UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

GEORGIACARRY.ORG, INC., *et.al.*,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	Civil Action No. 2:12-CV-171-LGW
BRIAN KABLER,	)	
	)	
Defendant	)	
	)	

PLAINTIFFS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Pursuant to Fed.R.Civ.Proc. 12(c), Plaintiffs move for partial judgment on the pleadings.

Introduction

Plaintiffs commenced this case after Plaintiff Mahlon Theobald was stopped by Defendant McIntosh County, Georgia Sheriff's Deputy Brian Kabler and detained while Kabler investigated Theobald's license to carry a weapon. Kabler told Theobald that possession of a weapon is grounds for such a detention and investigation and that Theobald could expect similar detentions in the future if he carried a weapon. Plaintiffs contend that the detention was unlawful and seek damages together with appropriate declaratory and injunctive relief.

Plaintiffs filed this case in the Superior Court of McIntosh County, but Kabler removed the case to this Court on the grounds that some of Plaintiffs' claims involve federal questions.

Background

The facts recited here are taken from the Complaint [Doc. 1] and the allegations therein admitted in the Answer [Doc. 8]. On August 3, 2012, Theobald was traveling in his automobile

on Interstate 95 in McIntosh County, Georgia when Kabler (a McIntosh County sheriff's deputy) activated his emergency lights and initiated a traffic stop of Plaintiff. Doc 1, ¶¶ 5, 9, and 11. Kabler had seen Theobald wearing a handgun in a waistband holster in a convenience store in McIntosh County. Doc. 8, ¶ 6. Kabler told Theobald that Kabler stopped Theobald to see if Theobald had a license to carry a weapon. Doc. 1, ¶ 27. Kabler told Theobald, "For future reference, at any time I see a weapon, I can ask for your permit, OK?" Doc. 1, ¶ 27. Dabler further said, "I can ask at any time. It is a concealed weapons permit, not an open carry permit. There is a difference in the State of Georgia." Doc. 1, ¶29.

Theobald had a license to carry a concealed weapon issued to him by the State of Florida. Doc. 1, ¶ 7. Further facts will be discussed in the Argument section below, as needed.

Argument

After the pleadings are closed, a party may move for judgment on the pleadings. Fed.R.Civ.Proc. 12(c). Judgment on the pleadings is appropriate if there are no material facts in dispute and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts. *Horsley v. Rivera,* 292 F.3d 695, 700 (11th Cir. 2002).

The crux of Plaintiffs' case is that Kabler stopped and detained Theobald because Kabler had seen Theobald at a convenience store with a handgun on his (Theobald's) belt, and that such stop and detention were unlawful. Because Kabler has asserted that the stop and detention were lawful, the gist of the case has been put into issue. If the stop and detention were lawful, then Plaintiffs have no case. If they were unlawful, then Plaintiffs case is made.

Kabler told Theobald on the scene that Kabler stopped Theobald to see if Theobald had a license to carry a weapon and that Kabler could do so "at any time." In his Answer, Kabler

asserts, "Under Georgia law, a *prima facie* case of a charge of carrying a concealed weapon or of possessing a weapon without a license, is stated solely by proof that the plaintiff carried a pistol in a public place, and it is a citizen's burden to prove he has a valid license. As such, a law enforcement officer is entitled to inquire further upon observation of a weapon." Doc. 8, ¶ 12.

Kabler's statements on the scene are legally wrong. His assertion of law in his Answer is so wrong as to be frivolous.

I. There is no Crime of Carrying a Concealed Weapon in Georgia

As noted above, Kabler asserts in his Answer that a case for carrying a concealed weapon is made "solely by proof that the plaintiff carried a pistol in a public place." This assertion is astonishing in light of the fact that ***carrying a concealed weapon in Georgia is not a crime.*** That crime was abolished in 2010, more than two years before the incident in the instant case occurred. 2010 Ga. Act 643. Obviously, if there is no such crime, no case for such a crime can be made regardless of the facts.

II. There is No Crime of Possessing a Weapon Without a License

Kabler also asserts that a the same facts as noted in Part I above make a case for a charge of "possessing a weapon without a license." Doc. 8, ¶12. Georgia never has required a license to possess a weapon. Again, because there is no such crime, no case for such a crime can be made.

Given the similarity of the language, however, Kabler may be referring to the crime of ***carrying*** a weapon without a license, O.C.G.A. § 16-11-126(h):

> (1) No person shall carry a weapon without a valid weapons carry license unless he or she meets one of the exceptions to having such license as provided in subsections (a) through (g) of this Code section.

(2) A person commits the offense of carrying a weapon without a license when he or she violates the provisions of paragraph (1) of this subsection.

The application of O.C.G.A. § 16-11-126(h) will be discussed below.

III. There Was No Probable Cause for a Charge Under O.C.G.A. § 16-11-126(h)

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

It is clear from Georgia case law that carrying a weapon without a license has, as an element of the crime, the lack of a license:[1]

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

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

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

Fleming v. State, 138 Ga.App. 97, 98 (1976). [Emphasis supplied].

One of the cases overruled by the Supreme Court of Georgia in *Head* was *Johnson v. State,* 230 Ga. 196 (1973), in which the Court had approved a jury instruction that the burden was on a criminal defendant to prove that he had a license (as opposed to the burden being on the

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

State to show that the defendant did not have a license). The Fifth Circuit condemned this holding of the Supreme Court of Georgia as a violation of due process, improperly shifting the burden of proof to a criminal defendant to disprove an element of the crime. *Johnson v. Wright,* 503 F.2d 828 (5th Cir. 1975). ("We hold that the trial court's instruction violated appellant's right to due process in permitting the jury to infer that his pistol was unlicensed from evidence that he possessed one, and also in shifting to him the burden of proof on an essential element of the offense.")

The opinions of the Fifth Circuit issued prior to October 1, 1981 have been adopted by the Eleventh Circuit and are therefore binding on this Court. *Bonner v. City of Pritchard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*). Thus, there is 37-year-old binding precedent that the lack of a license is an element of the crime, contrary to Kabler's assertion. Kabler admits that, until Theobald presented his Florida license to Kabler, Kabler had no idea whether (or not) Theobald had a license.[2] Because Kabler had no way of knowing whether Theobald had a license, Kabler had no basis to stop and detain Theobald.

IV. It is Illegal to Stop a Person Just to See if He Has a License

There is no provision in Georgia law requiring a licensee to display his license to a law enforcement officer upon demand. Even if there were, however, it would be a Fourth Amendment violation to stop a person for the sole purpose of ascertaining if he has one. *See, e.g., Delaware v. Prouse,* 440 U.S. 648, 661 (1979), holding that stopping a motorist just to see if

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the current crime of carrying a weapon without a license.

[2] Georgia has reciprocity with Florida for the purpose of weapons carry licenses. O.C.G.A. § 16-11-126(e); law.ga.gov/firearm-permit-reciprocity ("Georgia currently reciprocates in recognizing firearms licenses with the following states: Alabama, Alaska, Arkansas, Arizona, Colorado, ***Florida,*** Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming.") [Emphasis supplied].

he has a driver's license is unconstitutional ("When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations – or other ***articulable basis amounting to reasonable suspicion that the driver is unlicensed*** or his vehicle unregistered – we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.") [Emphasis supplied].

In addition, the Supreme Court has ruled that there is no "firearms exception" to the Fourth Amendment. *Florida v. J.L.,* 529 U.S. 266 (2000). Other courts around the country likewise have ruled that possessing a firearm in a jurisdiction where such possession is legal (even if a license is required) is not grounds for stopping a person seen carrying a firearm:

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

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

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

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

> The undisputed facts establish that Mr. St. John's seizure was unreasonable. Defendants lacked a justifiable suspicion that Mr. St. John had committed a crime, was committing a crime or was about to commit a crime. Indeed, Officer

> McColley conceded that he did not observe Mr. St. John committing any crimes and that he arrived at the theater with the suspicion that Mr. St. John was merely "showing a gun," which is not illegal in the State of New Mexico.

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

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

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

Conclusion

There was no basis for Kabler's stop and detention of Theobald. Kabler's assertion that he is authorized to detain anyone seen carrying a firearm is contrary to the Fourth Amendment and unsupported by Georgia law. Plaintiffs therefore seek a declaration that Kabler's assertion is incorrect and that a law enforcement officer may not stop and detain a person seen carrying a firearm for the sole purpose of ascertaining if the person possesses a license to do so.

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CERTIFICATE OF SERVICE

I certify that on November 20, 2012, I served a copy of the foregoing using the ECF system upon:

Richard K. Strickland
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/s/ John R. Monroe
John R. Monroe