In the United States District Court for the Southern District of Georgia Brunswick Division

GEORGIACARRY.ORG, INC., and MAHLON THEOBALD,	*	
Plaintiffs,	*	
vs.	*	2:12-cv-171
BRIAN KABLER	*	
Defendant.	*	

ORDER

Presently before the Court are cross-motions for summary judgment filed by Plaintiff Mahlon Theobald ("Theobald") and Defendant Deputy Brian Kabler ("Deputy Kabler"). Upon due consideration, Defendant's Motion for Summary Judgment (Dkt. No. 17) is **GRANTED** and Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 21) is **DENIED**.

FACTUAL BACKGROUND

This action is predicated on a traffic stop and request for a firearms permit. On August 3, 2012, Theobald travelled south along Interstate 95 in McIntosh County, Georgia. Dkt. No. 19, 9: 6-10. Shortly after midnight, Theobald stopped at a

convenience store. Id. at 9: 1-2, 17: 16-19. He was carrying a Glock pistol in a holster outside his jeans. Id. at 18: 2-19. Theobald wore the pistol underneath a seersucker suit coat. Id. at 19: 7-17. The pistol was not visible from a "normal vantage" without something causing the jacket to open. Id. at 20: 1-12. Deputy Kabler was on duty inside the convenience store with two other officers, Sergeant Myles and Deputy Wainwright. Id. at 39: 18-23; Dkt. No. 17, Exh. 2, ¶ 3.

After pumping gas, Theobald entered the store to purchase a snack, and noticed the officers as he entered. Dkt. No. 19, 17: 16-19, 20: 13-18. When Theobald opened the convenience store door, the wind blew open his jacket, revealing the firearm. Dkt. No. 20, 11: 19-22, 12: 10-15. Theobald grabbed his jacket and closed it.[1] Id. at 12: 12-14. Deputy Kabler asked Sergeant Myles if he had seen the weapon, and Sergeant Myles responded in the affirmative. Dkt. No. 17, Exh. 2, ¶ 7. Sergeant Myles stated that he "also told Deputy Kabler that because it appeared to [him] that the white male had attempted to cover up the gun, making it no longer visible, [he] was concerned about whether the white male possessed a valid weapon's license allowing him

[1] Theobald's testimony does not indicate that he intentionally covered up his firearm after it was accidentally exposed to law enforcement. Theobald stated that the law enforcement officers did not notify him while in the store that they had observed his gun. Dkt. No. 19, 23: 17-20. Theobald stated that it is possible that he accidentally revealed his gun when he reached for his wallet to pay for his snack inside the store. Dkt. No. 19, 26: 5-10.

to possess the weapon in a convenience store." Dkt. No. 17, Exh. 2, ¶ 7. Sergeant Myles advised Deputy Kabler that he believed it would be appropriate for Deputy Kabler to make contact with Theobald "because the concealing of the weapon by the white male upon encountering law enforcement seemed suspicious to [him]."[2] Id. at ¶¶ 8-9. Deputy Kabler testified that where "early in the morning at a convenience store, [a person] walk[ed] in and [] s[aw] three law enforcement officers and [] ma[de] an obvious move to conceal the weapon," the concealment of the firearm was of a "significant" and "suspicious" nature. Dkt. No. 20, 14: 5-9, 15: 17.

Shortly thereafter, Theobald returned to his car and exited the convenience store parking lot. Dkt. No. 19, 24: 16-25. Deputy Kabler walked outside and observed Theobald drive away. Dkt. No. 20, 17: 3-10. Deputy Kabler initiated a traffic stop shortly after Theobald merged onto the interstate. Dkt. No. 19, 27: 2-25. Within a minute, Sergeant Myles and Deputy Wainwright arrived as backup.[3] Dkt. No. 17, Exh. 3, Dash Video; Dkt. No. 20, 25: 19-25. Sergeant Myles and Deputy Wainwright never spoke to Theobald and remained behind Theobald's vehicle for the duration of the stop. Dkt. No. 17, Exh. 3, Dash Video; Dkt. No.

[2] Deputy Kabler specified in his deposition that he did not ask Sergeant Myles for permission to make contact with Theobald, but rather for his opinion. Dkt. No. 20, 13: 10-13.

[3] This is a common practice of the McIntosh County Sheriff's Department. Dkt. No. 20, 27: 8-16.

20, 26: 3-17. The traffic stop lasted eight minutes and fifty seconds (Dkt. No. 17, Exh. 3, Dash Video), during which time Theobald remained in his car. Dkt. No. 19, 29: 5-7. Deputy Kabler testified that the purpose of the stop was "[t]o identify that he . . . had a permit to carry the weapon that he . . . concealed [] in front of us." Dkt. No. 20, 35: 2-8.

Deputy Kabler approached Theobald's car on the passenger side and asked to see Theobald's driver's license. Id. at 21: 6-19. Deputy Kabler then asked Theobald if he had a weapon with him. Id. at 22: 16-17. Theobald "asked [Deputy Kabler] if he had to answer" the question and Deputy Kabler stated, "I would hope [you] would be truthful" or "honest." Id. at 22: 18-22. Theobald said that he had a Florida Weapons Permit. Id. at 22: 24-25. Deputy Kabler asked to see the weapons permit. Theobald again asked, "Do I have to show you it?" Id. at 23: 5-6. Deputy Kabler responded, "Yes, sir, you do." Id. at 23: 7-8. Theobald produced his concealed Florida Weapons Permit. Id. at 31: 12-14.

Theobald testified that he "had some concern that if [he] answered the question in the affirmative . . . , which was the truth, that would have . . . escalated the stop and . . . [he] would have been . . . made to get out of the car or . . . [Deputy Kabler] would have pointed his firearm at [him] or something like that." Dkt. No. 19, 30: 18-25. Deputy Kabler

testified that Theobald was being "evasive" in the "way he was questioning [Deputy Kabler's] questions" and by answering Deputy Kabler's questions with questions of his own. Dkt. No. 20, 23: 20-22.

After Theobald gave Deputy Kabler his licenses, Deputy Kabler walked behind Theobald's car and ran Theobald's driver's license. Id. at 23: 25, 24: 1-3; Dkt. No. 17, Exh. 3, Dash Video, 3:29-5:18. Theobald had a valid license. Id. at 24: 22. Aside from looking at Theobald's weapons permit, Deputy Kabler took no other stops to verify its validity. Id. at 24: 23-25, 25: 1-4. Deputy Kabler returned Theobald's licenses and told him he was free to go. Dkt. No. 17, Exh. 3, Dash Video, 6:05-6:45; Dkt. No. 20, 28: 5-8. Deputy Kabler did not issue a traffic citation. Dkt. No. 19, 36: 22-25.

Theobald asked Deputy Kabler for his name and badge number and for their current location. Dkt. No. 20, 29: 21-25. Deputy Kabler informed Theobald that they were in McIntosh County, Georgia, and told Theobald that he could find information about his rights online. Id. at 29: 23-25, 30: 1-7. Deputy Kabler went to his vehicle to retrieve a business card but realized he was out of cards. Dkt. No. 19, 32: 3-5. In lieu of a business card, Deputy Kabler gave Theobald his name and badge number to write down. Dkt. No. 19, 32: 3-15. Theobald testified that Deputy Kabler "wasn't particularly aggressive or antagonistic" and that

he was not concerned about Deputy Kabler's manner or attitude during the stop. Dkt. No. 19, 32: 19-25.

PROCEDURAL BACKGROUND

On September 21, 2012, Plaintiffs GeorgiaCarry.org ("GCO") and Theobald filed a complaint seeking relief under 42 U.S.C. § 1983 for violations of Theobald's constitutional rights at the hands of Defendant Deputy Kabler.[4] Dkt. No. 1, pg. 6. Specifically, Plaintiffs contend that Defendant violated Theobald's rights under the Fourteenth Amendment of the United States Constitution by subjecting him to an unreasonable seizure. Id. Plaintiffs also contend that Defendant violated O.C.G.A. §§ 16-11-173 and 51-7-20. Id.

Plaintiff Theobald seeks damages from Defendant in his individual capacity. Dkt. No. 25, pg. 21, ¶ 5. Both Plaintiffs seek declaratory and injunctive relief against Defendant in his official capacity. Id.

Defendant removed the case to this Court on October 22, 2012. Dkt. No. 1, Ex. A. On April 23, 2013, this Court denied Plaintiffs' motion for partial judgment on the pleadings. Dkt. No. 16. Currently before the Court are cross-motions for summary judgment. Dkt. Nos. 17, 21.

[4] One or two months after the traffic stop on August 3, 2012, Theobald joined the GCO. Dkt. No. 19, 25: 22-25.

LEGAL STANDARD

Summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that could impact the outcome in a case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine only where the jury could issue a verdict in the nonmoving party's favor. Id. In determining whether summary judgment is appropriate, the Court will view the evidence "in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The moving party bears the burden of showing a lack of genuine issue of material fact. Adickes, 389 U.S. at 157. The moving party should do so by identifying "particular parts of materials in the record" which indicate "the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c)(1)(A). It is only after the moving party has fulfilled this burden that the party opposing summary judgment bears a burden of responding. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The nonmovant will defeat a motion for summary judgment by presenting evidence "such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

The standard of review for cross-motions for summary judgment does not differ from the standard applied when only one

party files a motion. Am. Bankers Ins. Grp. v. U.S., 408 F.3d 1328, 1331 (11th Cir. 2005). "Cross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed." U.S. v. Oakley, 744 F.2d 1553, 1555 (11th Cir. 1984)(quoting Bricklayers Int'l Union, Local 15 v. Stuart Plastering Co., 512 F.2d 1017, 1023 (5th Cir. 1975)).

DISCUSSION

1. Fourteenth Amendment

Plaintiff contends that Defendant violated his Fourteenth Amendment rights by detaining Theobald without reasonable suspicion, by performing an unreasonable search, and by telling Plaintiff that Defendant could ask to see a person's permit any time Defendant saw a weapon. Dkt. No. 1, pg. 12, ¶¶ 48, 49.

According to the Eleventh Circuit, "[i]f an Amendment provides an explicit textual source of constitutional protection against the sort of conduct complained of, that Amendment—not the more generalized notion of substantive due process under the Fourteenth Amendment—is the guide for analyzing the claim." Jordan v. Mosley, 298 F. App'x 803, 805 (11th Cir. 2008). The Fourth Amendment to the United States Constitution explicitly protects against "unreasonable searches and seizures." U.S.

Const. amend. IV. Thus, Plaintiffs' unreasonable seizure claims should be analyzed under the Fourth Amendment.

2. Fourth Amendment

The Fourth Amendment applies to the states through the Fourteenth Amendment's Due Process Clause, and provides that "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. A court must consider the totality of the circumstances to decide whether a search or seizure is reasonable under the Fourth Amendment. Samson v. California, 547 U.S. 843, 848 (2006). Under the Supreme Court's decision in Terry v. Ohio,

> law enforcement officers may seize a suspect for a brief, investigatory Terry stop where (1) the officers have a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity, and (2) the stop 'was reasonably related in scope to the circumstances which justified the interference in the first place.'

U.S. v. Jordan, 635 F.3d 1181, 1186 (citing Terry v. Ohio, 392 U.S. 1, 19-20, 30). To justify pulling a vehicle over for a Terry stop, the police officer must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. The facts must show more than an "inchoate and unparticularized suspicion or hunch." Id.

at 27. "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." Illinois v. Wardlow, 528 U.S. 119, 123 (2000)(citing U.S. v. Sokolow, 490 U.S. 1, 7 (1989)).

In this case, the totality of the circumstances generated reasonable suspicion to perform a traffic stop to investigate whether Plaintiff possessed a license to carry the firearm. Deputy Kabler's reasonable suspicion formed when Theobald made "an obvious move to conceal the weapon." Dkt. No. 20, 14: 5-9. As noted above, the officers saw that Theobald was carrying a firearm when the wind blew his jacket open. After he saw the three officers inside the convenience store, Theobald concealed the firearm by closing his outer garment. Although Theobald's testimony indicates that he was unaware that the officers saw his firearm when it was accidentally exposed, this does not refute the totality of the circumstances that would warrant a reasonable officer's reasonable suspicion that Theobald was carrying a concealed firearm without a permit.

Courts have considered the time of night as a relevant factor in determining the reasonableness of a Terry stop. See U.S. v. Abokhai, 829 F.2d 666, 670 (8th Cir. 1987) (considering that the defendants approached the convenience store on foot

after dark as a factor to warrant a valid Terry stop); see also U.S. v. Glover, 662 F.3d 694, 695-98 (4th Cir. 2011) (citing defendant's presence at a convenience store in the middle of the night as a relevant factor to validate a Terry stop). Theobald entered the convenience store sometime after midnight, contributing to Deputy Kabler's reasonable suspicion.

Deputy Kabler observed Theobald carrying a concealed weapon in a place where Georgia law requires individuals to possess a valid weapons license. O.C.G.A. § 16-11-126(h)(1) states, "No person shall carry a weapon without a valid weapons carry license unless he or she meets one of the exceptions to have such license as provided in subsections (a) through (g) of this Code section." By Theobald entering the convenience store after midnight and closing his outer garment so as to conceal the weapon in the presence of police officers, a reasonable officer could form reasonable suspicion that Theobald did not possess a valid weapons license to carry a concealed firearm.

3. Qualified Immunity

Even if it could be said that Deputy Kabler was wrong in his conclusion that reasonable suspicion existed, there was at least arguable reasonable suspicion. As such, he is entitled to qualified immunity. "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." Jackson v. Sauls, 206 F.3d 1156, 1166 (11th Cir. 2000)(citing Williamson v. Mills, 65 F.3d 155, 157 (11th Cir. 1995)).

Government officials performing discretionary functions receive qualified immunity if a reasonable official would not have known that his actions violated clearly established law. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011). "Exact factual identity with a previously decided case is not required, but the unlawfulness of the conduct must be apparent from pre-existing law." Id. (citing Bashir v. Rockdale Cnty, Ga., 445 F.3d 1323, 1330-31 (11th Cir. 2006). "[T]he salient question . . . is whether the state of the law . . . gave [the officers] *fair* warning that their alleged treatment of [the plaintiff] was unconstitutional." Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002)(quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)). In the Eleventh Circuit, only "binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—[can be used] to determine whether the right in question was clearly established at the time of the violation." Coffin v. Brandau, 642 F.3d at 1013.

Binding precedent did not exist on August 3, 2012 to inform Deputy Kabler that he should not have formed a suspicion or that

stopping Theobald to determine whether he possessed a valid weapons license was an unreasonable seizure. Plaintiffs have not presented, and this Court has not found, U.S. Supreme Court, Eleventh Circuit, or Georgia Supreme Court precedent establishing that a law enforcement officer would not form reasonable suspicion to validate a Terry stop under the circumstances of this case. Deputy Kabler is entitled to qualified immunity.

4. State Law Claims

Defendant moved for summary judgment on the state law claims as well. Plaintiffs contend that Deputy Kabler violated O.C.G.A. § 16-11-173 by enforcing his own regulation on carrying concealed weapons in Georgia. Dkt. No. 25, 19, ¶ 5. Plaintiffs also contend that "[Deputy] Kabler violated O.C.G.A. § 51-7-20 because he had no authority to detain [Plaintiff] Theobald." Dkt. No. 25, 19, ¶ 5. This Court concludes that both of Plaintiffs' state law claims fail as a matter of law.

a) Municipal Regulation of Carrying a Firearm

Plaintiffs allege violations of O.C.G.A. § 16-11-173(b), which states, in relevant part, that "[n]o county or municipal corporation, *by zoning or by ordinance, resolution, or other enactment*, shall regulate in any manner guns shows; the possession, ownership, transport, carrying . . . of firearms or components of firearms . . . ." O.C.G.A. § 16-11-173(b)(1)

(emphasis added). On its face, this statute does not apply to Deputy Kabler, as a municipal defendant, because he did not attempt to enact an ordinance or regulation for carrying concealed weapons when he stopped Theobald to investigate Theobald's weapons license. In construing this statute, the "golden rule" of statutory construction requires the Court to follow the literal language of the statute unless doing so "produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else." Georgia Power Co. v. Monroe Co., 644 S.E.2d 882, 884 (Ga. Ct. App. 2007)(quoting Telecom*USA v. Collins, 393 S.E.2d 235, 237 (1990). The plain language of this statute expressly precludes a municipal corporation from regulating "by zoning or by ordinance, resolution, or other enactment." O.C.G.A. § 16-11-173(b)(1). No evidence exists to prove that Deputy Kabler or the McIntosh County Sheriff's Department violated this provision. Moreover, Deputy Kabler's investigatory stop for approximately eight minutes and fifty seconds does not equate to an informal policy of enforcing such regulation or ordinance.

The Plaintiffs' reliance on Sturm, Ruger & Co., Inc. v. City of Atlanta, 560 S.E.2d 525 (Ga. Ct. App. 2007) is misplaced. In Sturm, Ruger & Co., Inc., the City of Atlanta attempted to regulate the gun manufacturing industry when it brought suit against fourteen gun manufacturers and three trade

associations for negligent design, failure to include safety devices, and failure to warn. Id. at 713-14. The Georgia Court of Appeals held that the City of Atlanta could not indirectly regulate through litigation the right to bear arms which the State, through its regulatory and statutory scheme, expressly allowed. Id. at 718. Deputy Kabler's investigatory stop is not remotely similar to a city or county enacting an ordinance to regulate individuals' rights to bear arms. See id.; see also GeorgiaCarry.Org, Inc., et al. v. City of Atlanta, et al., 602 F.Supp.2d 1281, 1283 (N.D. Ga. 2008) (deciding that GCO's state-law claim for violation of O.C.G.A. § 16-11-173 against the city and the Hartsfield-Jackson Atlanta International Airport failed); see also GeorgiaCarry.Org, Inc., et al. v. Coweta Cnty, 655 S.E.2d 346, 347 (Ga. Ct. App. 2009) (holding that O.C.G.A. § 16-11-173 preempted a county ordinance enacted to regulate the carrying of firearms). Consequently, Plaintiffs' state law claim under O.C.G.A. § 16-11-173 fails as a matter of law.

b) False Imprisonment

Georgia law defines false imprisonment as "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. In Durden v. State, the Georgia Supreme Court held that "[a]n arrest and search, legal under federal law, [is] legal under state law." 297 S.E. 2d 237, 240 (1982).

The court explained that this holding was necessary because the dual federal and state inquiries into probable cause or reasonable suspicion "serve no useful purpose and result in complicating the law in an area which needs to be readily understood by law enforcement officers." Id. Because Deputy Kabler had reasonable suspicion to conduct a Terry stop of Theobald, Deputy Kabler did not violate Theobald's state right to be free from unlawful detention under O.C.G.A. § 51-7-20. Therefore, Plaintiffs' false imprisonment claim fails as a matter of law.

CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment is **GRANTED** (Dkt. No. 17) and Plaintiff's Motion for Partial Summary Judgment is **DENIED**. Dkt. No. 21. The Clerk of Court is directed to enter the appropriate judgment.

SO ORDERED, this 27TH day of February, 2014.

LISA GODBEY WOOD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA