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	)	
	)	

PLAINTIFF MAHLON THEOBALD'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Fed.R.Civ.Proc. 56, Plaintiff Mahlon Theobald moves for partial summary judgment. Theobald moves for summary judgment as to liability for his federal claims. He reserves for trial the matter of damages for such claims, and liability for his state claims.

Introduction

Plaintiff Mahlon Theobald commenced this case after he 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. Theobald contends that the detention was unlawful under state and federal law, and seeks damages together with appropriate declaratory and injunctive relief.

Theobald 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

Defendant Brian Kabler is a deputy with the McIntosh County, Georgia Sheriff's Office. Deposition of Brian Kabler, p. 4. Kabler was on duty in the early morning hours of August 3, 2012. *Id.*, pp. 6-7. Kabler was standing in a convenience store speaking to other officers. *Id.*, p. 8. Kabler observed Plaintiff Mahlon Theobald enter the convenience store. *Id.*, pp. 9-10.

As Theobald entered the store, Kabler observed a gust of wind blow open Theobald's outer garment, revealing a handgun on Theobald's waistband. *Id.*, pp. 11-12. Kabler further observed Theobald grab the outer garment and close it. *Id.*, p. 12. Kabler thought Theobald's actions were "suspicious." *Id.*, p. 15. Theobald had a transaction with the cashier of the store and left. *Id.*, p. 12.

Kabler followed Theobald out of the store, then followed Theobald onto Interstate 95 where he activated his emergency lights and initiated a traffic stop on Theobald. *Id.*, pp. 18-19. Prior to activating his emergency lights, Kabler did not see Theobald commit any traffic offenses. *Id.*, p. 18. Kabler did not see Theobald do anything that made Kabler suspicious that Theobald had committed or was committing a crime. *Id.*, p. 19. Kabler did not observe anything at the store that made him believe that Theobald did or did not do anything that constituted a crime. *Id.*, p. 19. Kabler did not suspect, based on everything that he saw, including the firearm, that Theobald had committed, was committing, or was about to commit a crime. *Id.*, ¶. 19.

Kabler approached Theobald's car, asked for Theobald's driver's license, and asked Theobald if he had any weapons in the car. *Id.*, p. 22. Theobald handed Kabler his license and asked Kabler if Theobald had to answer the question pertaining to weapons. *Id.*, p. 22. Kabler

responded, "Yes, pretty much. I'm going to ask if you have a weapon on you. Do you or do you not have a weapon on you?" Verified Complaint, ¶ 17; Answer, ¶17.

Theobald responded that he had a Florida concealed weapons permit. Kabler Depo., p. 22. Kabler asked to see it, and Theobald asked if he had to show it to Kabler. *Id.*, p. 23. Kabler told Theobald that Theobald did have to show Kabler Theobald's Florida concealed weapons permit. *Id.*, p. 23. Theobald provided Kabler Theobald's Florida concealed weapons permit. *Id.* Kabler checked Theobald's drivers license and examined his Florida concealed weapons permit. *Id.*, p. 24. Theobald's drivers license was valid and his Florida concealed weapons permit appeared to be in order. *Id.*, p. 25.

Kabler's understanding was that Georgia recognized Florida's concealed weapons permit as the equivalent of a Georgia permit. *Id.* Kabler told Theobald that the reason Kabler stopped Theobald was that Kabler had seen Theobald's firearm at the convenience store. Verified Complaint, ¶19; Answer, ¶ 19. Kabler told Theobald that Theobald's permit was a concealed weapons permit, "which means concealed," but that Theobald's weapon had been "in an open position." Verified Complaint, ¶ 20; Answer, ¶20.

Kabler asked Theobald, "Why are you being evasive? I'm just asking you random questions. You're being real evasive." Verified Complaint, ¶ 23; Answer, ¶23. After Kabler checked Theobald's licenses, Kabler said, "For future reference, at any time I see a weapon, I can ask for your permit, OK?" Verified Complaint, ¶27; Answer, ¶ 27. Kabler said, "I can ask at any time. It is a concealed weapons permit, not an open carry permit. There is a difference in the State of Georgia." Verified Complaint, ¶ 29; Answer, ¶29.

Theobald asked Kabler for his name and department name, and Kabler responded, "What

seems to be the problem?" Verified Complaint, ¶ 34-35; Answer, ¶35.

Theobald travels frequently for his work and intends to travel through McIntosh County on a regular basis. Verified Complaint, ¶ 43. Theobald generally carries a firearm with him as he travels. Verified Complaint, ¶ 44. Theobald wants to avoid detention and harassment by Kabler on account of carrying firearms. Verified Complaint, ¶ 45.

Argument

A party may move for summary judgment and such motion shall be granted 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.Proc. 56(a). In the instant case, there are virtually no disputes of fact at all, as the bulk of the events giving rise to the controversy were captured via audio and video recording by both Theobald and by Kabler.

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. Theobald contends that doing so violates his right to be free from unreasonable seizures of his person, a provision contained within the Fourth Amendment and applied to the states via the Due Process Clause of the 14th Amendment.

The Fourth Amendment does not apply directly to the states or state actors. *Weeks v. U.S.*, 232 U.S. 383, 398 (1914) ("The 4th Amendment is not directed to the individual misconduct of [state] officials.") *Weeks* was modified by the Court some 35 years later in *Wolf v. Colorado,* 338 U.S. 25 (1949) *overruled on another point by Mapp v. Ohio,* 367 U.S. 643 (1961), wherein the Court said, "The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit

in the concept of ordered liberty and as such enforceable against the States ***through the Due Process Clause.*** *Id.* at 27.

The holdings of *Weeks* and *Wolf* remain intact. The Fourth Amendment does not apply to the states, but the provisions of the Fourth Amendment apply to the states via the Due Process Clause of the Fourteenth Amendment. While it has become somewhat common in modern parlance to speak of "Fourth Amendment rights" in the context of a state government, it nonetheless is technically incorrect to do so. It is the Fourteenth Amendment that guarantees a person's right to be free from unreasonable searches and seizures from states, not the Fourth Amendment.

As Kabler pointed out in his Response to Plaintiffs' Motion for Judgment on the Pleadings, unreasonable seizure claims must be ***analyzed*** under the Fourth Amendment and not the Fourteenth Amendment. *Graham v. Connor*, 490 U.S. 386 (1989). This is so because there is only one body of federal constitutional search and seizure law, not two.

I. An Officer May Not Stop a Person Just for Carrying a Firearm

The central legal issue in this case was briefed already in Plaintiffs' Motion for Partial Judgment on the Pleadings [Doc. 9]. Defendant successfully deflected that Motion [Doc. 16] by convincing the Court that he should be allowed to produce evidence that he had reasonable articulable suspicion, or probable cause, to detain Theobald.[1] Now that discovery has closed, it is clear that Kabler cannot produce such evidence:

> Q. And you stopped him by activating your emergency lights on your squad car?

[1] Defendant emphasized his Answer to Par. 12 of the Complaint, in which he denied that "Defendant had no reasonable, articulable suspicion to believe that Theobald had committed, was committing, or was about to commit a crime."

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

Deposition of Brian Kabler, p. 18, ll. 20-25; p. 19, ll. 1-13.

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

Deposition of Brian Kabler, p. 34, l. 1.

It is clear, therefore, that Kabler had no reasonable articulable suspicion and he had no probable cause. Instead, he performed a traffic stop on Theobald for the sole and express purpose of checking to see if Theobald had a license to carry a firearm:

Q. And when you stopped Mr. Theobald what was the purpose of your stop? What were you intending to accomplish?
A. To identify that he wasn't – you know, that he had a permit to carry the weapon that he had attempted to conceal in front of us. He didn't make an attempt, he concealed it in front of us.

Kabler Deposition, p. 35, ll. 2-8. This is consistent with what Kabler told Theoald on the scene:

Defendant looked at Theobald's licenses and told Theobald that the reason Defendant stopped Theobald was because Defendant had noticed at the convenience store that Theobald had a weapon.

Verified Complaint, ¶ 19; Answer, ¶ 19. Kabler elaborated:

> Defendant returned to Theobald's vehicle [and] said, "For future reference, at any time I see a weapon, I can ask for your permit, OK?"

Verified Complaint, ¶27; Answer, ¶27.

I.A. Kabler Acted Based On His Incorrect Understanding of the Law

Kabler articulated his legal position succinctly in the much-discussed Par. 12 of his Answer:

> 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.

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

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

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

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

It is clear from Georgia and binding federal appellate case law that carrying a weapon

without a license has, as an element of the crime, the lack of a license:[2]

> [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 State to show that the defendant did not have a license). The Fifth Circuit condemned this holding of the Supreme Court of Georgia as a violation of due process, improperly shifting the burden of proof to a criminal defendant to disprove an element of the crime. *Johnson v. Wright,* 509 F.2d 828 (5th Cir. 1975). ("We hold that the trial court's instruction violated appellant's right to due process in permitting the jury to infer that his pistol was unlicensed from evidence that he possessed one, and also in shifting to him the burden of proof on an essential element of the offense.")

The opinions of the Fifth Circuit issued prior to October 1, 1981 have been adopted by

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

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.[3] Because Kabler had no way of knowing whether Theobald had a license, Kabler had no basis to stop and detain Theobald.

Theobald notes that he made the above argument in their Motion for Judgment on the Pleadings. 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 to the criminal defendant in carrying weapons without licenses cases. Doc. 13, p. 10. Kabler concludes, "Georgia law is not exactly crystal clear regarding the burden of proof." *Id.* Spurious decisions of the Court of Appeals of Georgia notwithstanding, both the Supreme Court of Georgia and the Fifth Circuit have ruled that it would be unconstitutional to shift the burden to the criminal defendant as the cases upon which Kabler relies purport to do.

Kabler's reliance on his mistaken understanding of law is fatal to his defense:

> [A]n officer's reasonable mistake of fact may provide the objective grounds for reasonable suspicion or probable cause required to justify a traffic stop, ***but an officer's mistake of law may not.***

USA v. Chanthasouxat, 343 F.3d 1271, 1276 (11th Cir. 2003). Thus, Kabler's mistaken belief,

[3] 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]. Kabler also admitted this reciprocity in his deposition. Kabler Depo., p. 24, ll. 7-18.

however well-intentioned or sincere, that the burden of proof lies with a person seen carrying a firearm to prove the person's authorization to do so, cannot form the basis for a valid traffic stop.

There is no provision in Georgia law even requiring a weapons carry licensee to display his license to law enforcement officers on demand. Even if there were, however, it would be unconstitutional to stop a person seen carrying a firearm, just to see if the person had a license to do so. *See, e.g., Delaware v. Prouse,* 440 U.S. 648, 661 (1979), holding that stopping a motorist just to see if 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].

Moreover, carrying a firearm is not the inherently dangerous activity that driving a car is. The majority of states do not require a license to carry a firearm.[4] On the other hand, every state requires a license to drive a car. In 2011, there were 34,677 deaths from motor vehicle accidents in the United States. There were 12,174 firearms deaths from accidental discharges and

[4] Plaintiff GeorgiaCarry.Org, Inc. has surveyed state laws regarding carrying firearms without a license. There are 30 states that do not require a license to carry a firearm (Washington, Oregon, California, Utah, Alaska, Nevada, Arizona, Idaho, Montana, Wyoming, Colorado, New Mexico, South Dakota, Nebraska, Kansas, Missouri, Louisiana, Wisconsin, Michigan, Kentucky, Alabama, Ohio, West Virginia, Virginia, North Carolina, Pennsylvania, Maine, Vermont, New Hampshire, and Delaware). There are 19 states that require licenses to carry firearms (Hawaii, Utah, North Dakota, Minnesota, Iowa, Arkansas, Oklahoma, Texas, Indiana, Tennessee, Mississippi, Georgia, Massachusetts, Connecticut, Rhode Island, New Jersey, New York, South Carolina, Florida, and Maryland). One state, Illinois, forbids the carrying of firearms and does not issue licenses to do so. The 7th Circuit has declared Illinois' scheme to be unconstitutionally violative of the Second Amendment. *Moore v. Madigan,* 702 F.3d 933 (2012).

homicides by firearms.[5]

Given that there are three times as many deaths from automobile accidents, that driving is much more heavily regulated than carrying a firearm, and that carrying a firearm is explicitly protected by the Constitution, there can be no rationale for not applying the rule from *Prouse* to weapons carry licenses. Kabler had no idea whether Theobald possessed a license to carry a firearm or not. He simply had no legally valid reason for detaining Theobald.

I.B. Theobald's Concealing of the Firearm is Insignificant

In his deposition, Kabler attempts to justify the traffic stop by describing Theobald's actions upon entering the convenience store. Kabler said a gust of wind, or air pressure, blew open Theobald's blazer and allowed Kabler to view Theobald's firearm on his waistband. Kabler Depo., pp. 12-15. Kabler says that Theobald "grabbed his outer garment or the jacket and closed it." *Id.*, p. 12, ll. 12-14. Kabler called this action "suspicious," *Id.*, p. 15, l. 17. He believed Theobald was trying to conceal his firearm in front of the Kabler and other officers.

Kabler's other testimony, however, belies the sincerity of his suspicions. As already noted, Kabler admits he had no idea whether Theobald had a license or not. He also admits he had no reason to believe Theobald had committed, was committing, or was about to commit a crime. Moreover, Kabler testified, "To the best of my knowledge, you're not allowed to open carry in the State of Georgia [with or without a permit]." Kabler Depo., p. 32, ll. 20-25. Kabler fails to reconcile his suspicion of Theobald's concealing a firearm with his (mistaken) belief that a person with a license must conceal his firearm and cannot carry it openly. If, as Kabler

[5] U.S. Centers for Disease Control, *National Vital Statistics Reports*, Vol. 61, No. 6, available online at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf.

believes, a person with a license to carry a weapon must conceal it, there should have been nothing suspicious about Theobald apparently attempting to conceal a firearm. Quite the contrary, a reasonable officer in Kabler's position (with the mistaken understanding of the law) logically would believe a citizen would be alarmed at inadvertently exposing a firearm in front of law enforcement.

Indeed, Theobald hails from a state (Florida) that has the very law that Kabler ascribed to Georgia. Although in Georgia a person may carry a firearm openly or concealed with a license, Florida ***requires*** licensees to carry their firearms concealed and criminalizes the open carry of firearms, even by licensees. Florida Statutes § 790.053. It was only natural, therefore, for Theobald's instinct to be to follow the rule of his home state and keep his firearm concealed. Moreover, it also is natural, when one's garment is blown open by the wind, to hold the garment closed. Kabler's "suspicions" were unfounded.

To be lawful, a *Terry* stop must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *United States v. Boyce*, 351 F.2d 1102, 1108 (11th Cir. 2003). Taking the facts in a light most favorable to Kabler, Kabler saw Theobald walk into a convenience store, saw a gust of wind blow open Theobald's jacket, revealing a firearm and saw Theobald pull his jacket back down, re-concealing the firearm.

Kabler viewed these facts as suggesting that Theobald did not have a license to carry the gun. In particular, Kabler says Theobald's actions of concealing the gun in the officers' presence indicated that Theobald might not have had a license. But Kabler also says he had no reason to believe or even suspect that Theobald had no license. In short, Kabler had no valid basis for

detaining Kabler. When an officer is "[S]topping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment will not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas*, 443 U.S. 47, 52 (1979).

I.C. Courts Around the Country Have Rejected Detentions for Carrying Firearms

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).

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

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

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

I.D. Kabler's Affirmative Defenses Are Unavailing

Kabler has raised several affirmative defenses that Theobald will address here.

First, Kabler raised the defense of failure to state a claim. This is not really an affirmative defense at all, but grounds for denial of relief. It is not form an independent basis for dismissing the case.

Second, Kabler raised the defense of 11th Amendment immunity. As a reminder, however, Theobald did not invoke the jurisdiction of this Court. Kabler did, by removing this

case from the Superior Court of McIntosh County, Georgia..

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim *Eleventh Amendment* immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand.

Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 619 (2002). In *Lapides*, the state removed a case filed in a state court in Georgia to federal court, then claimed 11th Amendment immunity. The Supreme Court said, "We conclude that the State's action … removing … this case to federal court waived its *Eleventh Amendment* immunity…." *Id.* at 624. Moreover, Kabler had no Eleventh Amendment immunity in the first place. He was sued in his individual capacity. No governmental agencies were implicated.

Kabler's third defense is that he is not, in his official capacity, a "person." The Court need not tarry on this defense, because Theobald has not sued Kabler in Kabler's official capacity.

Kabler's fourth defense is that Theobald's state law claims against Kabler in Kabler's official capacity are barred by sovereign immunity. Theobald seeks damages against Kabler only for Kabler's violations of Theobald's federal constitutional rights, not Theobald's state law rights. Thus, there is no immunity at the state level. In any event, Theobald is not suing Kabler in Kabler's official capacity.

Kabler's fifth defense is that Theobald's state law claims are barred by official immunity. Theobald seeks damages against Kabler only for Kabler's violations of Theobald's federal constitutional rights, not Theobald's state law rights. Thus, there is no immunity at the state level.

Kabler's sixth defense is that Kabler is entitled to qualified immunity. This defense will be discussed below.

Kabler's seventh defense is that Kabler acted lawfully at all times. This, of course, is not a valid statement of an affirmative defense. It merely recites a general defense of lack of liability.

Kabler's eighth defense is that Plaintiff GeorgiaCarry.Org, Inc. ("GCO") lacks standing. GCO is not a party to this motion, so Theobald need not address this defense here.

Kabler's ninth defense is that O.C.G.A. § 16-11-173 does not provide a private right of action for damages. Theobald is not seeking damages under O.C.G.A. § 16-11-173.

Kabler's tenth defense is that the Fourteenth Amendment does not provide Theobald with a cause of action in this case. Again, this is not an affirmative defense, but a denial of liability. Kabler may have to elaborate on his meaning with this defense in order for Theobald to address it adequately, but Theobald suspects Kabler is referring to the issue already discussed in conjunction with the Motion for Judgment on the Pleadings.

Kabler's 11th defense is a denial of liability for attorney's fees and, again, is not truly an affirmative defense.

I.E. Kabler is Not Entitled to Qualified Immunity

We now turn to Kabler's qualified immunity defense. Assuming *arguendo* that Kabler can establish a prima facie case for qualified immunity (he has yet to do so), the burden would shift to Theobald to overcome the claim for immunity.

In deciding whether qualified immunity applies, the Court must make a two-pronged analysis. The Court must decide whether Kabler violated a constitutional right and whether the law regarding the right was clearly established. *Saucier v. Katz,* 533, U.S. 158 (2001). While

these factors were covered in some detail above in the discussion of the merits of Theobald's claim, a brief review is in order.

There can be no doubt that Kabler "seized" Theobald for purposes of the 4th Amendment.[6] *Prouse.* (traffic stop is a "seizure.") A warrantless seizure is *per se* unreasonable unless it falls into a well established exception. *United States v. Steed*, 548 F.3d 961, 967 (11th Cir. 2008). We therefore start with the premise that Kabler's seizure of Theobald was unreasonable – unless we can identify an exception.

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. Clearly, the first prong of *Saucier* is established. Kabler violated Theobald's right to be free from unreasonable seizures.

The second inquiry is whether the law in question was clearly established. A law is clearly established within the 11th Circuit if it has been in the "effective decisions at the time of the challenged conduct by the United States Supreme Court, the Eleventh Circuit Court of Appeals, or the highest state court in the state where the case originated." *Jenkins v. Talladega City Board of Education*, 95 F.3d 1036, 1050 (11th Cir. 1996).

In the instant case, 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

[6] Theobald once again reiterates that he is referring to *provisions* of the 4th Amendment that are

Supreme Court of Georgia so ruled in *Head* in 1975, and the 5th Circuit, which at the time included Georgia, ruled the same year that to hold otherwise would violate the Constitution. Plus, the Supreme Court of the United States ruled in *Prouse* that stopping a person just to see if he had a license was unconstitutional. The law was clearly established.

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.

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. Theobald therefore seek a declaration and appropriate injunction that Kabler's assertion is incorrect and that a Kabler may not stop and detain him for the sole purpose of ascertaining if he possesses a license to carry a weapon. He also seeks damages in an amount to be determined at trial.

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applied to state actors by virtue of the 14th Amendment.

CERTIFICATE OF SERVICE

I certify that on April 29, 2013, I served a copy of the foregoing using the ECF system upon:

Richard K. Strickland
rstrickland@brbscsw.com

/s/ John R. Monroe
John R. Monroe