 286 Ga.App. 889, 894 (2007). *See, also*, Cameron v. Lang, 274 Ga. 122, 126 (2001); and Ward v. Dodson, 256 Ga.App. 660, 662 (2002).

Governmental entities are entitled to sovereign immunity under Georgia law. In 1985, the Georgia Supreme Court determined that the Constitution applied to counties, since they were within the meaning of "departments and agencies" of the state. *See*, Toombs County v. O'Neal, 254 Ga. 390 (1985), *citing* Nelson v. Spaulding County, 249 Ga. 334 (1982).

A 1991 Amendment to Article I, § II, ¶ IX of the Georgia Constitution restored sovereign immunity:

> (a) The General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for making, handling and the disposition of actions or claims against the state and its departments, agencies, officers and employees upon such terms and subject to such conditions and limitations as the General Assembly may provide.
>
> . . .
>
> (e) Except as specifically provided in this paragraph, sovereign immunity extends to the State and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver. Constitution of the State of Georgia, Art. I, § II, ¶ IX (as amended 1991) (Emphasis added).

Pursuant to the 1991 amendment, the "1983 insurance waiver" in the Constitution was withdrawn. Now, unless the General Assembly specifically provides for a waiver of such immunity, counties are entitled to sovereign immunity. Woodard at 405, *citing* Gilbert, *supra*.

Though the General Assembly has provided a waiver applicable to the state in the Georgia Tort Claims Act, that act specifically excludes "counties" from the definition of state. *See*, O.C.G.A. § 50-21-22 and Woodard, *supra*. Further, though there are state statutes providing sovereign immunity waivers for municipalities by the purchase of general liability insurance, e.g., O.C.G.A.

§ 36-33-1, there has been no such specific waiver provided for counties.[7] In fact, the only legislative intent is to the contrary. *See*, O.C.G.A. § 36-1-4.

County immunity has repeatedly been reaffirmed after Woodard and Gilbert. *See*, Swan v. Johnson, 219 Ga. App. 450 (1995); Kordares v. Gwinnett County, 220 Ga. App. 848 (1996); Saylor v. Troup County, 225 Ga. App. 489 (1997).

> The Kordares case fairly summarizes this particular area of the law.
>
> [T]he court finds that the county is immune from negligence liability. The doctrine of sovereign immunity applies to all state departments and agencies, including counties, regardless of the purchase of liability insurance. Ga. Const. 1983, Art. I, Sec. II, Para. IX (amended 1990); Gilbert v. Richardson, 264 Ga. 744 (1994).... The Georgia Constitution further dictates that sovereign immunity 'can only be waived by an act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver'. Kordares, *supra* at 849.

The Eleventh Circuit has recognized that under Georgia law, counties are "immune to suit for any cause of action, unless sovereign immunity is expressly waived by constitutional provision or statute." Kitchen v. CSX Transportation, Inc., 6 F.3d 727, 731 (11th Cir. 1993). The Kitchen court based its decision upon the Constitution of the State of Georgia, Article I, § II, ¶ IX (as amended 1991) and O.C.G.A. § 36-1-4.

The official capacity claim against Deputy Kabler is precluded by sovereign immunity. Gilbert v. Richardson, 264 Ga. 744 (1994) and Woodard v. Laurens County, 265 Ga. 404 (1995).

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[7] The General Assembly has provided a waiver of sovereign immunity for counties by the purchase of motor vehicle liability insurance. *See*, O.C.G.A. § 33-24-51 and Gilbert v. Richardson, 264 Ga. 744 (1994). However, that statute only provides a waiver when the incident arises out of the "ownership, maintenance, operation or use" of a motor vehicle "by...the county." *See also*, Woodard at 405. That statute is inapplicable here and does not provide a waiver of sovereign immunity.

> "Although Walker County is not a named defendant in this action, Millard was sued in his capacity as Walker County Sheriff. Accordingly, the Gilberts' claims are, in essence, claims against Walker County and Millard may raise any defense available to the county, including sovereign immunity." Gilbert at 746, n.4 (emphasis supplied).

See also, Nichols v. Prather, 286 Ga.App. 889, 894 (2007).

b. Official Immunity.

Georgia law protects governmental officials from individual liability arising from the performance of "discretionary actions taken within the scope of their official authority" as long as there is no actual malice or actual intent to cause injury. Cameron v. Lang, 274 Ga. 122, 123 (2001). Making warrantless arrests falls within discretionary functions of law enforcement officers for purposes of official immunity. See, *e.g.,* Selvy v. Morrison, 292 Ga.App. 702, 704 (2008) ("The making of a warrantless arrest for conduct occurring in an officer's presence is a discretionary act ...."); Reed v. DeKalb Cnty., 264 Ga.App. 83, 86 (2003) (describing the decision to make an arrest as discretionary because it requires "personal judgment and deliberation on the part of the officer"). Likewise, **investigating a case**, obtaining a search arrest warrant, and executing the warrant are discretionary functions. Marshall v. Browning, 310 Ga. App. 64, 67 (2011).

Therefore, to overcome official immunity, the Plaintiffs have the burden of pointing to some evidence that a particular Defendant acted with actual malice or deliberate intent to injure. Reed, 264 Ga.App. at 86. In the context of official immunity, "actual malice requires a deliberate intention to do wrong and denotes express malice or malice in fact." Adams v. Hazelwood, 271 Ga. 414 (1999). That "actual malice requires more than harboring bad feelings about another is well established." Peterson v. Baker, 504 F.3d 1331, 1339 (11th Cir. 2007). "While ill will may be an

element of actual malice in many factual situations, its presence alone cannot pierce official immunity; rather, ill will must also be combined with the intent to do something wrongful or illegal." Id. As explained by the Eleventh Circuit, "malice in this context means badness, a true desire to do something wrong." Id. In addition, "actual intent to cause injury" means "an actual intent to cause harm to the plaintiff, not merely an intent to do the act purportedly resulting in the claimed injury." Id. Here, the Plaintiffs have no such evidence. In fact, Plaintiff Theobald admits that no such evidence exists. (Depo. of Theobald, pp. 32-33, 39; Exhibit B- DVD). Accordingly, Deputy Kabler is entitled to official immunity as to the Plaintiffs' state-law claims.

IV. CONCLUSION

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

This 24th day of April, 2013.

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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 24th day of April, 2013.

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