**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ROME DIVISION**

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|---|---|---|
| **LUKE WOODARD** | ) | |
| | ) | |
| **Plaintiff** | ) | **CIVIL ACTION FILE NO.** |
| | ) | |
| **v.** | ) | **4:08-CV-178-HLM** |
| | ) | |
| **TYLER DURHAM BROWN et.al.,** | ) | |
| **Defendants.** | ) | |

# MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS

## STATEMENT OF FACTS

On May 12, 2008, Defendants were on duty in separate cars as deputies of the Paulding County Sheriff's Department. Brown Dep., p. 5; Payne Dep., p. 5. At approximately 6 p.m., the dispatcher notified Defendant Brown that a person possessed a pistol at Scott's Country Store on Highway 101. Brown Dep., p. 6. Plaintiff was lawfully carrying a pistol at Scott's, where he is a well known, frequent customer. Woodard Dep., p. 30.

Defendant Brown arrived at Scott's Country Store just as Mr. Woodard was leaving in his car and activated his emergency lights and siren to stop Mr. Woodard from leaving the parking lot. Brown Dep., p. 8; Woodard Dep., pp. 72-74. It is undisputed that at the time of the stop, Defendant Brown had not witnessed any traffic infraction and possessed only the information provided by

radio dispatch, which was that a man in possession of a pistol was leaving in a car matching the description of Mr. Woodard's car. Brown Dep., pp. 6-8, 47. When asked whether he had observed anything that the defendant thought "was a traffic infraction or other crime," he responded with a simple, "No." Brown Dep., p. 47.

Defendant Brown ordered Mr. Woodard to place his hands outside the window, and Mr. Woodard peacefully complied. Brown Dep., p. 9; Woodard Dep., p. 75. Defendant Brown asked Mr. Woodard for the location of the pistol. "He told me, I think, it was on his back or hip or something to that effect. I asked him to lean forward, and I saw the weapon in his waistband." Brown Dep., pp. 9-10 ("When he leaned forward, I could see it"). The handgun was exposed and clearly identifiable as a firearm. Brown Dep., pp. 13-14. Defendant Brown reached inside and seized Mr. Woodard's handgun (an EAA Witness .45). Brown Dep, p. 10; Woodard Dep., p. 75.

Defendant Brown demanded identification, and Mr. Woodard provided him with both his driver's license and his valid firearms license. Woodard Dep., pp. 75-76; Brown Dep., p. 15. Defendant Payne arrived on the scene and seized a second firearm (a cased Browning 9 mm on the seat belonging to Mr. Woodard's wife). Woodard Dep., pp. 76-77; Payne Dep., p. 18; Brown Dep., p. 40.

While being recorded on the video camera in Defendant Brown's patrol car, Mr. Woodard asked whether there was a problem, and Defendant Payne responded that the problem was Mr. Woodard "openly carrying a firearm." Payne Dep., pp. 15-16; Brown Dep., pp. 40-44. This plain statement of justification clearly contradicts the later arrest of Mr. Woodard on a charge of "carrying a concealed weapon." This statement at beginning of the stop demonstrates 1) that the deputies at the scene erroneously thought it is illegal to carry a pistol openly in Georgia (with a Georgia firearms license – "GFL") and 2) that Mr. Woodard was indeed carrying openly. The later claim of "carrying a concealed weapon" arose only after the officers were unable to find a Georgia statute prohibiting a GFL holder from openly carrying a firearm.[1]

While Defendant Brown detained Mr. Woodard, Defendant Payne interviewed witnesses near the scene. Payne Dep., p. 5; Brown Dep., pp. 16. The result of the interviews was that "nobody ever specifically said that the weapon was completely hid[den] from view . . ." Payne Dep., p. 14. Defendant Brown,

[1] There has never been a law in Georgia banning carrying firearms openly, from the time of its founding as a British colony until today (O.C.G.A § 16-11-128 prohibits carrying a pistol without a GFL, but that statute obviously would not apply to Mr. Woodard, who possessed – and displayed to Defendants -- his GFL on the day in question).

who made the arrest for carrying a ***concealed*** weapon, testified that neither he nor any witness saw Mr. Woodard conceal the gun. Brown Dep., p. 37.

Defendant Brown did not bother to interview any witnesses at the scene and arrested Mr. Woodard solely on the basis of information relayed by officers that did interview witnesses.

> Q. Then did you interview witnesses on the scene?
> A. No, not all the witnesses. I talked to Mr. Woodard while other officers talked to witnesses that were around the scene.
> Q. You didn't speak directly with any of the witnesses?
> A. Not to my recollection.

Brown Dep., p. 17. Later, Defendant Brown was asked, "Do you know which officers interviewed which witnesses?" and he responded, "No." Brown Dep., p. 17. Despite the lack of any direct or indirect knowledge of facts that would substantiate the charges, Defendant Brown made the arrest.

Defendant Brown later signed applications for warrants to arrest Mr. Woodard on charges of carrying a concealed weapon and disorderly conduct. In the application for a disorderly conduct warrant, Defendant Brown swore under oath that "Subject did commit offense of disorderly conduct when his action placed others in fear of receiving injury." Brown Dep., p. 42. In the application for the carrying a concealed weapon warrant, Defendant Brown swore under oath that "Subject did commit offense of carrying concealed weapon by concealing a pistol

in his waist band not in any type of holster or retention device." Brown Dep., p. 32. Defendant Brown swore under oath to these facts even though he never interviewed a single witness and did not observe these facts himself. Defendant Brown admits that he had no information that the firearm was completely concealed. Brown Dep., p. 37. Defendant Brown admits that he had no information to support any "violent or tumultuous" acts contributing to disorderly conduct by Mr. Woodard. Brown Dep., p. 19.

The Paulding County District Attorney's office never filed an indictment or information against Mr. Woodard for these, or any, charges. Decl. of Luke Woodard, ¶ 3. On October 27, 2008, the Paulding County District Attorney's office dismissed the warrants. *Id.* While the charges were pending, however, Mr. Woodard's GFL expired. Woodard Dep., p. 21. Because the "charges" brought by Defendant Brown were pending against Mr. Woodard, he was ineligible to obtain a renewal GFL.[2]

[2] O.C.G.A. § 16-11-129(b)(2) provides that a person is ineligible to renew his firearms license if he has a charge pending for violation of O.C.G.A. § 16-11-126. Thus, Deputy Brown's false charges had the effect of completely disarming Mr. Woodard outside of his home. Furthermore, a person who is enumerated as ineligible for a firearms license may not legally possess a firearm in the car at all. See O.C.G.A. § 16-11-126(d) and (e). The pending charge meant that Mr. Woodard was enumerated as ineligible.

Defendant Brown arrested Mr. Woodard for carrying a concealed weapon when the weapon in question was not concealed. He also arrested Mr. Woodard for disorderly conduct in the absence of any evidence that Mr. Woodard committed that crime. He signed warrant applications to arrest Mr. Woodard for the above crimes, knowing the statements made under oath on the applications were not true (or acting in reckless disregard of the truth) and did not even support all the elements of the crime charged. He and Defendant Payne seized Mr. Woodard's property in the absence of probable cause. For these reasons, Mr. Woodard is entitled to a declaration that Defendants violated his civil rights.

## Jurisdiction

This Court has jurisdiction over the case because the primary cause of action is a federal question, i.e., violations of the federal 4th and 14th Amendments to the Constitution of the United States. 28 U.S.C. § 1331.

## Argument

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed. Rules Civ. Proc. Plaintiff will show that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law as to Defendant Brown's liability.

The argument will be presented in three main parts. The first part addresses the complete lack of any reasonable suspicion of a crime to support the stop. The second part addresses the lack of probable cause to make an arrest and the false statements made in order to obtain a warrant after Defendant Brown placed Mr. Woodard in the Paulding County Jail. The third part addresses the seizure of Plaintiff's property without probable cause.

**I. The Initial Stop of Plaintiff Was Unfounded**

At the time Defendant Brown stopped Mr. Woodard, Defendant Brown knew that someone matching Plaintiff's description was at Scott's wearing a gun. Brown Dep., p. 6. There was no information that Mr. Woodard had robbed Scott's Country Store. There was no information that Mr. Woodard had committed or threatened to commit any violent act prior to getting in his car to leave after making his purchases. Defendant Brown had no reason to believe that Woodard was engaged in or planning or preparing to engage in any illegal activity due to his possession of a gun.

The Fourth Amendment prohibits "unreasonable searches and seizures...." U.S. Const. Amend IV; *see also Harris v. United States*, 331 U.S. 145, 150, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947). "What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or

seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985). The "general rule" is that "warrantless searches are presumptively unreasonable...." *Horton v. California*, 496 U.S. 128, 133, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). The courts have, however, fashioned exceptions to the general rule, recognizing that in certain limited situations the government's interest in conducting a search without a warrant outweighs the individual's privacy interest. *See, e.g., id.; Montoya de Hernandez*, 473 U.S. at 537-41, 105 S.Ct. 3304. A *Terry* "stop and frisk" is one such exception. *See Terry v. Ohio*, 392 U.S. 1, 20-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

*Terry*, and cases which follow it, make clear that "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 675, 145 L.Ed.2d 570 (2000). To make a showing that he or she in fact had reasonable suspicion, "[t]he officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch" of criminal activity.' " *Id*. (quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868). The Supreme Court has instructed that in "cases in which the officer's ***authority to make the initial stop*** is at issue," there is no "automatic firearms exception" to the Fourth Amendment and *Terry v. Ohio*, 392 U.S. 1 (1968). *See Florida v. J. L.*,

529 U.S. 266, 272, 120 S. Ct. 1375 (2000) (emphasis added). "Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." *J.L.*, 529 U.S. at 272.

The present case presents the question of whether Defendant Brown had authority to make the initial stop when he activated his emergency lights in the parking lot of Scott's Country Store, and, therefore, according to *J.L.*, the propriety of the initial stop must be examined under the standards of *Terry*. Under these standards, it is clear that Deputy Brown had no authority to make the stop. Under the Fourth Amendment, reasonable suspicion of a crime is the absolute minimum standard required to detain a citizen.[3] As will be seen below, a report that a person possesses a firearm, even combined with a "suspicious person" call, does not amount to an articulable, reasonable suspicion of illegal conduct.

There is a dearth of case law in the Eleventh Circuit discussing the authority of a police officer forcibly to detain a person in the absence of any reasonable suspicion of crime merely because the person possesses a firearm. Presumably,

[3] Lesser standards have been adopted only in the context of sobriety checkpoints, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), airports (*J.L.*, *supra*, 529 U.S. at 274 (in dictum), and schools, *Id*. (in dictum); *New Jersey v. T.LO.*, 469 U.S. 325 (1985), but, as noted above, the Supreme Court has declined to adopt an "automatic firearms exception." *J.L.* 529 U.S. at 272.

this is because most police officers in the Eleventh Circuit adhere to the standards in *Terry* and do not detain people without a minimum of a reasonable suspicion of a crime. [4] Courts in other circuits have addressed the issue directly. In *United States v. Dudley*, 854 F.Supp. 570, 580 (S.D.Ind.1994), the court held that a radio call alerting police to the presence of two people in a vehicle with firearms did not provide reasonable suspicion of a crime, because possession of firearms is not, generally speaking, a crime. The court discussed in more detail the issues of firearms licensing and whether possession of the firearm itself amounts to reasonable suspicion of illegal conduct:

> [Officer] Martin's impetus to investigate the Dudleys was a radio call alerting him to the presence of two people at the truckstop 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. In fact he testified he had absolutely no knowledge, or suspicion, that the Dudleys were engaged in any criminal activity until he discovered the first sawed-off shotgun. ***A telephone report of citizens possessing guns or merely engaging in "suspicious" activity, standing alone, cannot amount to reasonable suspicion of crime***.

[4] In *Mead v. Strength*, Case No. 1:08-CV-00145-JRH-WLB (S.D. Ga 2008), the court ruled in a consent order (Doc. 11 in that case, available via PACER) that a sheriff's deputy violated the plaintiff's Fourth Amendment rights by seizing the plaintiff's firearm in a grocery store parking lot when people had reported plaintiff wearing a firearm and "acting strangely" in the store. That case did not involve a subsequent full blown arrest like the instant case.

(emphasis added). In this case, Defendant Brown testified that he was responding to a call that Mr. Woodard possessed a gun and was "a suspicious person at a store." Brown Dep., p. 6. Defendant Brown was also "presumably not clairvoyant," or he would have known that Mr. Woodard had a valid Georgia firearms license. Defendant Brown "had absolutely no knowledge, or suspicion, that [Mr. Woodard was] engaged in any criminal activity." The court in *Dudley* further noted, "If the stop itself is unlawful, neither *Terry* nor *Michigan v. Long* authorize the police to search the suspects or the suspect's vehicle for weapons, even if the officers reasonably fear for their safety." *Dudley, Id.*

The Third Circuit Court of Appeals, with Northern District of Georgia Senior Judge O'Kelley sitting by designation, unanimously held that a tip by an identified witness that a celebrant at a festival was carrying a pistol was not sufficient to justify a stop of the celebrant. *United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000). "For all the officers knew, even assuming the reliability of the tip that Ubiles possessed a gun, Ubiles was another celebrant lawfully exercising his right[5] under Virgin Island law to possess a gun in public." *Id*. at 218.

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[5] Ironically, licenses to carry in the Virgin Islands are discretionary and extremely rare because they are notoriously difficult to obtain. V.I. law provides that such licenses are issued only to narrow classes of residents, including a person who proves by affidavit and two witnesses "that he has good reason to fear death or great injury" or can "demonstrate the need for such a license." V.I. Code Title 23

> This situation is no different than if [the informant] had told the officers that Ubiles possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed counterfeit bills-the possession of which is a crime under United States law, see 18 U.S.C. §§ 471-72-the officers would have had no justification to stop Ubiles based merely on information that he possessed a wallet, and the seized bills would have to be suppressed. . . .
>
> As with the case of the hypothetical wallet holder, the authorities here had no reason to know that Ubiles's gun was unregistered or that the serial number had been altered. Moreover, they did not testify that it is common for people who carry guns in crowds-or crowds of drunken people-to either alter or fail to register their guns, or to use them to commit further crimes-all of which would be additional evidence giving rise to the inference that Ubiles may have illegally possessed his gun or that criminal activity was afoot. Therefore, as with the wallet holder, the 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's Fourth Amendment rights***.

*Id*. at 218 (emphasis added). *See also Lund v. Salt Lake City*, 2008 U.S. Dist. LEXIS 98722, 24, FN 9 (D. Ut 2008). ("By itself, mere possession of a firearm in public is not unlawful and may well represent the exercise of a fundamental constitutional right guaranteed by the *Second Amendment to the United States Constitution.…"*). [Emphasis in original].

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§ 454(3). Accordingly, the reasoning in the *Ubiles* decision is even stronger when applied to Georgia, where firearms licenses are "shall issue" (meaning they cannot be denied to qualified applicants), and Georgia's 159 probate courts issued more than 121,000 of them in 2008 alone, good for a full five years.

As in both *Dudley* and *Ubiles*, Plaintiff in this case was stopped merely for possessing a firearm (and perhaps acting "suspicious[ly]"), and, going beyond the facts in *Dudley* and *Ubiles*, the firearm was seized even after the investigation revealed no crime whatsoever, as will be discussed below, in Sections II and III. There was nothing in Plaintiff's conduct that would lead a reasonable officer to suspect that criminal activity was afoot at the time Defendant Brown stopped him. Moreover, Defendants Brown and Payne, presumably not clairvoyant, had no way of knowing whether Mr. Woodard had a GFL. They had no knowledge or suspicion that Mr. Woodard did not (and, indeed, it is undisputed that Mr. Woodard had a valid GFL). A telephone call of a man possessing a gun or engaging in suspicious activity, alone, cannot amount to reasonable suspicion of a crime. For all the officers knew, Plaintiff was another Georgian "lawfully exercising his right under [Georgia] law to possess a gun in public." *See Ubiles*, 224 F.3d at 218.

Because Defendant Brown had no reason to believe, at the time he stopped Plaintiff, that Plaintiff had committed or was about to commit a crime (even a traffic offense), he lacked probable cause to stop Plaintiff's car. A person who is stopped in an automobile by police without probable cause has a valid basis for challenging the police officer's actions. *Branlen v. California*, 551 U.S. 249, 127

S.Ct. 2400, 168 L.Ed. 132, 136 (2007). In addition to lacking probable cause, Defendant Brown lacked reasonable suspicion for stopping Plaintiff's car. "Although a law enforcement officer may conduct a brief investigative stop of a vehicle, the stop must be based upon reasonable, articulable suspicion. And articulable suspicion requires a particularized and objective basis for suspecting that a citizen is involved in *criminal* activity. *State v. Martin*, 291 Ga. App. 548, 662 S.E.2d 316 (2008) (footnotes, citations, and punctuation omitted) [emphasis in original]. Defendant Brown had no particularized or objective basis for suspecting Woodard was involved in any *criminal* activity.

**II. There Was No Probable Cause to Arrest Plaintiff**

In addition to the improper detention of Plaintiff at the initiation of the stop, Defendant Brown compounded the violations of Plaintiff's Fourth Amendment rights by arresting him without a warrant and in the absence of probable cause to believe that Plaintiff had committed a crime. Defendant Brown put Plaintiff in jail on charges of (1) carrying a concealed weapon and (2) disorderly conduct.

IIA. Plaintiff's Firearm Was Not Concealed

The evidence available to Defendant Brown at the time he arrested Plaintiff is that Plaintiff had been carrying a firearm in the waistband of his pants "in plain view." There is not a scintilla of evidence to support the notion that the firearm

was concealed. Through discovery, it has become apparent that Defendants mistakenly believe that a holster is required under Georgia law to carry a firearm openly, and that is why they charged Mr. Woodard with "carrying a concealed weapon" even though his weapon was not concealed from anybody in the vicinity of Scott's Country store.

> Q. [W]hat was the basis for the charge?
> A. Carrying concealed weapon, carrying a pistol in a waistband not in any type of holster or retention device.

Brown Dep., p. 32.

As will be explained below, a holster is required in Georgia ***only*** when carrying concealed. Mr. Woodard testified that when he conceals a pistol, he always uses a holster. Woodard Dep., pp. 41-42. On the day in question, however, it is undisputed that Mr. Woodard was carrying openly, and Defendant Brown had no information that the pistol was concealed when he arrested Mr. Woodard. In his deposition, Defendant Brown admitted that he did not observe the pistol concealed and was not aware that anybody else had, either:

> Q. All right. Now, the officers that relayed witness information to you, did any of them tell you that at times Mr. Woodard's weapon was fully concealed?
> . . .
> A. At some point the witnesses, to my understanding, saw the weapon. And at some point I believe, it's my understanding, that he manipulated the weapon into his pants or around his pants or his waistband. Now, at that point he may have concealed it. I'm not sure.

> Q. And then, when you say you're not sure, does that mean because you don't recall or because—
> A. I didn't see him do it.
> Q. Okay. And did any officers report to you that a witness had seen him do that?
> A. What? Completely hide the weapon?
> Q. Yeah.
> A. I don't believe so.

Brown Dep., pp. 36-37.

A firearm is not "concealed," for the purpose of O.C.G.A. § 16-11-126[6], when it could be plainly visible to anyone encountering the person with a view of the side of the subject where the firearm is worn. *Stripling v. State*, 114 Ga. 538, 40 S.E. 733 (1901) ("if a man had a pistol fastened to a belt, and it was fully exposed at his back, he could not be legally convicted on the testimony of one who came in front of him and did not see the pistol"); *Stockdale v. State*, 32 Ga. 225 (1861) (pistol shoved into the waistband of one's "pantaloons" is not concealed). It is immaterial that a person without such a vantage point may not be able to see it. *Stripling*, 114 Ga. at 538.

Moreover, a firearm is not concealed when a large enough portion of it protrudes from a person's clothing (such as from his pocket) to identify it as a

[6] O.C.G.A. § 16-11-126(a) provides: A person commits the offense of carrying a concealed weapon when such person knowingly has or carries about his or her person, ***unless in an open manner and fully exposed to view***, any … firearm … outside of his or her home or place of business, except as permitted under this Code section. [Emphasis supplied].

firearm. *McCroy v. State,* 155 Ga. App. 777 (1980) ("butt end of a pistol sticking out of defendant's . . . pocket"). Defendant Brown testified that the grip of the full-sized firearm in question was protruding from Plaintiff's waistband:

> **Q.** Okay. Then what happened?
> **A.** ...He told me, I think, it was on his back or on his hip or something to that effect. I asked him to lean forward, and I saw the weapon in his waistband.
> . . .
> **Q.** I think you said when he leaned forward, you saw the gun; is that right?
> **A.** Yes.
> **Q.** And it was stuck in the waistband of his pants?
> **A.** Yes
> **Q.** Was he wearing any type of upper garment?
> **A.** No.
> **Q.** He had no shirt, no jacket, nothing like that?
> **A.** Just jeans, if I recall.
> **Q.** Do you recall how much of the gun was sticking out of his waistband?
> **A.** Part of the grip I know was out, and other than that, I was looking straight down on it. So I was actually looking down into his waistband.
> **Q.** Okay. Did you have to reach into his waistband, into his pants in order to get your hand on the gun, or were you able to pull it out without doing that?
> **A.** I just grabbed the end of the grip.

Deposition of Defendant Brown, pp. 9-11. In other words, just like the other witnesses, Defendant Brown immediately recognized the handle protruding from his waistband as a pistol. A photograph depicting Defendant Brown demonstrating how much of the firearm was protruding from Plaintiff's waistband is included

with the materials filed contemporaneously with this Motion. Brown Dep., pp. 13-14. Decl. of Luke Woodard, ¶ 5. The photograph is inserted below for the Court's convenience.


During the deposition, Defendant Brown was asked to use a sheet of paper, representing Mr. Woodard's pants, to demonstrate how much of Mr. Woodard's firearm protruded above Mr. Woodard's waistband. Brown Dep., pp. 13-14. The grips, backstrap, rear sights, and a portion of the slide and frame all are sufficiently visible for even a casual observer to identify the object as a gun.

*No Holster Is Required under the Circumstances of This Case*

It has become obvious through discovery that Defendants are contending that the arrest for carrying a concealed weapon (even though it is undisputed that the weapon was visible) is justified because of the lack of a holster. Contrary to Defendant Payne's contention at the scene and Defendant Brown's contention in the warrant application, a person carrying a firearm in an unconcealed manner is ***not*** required to use a holster.[7] Rejecting the government's argument that openly carrying a pistol ***without a holster*** constitutes the offense of carrying a concealed weapon, the Georgia Court of Appeals held:

> We do not believe, however, that such a construction is warranted, for it would prohibit the carrying of a pistol 'in an open manner and fully exposed to view' in one's hand. While carrying a pistol in such a manner may be a violation of [O.C.G.A. § 16-11-128], carrying a pistol without a license … it certainly cannot be said that the weapon would be concealed.

*Goss v. State*, 165 Ga. App. 488 (1983). The *Goss* court went on to re-affirm the holding in *McCroy*, noting:

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[7] A holster or similar device is required when the firearm is ***concealed,*** but not when it is carried ***openly***. The concealed carry statute, O.C.G.A. § 16-11-126(c), provides:

> (c) This Code section shall not permit, outside of his or her home, motor vehicle, or place of business, the ***concealed*** carrying of a pistol, revolver, or concealable firearm by any person ***unless*** that person has on his or her person a valid license issued under Code Section 16-11-129 ***and*** the pistol, revolver, or firearm may only be carried in a shoulder holster, waist belt holster, any other holster, hipgrip, or any other similar device, ***in which event the weapon may be concealed***…. [Emphasis supplied]

> The evidence in the case at bar shows that the witness and the arresting officer both clearly saw the handle of the pistol and immediately recognized it as a pistol. The pistol thus was not concealed.

*Id.* According to the *Goss* and *McCroy* courts, a pistol worn on the person with the handle exposed, that is recognizable as a pistol to the police and witnesses, ***is not concealed,*** and therefore no holster is required. This is exactly the situation in the instant case.

IIB. Plaintiff Did Not Commit Disorderly Conduct

Georgia's disorderly conduct statute, O.C.G.A. § 16-11-39, provides, in pertinent part:[8]

> (a) A person commits the offense of disorderly conduct when such person commits any of the following:
> (1) Acts in a violent or tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person's life, limb, or health….

In his warrant application for the charge of disorderly conduct, Defendant Brown said merely that Mr. Woodard's "action placed others in fear of receiving injury." Presumably, this is a reference to the final element in the statute, but the warrant application was completely silent with respect to whether Mr. Woodard acted "in a violent or tumultuous manner." At his deposition, Defendant Brown admitted that

[8] Disorderly conduct can also involve damage to property or use of "fighting words," but Defendant Brown admitted in his deposition that these types of conduct were not present in this case. Brown Dep., pp. 18-19.

he had no information to support the notion that Mr. Woodard acted in a violent or tumultuous manner toward any person, and Defendant Brown was not able to identify a single person that was actually placed "in fear of receiving injury:"

> **Q.** Now, what witness information was relayed to you by the officers that contributed to your decision to arrest Mr. Woodard?
> **A.** That he had made them think that he was about to hurt somebody.
> **Q.** Do you know which witnesses said that?
> **A.** Not by name, no.
> **Q.** But do you know them by some other means than their name?
> **A.** I can't quote who said what.
> **…**
> **Q.** And then, just to clarify, you don't know which witnesses were scared?
> **A.** At this time I cannot tell you the names.
> **Q.** Okay. Is there someone else who knows which witnesses were scared?
> **A.** I'm not sure.
> **…**
> **Q.** Did any witnesses report to you or did you get information via one of the officers who interviewed the witnesses that any of the witnesses reported that he had drawn the weapon?
> **A.** No.
> **…**
> **Q.** Did you get any information from any of the officers that interviewed witnesses that Mr. Woodard made any violent actions towards any witnesses?
> **A.** No.
> …
> **Q.** Did you receive any information that Mr. Woodard made any violent actions towards anyone?
> **A:** No.
> …
> **Q.** Did you receive any information that Mr. Woodard made any tumultuous actions towards any person?
> **A:** Tumultuous form towards any single person, no.

**Q.** What about towards a group of people?
**A:** Directly toward a specific entity, I would say no.

Deposition of Defendant Brown, pp. 18-19. Defendant Brown gave no hint that any other elements of the crime were present and, in fact, specifically denied that they existed. There is not a shred of evidence to support any allegation that Mr. Woodard acted in a violent or tumultuous manner or used any vulgar or profane language. Deposition of Defendant Brown, pp. 22-24.

The fact that an overly-sensitive passerby happens to be frightened by someone wearing a gun does not make the otherwise lawful carrying of the gun a criminal act under O.C.G.A. § 16-11-39. If this were not the case, every police officer wearing a gun could be committing disorderly conduct every time he or she encounters such an overly-sensitive person. Without a violent or tumultuous action, there can be no disorderly conduct under the Georgia statute. Because Defendant Brown admits that he made an arrest for disorderly conduct in the absence of violence or tumultuous acts, there is no genuine dispute as to whether the arrest for disorderly conduct was unlawful.

IIC. The Warrant Applications Were Unreasonable

An officer violates a citizen's rights when the officer applies for and obtains an arrest warrant when the officer should know that there is no basis for obtaining the warrant. It is no defense (for the officer) that the magistrate to whom the

warrant application was given issued the warrant. *Malley v. Briggs*, 475 U.S. 335, 344, (1986). ("The… question …is whether a reasonably well-trained officer … would have known that his affidavit failed to established probable cause and that he should not have applied for a warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest.") Because Defendant Brown should have known that his warrant applications failed to establish probable cause, it was not objectively reasonable for him to apply for the warrants.

**III. <u>Seizure of the Firearms Was Improper</u>**

In *State v. Jones*, 289 Ga. App. 176 (2008), the Court of Appeals of Georgia held that in order to seize a firearm, even temporarily during a lawful motor vehicle stop, "some conduct on the part of the occupants such as furtive movements or other indications of danger to the officer must be shown, and the officer must have an 'objectively reasonable' belief that the occupants of a vehicle are 'potentially dangerous'." *Id*. The Court added that there is no "carte blanche authority" to seize all weapons during a routine traffic stop. *Id*. In the present case, the officer stopped Mr. Woodard merely because he possessed a firearm, and Mr. Woodard did not engage in any furtive movements or other indications of

danger to the officer. Defendant Brown admitted that Mr. Woodard fully complied with Defendant Brown's commands without incident:

> **Q.** Okay. What happened when you pulled up into the store parking lot?
> **A.** Vehicle description was leaving or was pulling around the parking lot. I pulled in behind the vehicle and activated my lights.
> **Q.** Okay. Then what happened?
> **A.** I stepped out of my car partly, and I asked Mr. Woodard if he had a weapon. He said yes. I asked him to place his hands, I believe out the window or on the steering wheel. I'm not sure which.
> **Q.** Okay. Did he comply with your commands?
> **A.** Yes, he did.

Deposition of Defendant Brown, p. 9.

Defendant Brown seized Plaintiff's firearms during his detention, and thereafter, without a warrant and without justification. The seizure was unlawful. The firearms remained in custody for five months until after the District Attorney dismissed the warrants against Mr. Woodard. Decl. of Luke Woodard, ¶ 4.

Even assuming, *arguendo*, that the firearm Mr. Woodard was carrying was properly seized and retained as "evidence," (an assumption that Mr. Woodard vehemently denies), there was no reason to seize and retain the second firearm. Moreover, Mr. Woodard and his wife attempted to pick up the second firearm from the police after Mr. Woodard's release from jail, but they were told it was being held as "evidence." Decl. of Luke Woodard, ¶ 4.

## Conclusion

Mr. Woodard spent the night in a cold concrete cell after breaking no laws and cooperating fully with an unlawful detention by deputies of the Paulding County Sheriff's Department. He subsequently lost his firearms license because of the pending false charges against him. Mr. Woodard has shown that Defendant Brown detained him without reasonable suspicion and arrested him without probable cause. He has further shown that Defendant Brown applied for the warrants unreasonably. Finally, he has shown that Defendants' seizure of his two firearms, and their subsequent retention of those firearms for five months, was unreasonable and illegal. For the foregoing reasons, Mr. Woodard requests that the Court declare that Defendants violated his constitutional rights and find liability for damages against Defendants in an amount to be determined at trial.

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## Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

/s/ John R. Monroe
John R. Monroe

## CERTIFICATE OF SERVICE

I certify that on May 19, 2009, I filed the foregoing, together with accompanying documents, using the ECF system, which automatically will send a copy to:

G. Kevin Morris
kevin@tew-law.com

/s/ John R. Monroe
John R. Monroe