Docket No. 14-11225

The United States
Court of Appeals
For
The Eleventh Circuit

GeorgiaCarry.Org, Inc., *et.al.,* Appellants
v.
Brian Kabler, Appellee

Appeal from the United States District Court
For
The Southern District of Georgia
The Hon. Lisa G. Wood, District Judge

Reply Brief of Appellants

John R. Monroe
Attorney at Law
9640 Coleman Road
Roswell, Georgia 30075
(678) 362-7650
Attorney for Appellants

Certificate of Interested Persons

Appellants certify that they have no modifications to their earlier Certificate of Interested Persons.

Table of Contents

CERTIFICATE OF INTERESTED PERSONS 2

TABLE OF CITATIONS..4

ARGUMENT AND CITATIONS OF AUTHORITY 6

1. KABLER'S STOP OF THEOBALD WAS NOT JUSTIFIED 6

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 19

Table of Citations

Cases

Florida v. J.L., 529 U.S. 266 (2000) 14

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 13

People v. Jordan, 121 Cal. App. 4th 544, 555 (Ct. Ap. Cal. 2004) 15

People v. Mario T., 376 Ill.App. 468, 481 (Ct. App. Ill 2007) 15

Reid v. Georgia, 448 U.S. 438 (1980)...9, 11

St. John v. McColley, 653 F.Supp.2d 1155 (D. N.M. 2009) 16

State v. Cunningham, 183 Vt. 401, 418 (S.Ct. Vt. 2008)............................15

Terry v. Ohio, 392 U.S. 1, 27 (1968)... passim

U.S. v. Sokolow, 490 U.S. 1, 2 (1989) 7

United States v. Black, 707 F.3d 531 (4th Cir., 2013)...................................17

United States v. Blackshaw, 367 F.Supp.2d 1165, 1171 (N.D. Ohio 2005) 14

United States v. Crandell, 509 F.Supp.2d 435, 442 (D. N.J. 2007) 14

United States v. Dudley, 854 F.Supp. 570, 580 (S.D. Ind. 1994)..................15

United States v. Harrell, 268 F.3d 141, 151 (2nd Cir. 2001) 14

United States v. Hauk, 421 F.3d 1179 1187 (10th Cir. 2005) 14

United States v. King, 990 F.2d 1552, 1559 (10th Cir. 1993).........................16

United States v. Reynolds, 526 F.Supp.2d 1330, 1339 (N.D. Ga. 2007) 14

United States v. Ubiles, 224 F.3d 213, 218 (3rd Cir. 2000) 14, 16

Summary of the Argument

Appellee Brian Kabler emphasizes his “suspicions” of Appellant Mahlon Theobald. Nowhere below or in his Brief did Kabler ever articulate what the suspicions were. Because he cannot articulate what exactly he suspected, he cannot have made a valid *Terry* stop. He also is not entitled to qualified immunity because case law is clear that law enforcement may not detain a person to force the person to identify himself or to check for licenses.

Argument and Citations of Authority

1. Kabler's Stop of Theobald Was Not Justified

Kabler bases his traffic stop of Theobald on his own subjective "suspicions" of Theobald. He "thought" Theobald's action of closing his jacket against the wind was "suspicious." By the same token, however, Kabler admits that he witnessed no traffic infractions, and had no suspicions that Theobald had committed, was committing, or was about to commit a crime. He merely had inchoate, unparticularized "suspicions" about Theobald. He therefore forcibly detained Theobald and demanded that Theobald produce identification.

"And in determining whether the officer acted reasonably in [detaining someone], due weight must be given, not to his ***inchoate and unparticularized suspicion or 'hunch,'*** but to the specific reasonable inferences which he is entitled to draw…." *Terry v. Ohio,* 392 U.S. 1, 27 (1968) [emphasis supplied]. "[T]he police can stop and briefly detain a person for investigative purposes if they have a reasonable suspicion support by articulable facts ***that criminal activity 'may be afoot…***.' Reasonable suspicion entails … something more than an inchoate and unparticularized suspicion or 'hunch'…." *U.S. v. Sokolow,* 490 U.S. 1, 2 (1989).

In the present case, Kabler ***never*** articulates what he suspected Theobald of. That is, his suspicions remained inchoate and unparticularized throughout the incident. He ***implies*** several possibilities, but he articulates none. For example, he points out that his initial observation of Theobald took place late at night in a convenience store, and obliquely mentions the possibility of a robbery. Yet he never comes to the particularized conclusion that he suspected Theobald of robbing the store. In fact, he freely admits he stopped Theobald as Theobald was driving at Interstate Highway speeds ***heading away from the store.***

Surely Kabler could not have thought Theobald was committing or was about to commit a robbery on the store he was leaving. Likewise, he had no facts at all that could lead him to believe Theobald had committed a robbery, because Kabler had observed Theobald the entire time Theobald was in the store. One can only conclude that Kabler's mention of the possibility of a robbery is just smoke and mirrors, throwing up all sorts of irrelevant facts and hoping something will appeal to the Court.

In comparing the present case to *Terry* and its progeny, it readily becomes apparent that Kabler's suspicion falls far short of the suspicion needed to justify a *Terry* stop. First, the famed Ofc. McFadden in *Terry* developed a "hypothesis" that Terry and his cohort "were contemplating a

daylight robbery." 392 U.S. at 29. In contrast, Kabler cannot articulate any crime he hypothesized that Theobald was contemplating.

Next, "nothing in [Terry's and his cohort's] conduct from the time [McFadden] first noticed them until the time he confronted them … gave him sufficient reason to negate that hypothesis." In the present case, Theobald entered the store, browsed for a snack, went to the counter to pay for it, and left. Theobald's conduct was entirely consistent with being a customer of the store.

Kabler's actions during his detention of Theobald underscore the lack of a robbery suspicion. Kabler did not ask Theobald where Theobald had been or where he was going. He did not check Theobald's criminal history. He made no attempt to verify Theobald's Florida concealed carry license. In short, if Kabler really had had some sort of robbery suspicion, he did woefully little to allay that suspicion. Of course, it bears repeating that Kabler had no such suspicion.

Another case that originated in Georgia closely resembles what Kabler believes to be the operative facts in the present case. In *Reid v. Georgia,* 448 U.S. 438 (1980), Reid and another man flew from Fort Lauderdale to Atlanta. As they left the plane and walked through the concourse, they were separated by other people, but the other man

occasionally looked back in Reid's direction. They met up with each other in the baggage claim area and were detained by a DEA agent when they left the terminal.

The grounds for the detention articulated by the DEA agent were location, time of day, attempt to conceal, and no luggage. Specifically, the agent said the men came from Fort Lauderdale (a known drug source), early in the morning (when law enforcement in the airport is less), attempted to conceal their relationship with each other by walking separately, and had no luggage. 448 U.S. at 441.

Aside from the apparent attempt to conceal their relationship, the Supreme Court found the other factors not to be particularized. The other factors articulated by the agent were, the Court found, applicable to "a very large number of presumably innocent travelers, who would be subject to virtually random searches were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.*

The parallels to the present case are striking. Here, Kabler notes the location, time of day, and attempt to conceal (but there is no mention of luggage). Kabler makes something of the fact that Theobald was in a convenience store, early in the morning, and concludes that convenience

stores are known targets for robberies. Kabler does not, however, mention whether the convenience store at issue had ***ever*** been the target of a robbery.

Theobald's patronage of a convenience store early in the morning is like Reid's flight from Fort Lauderdale early in the morning. If it is okay to detain Theobald for shopping at a convenience store early in the morning, then the police may detain "a very large category of presumably innocent shoppers, who would be subject to virtually random seizures." In other words, there is nothing particularized as to Theobald for being an early morning traveler stopping in a convenience store.

Like Reid's attempt to conceal his relationship with his traveling companion, the only fact articulated by Kabler that is particular to Theobald is that he closed his jacket when the wind blew it open – a fact Kabler subjectively believes was an attempt to conceal Theobald's firearm. While this factor is particular to Theobald, it simply does not support Kabler's [nonexistent] belief that Theobald had no license to carry the firearm. It was, to quote *Reid,* "a belief that was more an 'inchoate and unparticularized suspicion or hunch' than a fair inference in light of his experience," and therefore "too slender a reed to support the seizure in this case."

This analysis is underscored by the fact that Kabler deposed he had no opinion before stopping Theobald whether Theobald had a weapons permit.

Kabler testified he had "no idea" on that topic. Kabler Deposition, p. 33, l. 19 – p. 34, l. 7. In short, Kabler never developed the *Terry* hypothesis of criminal activity that is a condition precedent to a *Terry* stop. Kabler went directly from inchoate and unparticularized hunch to forcible detention. In fact, Kabler did not even have a hunch – even now he fails to articulate what he hoped to prove or disprove about Theobald's behavior.

Under Kabler's theory, anyone seen concealing a firearm in the presence of law enforcement officers is subject to detention. But, as already shown, Georgia does not have a crime against carrying a concealed weapon. Moreover, openly-carried firearms are a subject of much debate. At one time in this country, it was thought that only scoundrels concealed their weapons. Honest men wore their guns on their belts for all to see. Thus, the proliferation of laws against carrying concealed weapons.

The tide is shifting, however. Many in society are put at unease by seeing people around them wearing guns. States such as Florida actually prohibit wearing guns openly, and require they be concealed. Many self-defense advocates recommend that people who carry guns for self defense conceal those weapons in order to preserve the element of surprise if they face a confrontation.

It is no surprise, then, that a person such as Theobald who has a license to carry a firearm would conceal it. In fact, Theobald was concealing the firearm when he walked into the convenience store in the first place. It is Kabler who reports that the firearm was revealed when the wind blew Theobald's jacket open, and Theobald restored his jacket position to the *status quo ante*. Such an action is no different from restoring one's necktie, hat, or hair when a gust of wind moves them. While concealing ones' shirt buttons or hair results when the necktie and hat are restored to their positions, the object is not the concealment, but the restoration. There is no reason to believe that Theobald was doing anything different.

Kabler places undue emphasis on *Pennsylvania v. Mimms,* 434 U.S. 106 (1977), which stands for nothing more than the proposition that, in 1977 in Pennsylvania, where it was illegal to carry a concealed weapon, an officer already conducting a traffic stop may, upon seeing a bulge in outer clothing, pat the subject down for weapons. Kabler attempts to bootstrap *Mimms* to be *carte blanche* to detain a person known or suspected to be armed.

The problem with Kabler's logic is that this is not 1977 and we are not in Pennsylvania. In 2012 in Georgia, there was (and still is not) a crime of carrying a concealed weapon. The present case falls more in line with any

of several cases condemning detaining a person known (or suspected) to be armed.

The Supreme Court has ruled that there is no "firearms exception" to the Fourth Amendment. *Florida v. J.L.,* 529 U.S. 266 (2000). Since *J.L.* was decided, courts around the country have relied on *J.L.* to limit detention or searches of people based on information or belief that the person was armed. *United States v. Reynolds,* 526 F.Supp.2d 1330, 1339 (N.D. Ga. 2007) ("declining to adopt a firearm exception to stop-and-frisk Terry analysis"); *United States v. Harrell,* 268 F.3d 141, 151 (2nd Cir. 2001), Meskill *concurring,* ("In *J.L.,* the Supreme Court rejected the 'firearm exception"); *United States v. Ubiles,* 224 F.3d 213, 218 (3rd Cir. 2000) ("rejecting an 'automatic firearm exception' to the rule in Terry"); *United States v. Hauk,* 421 F.3d 1179 1187 (10th Cir. 2005) ("rejecting a firearms exception to the Fourth Amendment"); *United States v. Crandell,* 509 F.Supp.2d 435, 442 (D. N.J. 2007), *vacated on other grounds,* 554 F.3d 79, ("The Court declined to create a 'firearm exception' to the Terry analysis"); *United States v. Blackshaw,* 367 F.Supp.2d 1165, 1171 (N.D. Ohio 2005) ("The J.L. Court also declined to adopt the government's major argument that the standard Terry analysis should be modified to license a 'firearm exception.'"); *Brown v. City of Milwaukee,* 288 F.Supp.2d 962, 971 (E.D.

Wis. 2003) ("declining to adopt a 'firearm exception' to the standard *Terry* analysis"); *State v. Cunningham,* 183 Vt. 401, 418 (S.Ct. Vt. 2008) ("declining to adopt a 'firearm exception' to the warrant requirement; noting that possession of a firearm, like possession of narcotics, does not pose an imminent danger"); *People v. Jordan,* 121 Cal. App. 4th 544, 555 (Ct. Ap. Cal. 2004) ("The court also declined to modify the reasonable suspicion standard established in *Terry* by creating a 'firearm exception'"); *People v. Mario T.,* 376 Ill.App. 468, 481 (Ct. App. Ill 2007) ("rejecting the 'firearm exception' to the standard Terry analysis").

Beyond the *J.L.* line of cases, there are many more examples of courts frowning on detentions of people based on nothing more than the presence of 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).

<u>Conclusion</u>

GCO and Theobald have shown that Kabler had no reasonable suspicion that Theobald lacked a GWL. Given Kabler's inability to articulate any criminal suspicion of Theobald, there simply was no justification for Kabler's decision to detain Theobald.

JOHN R. MONROE
ATTORNEY AT LAW

____

John R. Monroe
Georgia State Bar No. 516193

9640 Coleman Road
Roswell, GA 30075
Telephone: (678) 362-7650
Facsimile: (770) 552-9318

ATTORNEY FOR APPELLANTS

Certificate of Compliance

I certify that this Reply Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Reply Brief of Appellants contains 2,965 words as determined by the word processing system used to create this Reply Brief of Appellants.

John R. Monroe
Attorney for Appellants
9640 Coleman Road
Roswell, GA 30075
State Bar No. 516193
678-362-7650

Certificate of Service

I certify that I served a copy of the foregoing Reply Brief of Appellants via U.S. Mail on July 21, 2014 upon:

Richard Strickland
P.O. Box 220
Brunswick, GA 31521

I also certify that I filed the foregoing Reply Brief of Appellants by mailing it via U.S. Mail to the Clerk on July 21, 2014.

____
John R. Monroe
Attorney for Appellants
9640 Coleman Road
Roswell, GA 30075
State Bar No. 516193
678-362-7650