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

LUKE WOODARD	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION FILE NO.**
	)	**4:08-CV-178-HLM**
TYLER DURHAM BROWN, and	)	
ALTON RABON PAYNE,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COME NOW TYLER DURHAM BROWN and ALTON RABON PAYNE, the Defendants in this action, and, pursuant to Fed.R.Civ.P. 56, file this their Response Brief in Opposition to Plaintiff's Motion for Summary Judgment as follows:

ARGUMENT AND CITATIONS TO AUTHORITY

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AS A MATTER OF LAW BECAUSE IT FAILS TO DEMONSTRATE THAT THE DEFENDANTS VIOLATED CLEARLY ESTABLISHED LAW

Plaintiff filed the underlying lawsuit on November 5, 2008. [Doc. 1]. On December 1, 2008, the Defendants timely answered Plaintiff's lawsuit and

affirmatively asserted a defense predicated on qualified immunity. [Doc. 5 at "THIRD DEFENSE"]. Further, the Defendants admitted paragraphs 6, 7, 12, 14 and 15 of the Complaint, wherein the Plaintiff essentially alleged that the Defendants were Paulding County deputies, that they were dispatched by 911 to Scott's Store, that they responded to the location with their emergency lights activated and that Deputy Brown stopped Plaintiff. Compare Complaint at ¶¶ 6, 7, 12, 14 and 15 with Answer at ¶¶ 6, 7, 12, 14 and 15; see also Harbert Int'l v. James, 157 F.3d 1271, 1282 (11th Cir.1998)(concluding that to "establish that the challenged actions were within the scope of his discretionary authority, a defendant must show that those actions were (1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority").

It is well-settled that qualified immunity provides "complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir.2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

To be entitled to qualified immunity, it must be alleged or demonstrated that the public official "was acting within the scope of his discretionary authority when

the allegedly wrongful acts occurred." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). **The burden then shifts to the plaintiff to demonstrate that the official is not entitled to qualified immunity.** Id. And, in order to do so, "the plaintiff must show two things: (1) that the defendant has committed a constitutional violation and (2) that the constitutional right the defendant violated was 'clearly established' at the time he did it." Crosby v. Monroe County, 394 F.3d 1328, 1332 (11th Cir.2004).

In this case, Plaintiff's Motion for Summary Judgment is ripe for denial because it does not even address the second prong of the qualified immunity test. Instead, he focuses exclusively on three (3) distinct alleged constitutional violations—1) the stop; 2) the arrest and 3) the firearms seizure—and never once argues that the law was clearly established. This is significant because it means that, even assuming *arguendo* that Plaintiff's constitutional rights were violated, his summary judgment motion must be denied because he has not met his burden of demonstrating that said rights were clearly established. Griffin v. Troy State University, 128 Fed.Appx. 739, 741 (11th Cir. 2005)("It is the plaintiff's burden to establish both prongs of the foregoing test to defeat . . . qualified immunity.").

Accordingly, because Plaintiff only argues that the Defendants' underlying acts were unconstitutional and completely ignores the "clearly established" prong,

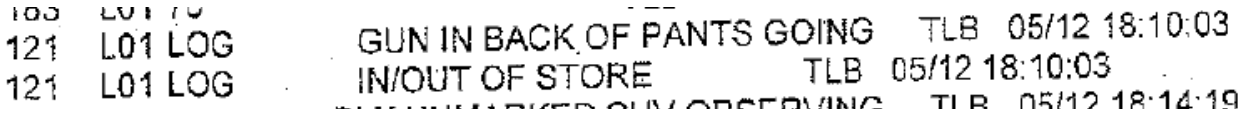
Plaintiff has failed to satisfy his burden and his motion for summary judgment must be denied.

II. PLAINTIFF IS PRECLUDED FROM SUMMARY JUDGMENT BY THE EXISTENCE OF AT LEAST ARGUABLE REASONABLE SUSPICION

"The Supreme Court has repeatedly recognized that a reasonable suspicion may be the result of any combination of one or several factors: specialized knowledge and investigative inferences, personal observation of suspicious behavior, information from sources that have proven to be reliable, and information from sources that-while unknown to the police-prove by the accuracy and intimacy of the information provided to be reliable at least as to the details contained within that tip." U.S. v. Nelson, 284 F.3d 472, 478 (3rd Cir. 2002). The Supreme Court put it this way: "The terms reasonable suspicion and probable cause are meant to be utilized as 'commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Ornelas v. United States, 517 U.S. 690, 696, 116 S.Ct. 1657, 1661-62, 134 L.Ed.2d 911 (1996); (quoting Illinois v. Gates, 462 U.S. 213, 231, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983); Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949)).

"[I]n the context of the Fourth Amendment, when a defendant raises the defense of qualified immunity, the standard is not actual reasonable suspicion, but 'arguable' reasonable suspicion." Jackson v. Sauls, 206 F.3d 1156, 1166 (11th Cir.2000). Arguable reasonable suspicion means that: "in light of all of the facts and circumstances, an officer reasonably could have believed that probable cause was present." Id. In other words, "[a] law enforcement official who reasonably but mistakenly concludes that reasonable suspicion is present is still entitled to qualified immunity." Id.

In this case, the undisputed facts known to the Defendants include: Prior to May 12, 2008, Scott's Store had been robbed on numerous occasions prior to 5/12/08. Brown depo. at 29; Green Dec. at ¶ 8. This was a fact that Deputy Brown knew. Brown depo. at 29. At least one person called 911 and reported that Plaintiff had pulled his car up onto the curb and was partially blocking the entrance. "Complainant advising that a white Trans Am . . . drove up on the curb; it's still sitting there, occupied by a white male with tattoos, possibly 10-32 (armed) with a gun unknown type." [Doc. 18-2 (911 Audio at 00:15-00:34)]. Deputy Brown was also notified that Plaintiff had the gun in the back of his pants and was going in and out of the store. [Doc. 18-3(Paulding Def. Exhibit "B") at 047.



Then, when the Chief of Police for Hiram covertly arrived on-scene and observed the behavior of Plaintiff, he did not radio the Defendants and tell them that everything was okay. Rather, when asked whether the subject (Plaintiff) was still there, Chief Shirley responded: "10-4, in the vehicle parked [in/at] the front door," which was consistent with the original call[1]. [Doc. 18-2 (911 Audio at 06:40)].

In this case, when these undisputed facts are considered in light of well-settled precedent involving the reasonable suspicion calculus, it is obvious that at least arguable probable cause—if not actual reasonable suspicion—existed. For example, in discussing the weight of credibility that should be given to anonymous 911 calls, as was the case here, "the Eleventh Circuit has emphasized the importance of 911 calls in communicating emergency situations to law enforcement officials." U.S. v. Wehrle, 2007 WL 521882, *4 (S.D.Ga.,2007) (quoting United States v. Holloway, 290 F.3d 1331, 1339 (11th Cir. 2002)). The 11th Circuit reasoned in Holloway that, "[n]ot surprisingly, 911 calls are the predominant means of communicating emergency situations.". And, "[i]f law

[1] The original call came in at 17:59:05. [Doc. 18-3(Paulding Def. Exhibit "B") at 046-47]. Deputy Brown stopped Plaintiff at 18:14:57. Id. During this time, three (3) more calls were made to Paulding 911 regarding Plaintiff's behavior. Id. at 46-47 ("jensty johns" at 18:04; "Scott Rakestraw" at 18:08 and "Jason Johns" at 18:15).

enforcement could not rely on information conveyed by anonymous 911 callers, their ability to respond effectively to emergency situations would be significantly curtailed." Id.

The undisputed facts related to the 911 call include: 1) multiple people called 911; 2) all of the callers reported suspicious behavior; 3) the calls were made contemporaneous with the alleged suspicious behavior; 4) the separate callers provided similar physical descriptions of the Plaintiff; and 5) the callers advised 911 that the subject had a gun shoved into his pants. Indeed, the information communicated about the Plaintiff was sufficiently credible to establish arguable reasonable suspicion.

Similarly, in determining whether or not reasonable suspicion exists, well-reasoned precedent authorizes law enforcement to take into account the reputation of the incident location. The Supreme Court held in Illinois v. Wardlow, that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); United States v. Gordon, 231 F.3d 750, 755-56 (11th Cir.2000). This is significant because, as previously established, Deputy Brown

testified that he was aware that Scott's Store had been robbed previously. Brown depo. at 29; Green Dec. at ¶ 8

And finally, it is axiomatic "law enforcement officers are at greatest risk when dealing with potentially armed individuals because they are the first to confront this perilous and unpredictable situation." U.S. v. Gibson, 64 F.3d 617, 624 (11th Cir. 1995). The Supreme Court has recognized that, when a law enforcement officer responds to a dispatch involving a gun, he/she may take such hazard into consideration when balancing the suspect's right to only be stopped based on reasonable suspicion against the "need for law enforcement officers to protect themselves and other prospective victims of violence." Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968). In other words, reasonable suspicion jurisprudence recognizes that law enforcement face unique risks on a regular basis, and it does not require officers to ignore these risks when the "reasonable suspicion" equation includes a firearm. Here, the fact that Plaintiff was not only armed, but that the gun was cavalierly shoved into his waistband, warranted further investigation.

In sum, there is no dispute that the U.S. Constitution affords citizens the right to possess firearms. And, the Plaintiff would have the Court believe that Deputy Brown stopped him for merely exercising said right. "Plaintiff in this case

was stopped merely for possessing a firearm . . . .” [Doc. 15-2 (Plaintiff MSJ Brief) at 13]. But that argument is myopic and fails to appreciate the totality of the facts and circumstances known by the officers. U.S. v. Arvizu, 534 U.S. 266, 274-275, 122 S.Ct. 744 (2002)(“A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct”).

Firearms have legitimate uses—as tools for hunting and self protection—and a subject’s possession of such in many contexts may not cause witnesses to become alarmed and call 911. However, in this context, where Plaintiff reportedly 1) pulled his car onto the curb and partially blocked the entrance, 2) repeatedly entered and exited a store that had been robbed numerous times before—each time crudely stuffing the pistol into his pants—and 3) constantly manipulated the weapon while in the store, the witnesses and deputies drew the reasonable conclusion[2] that criminal activity was afoot.

III. PLAINTIFF IS PRECLUDED FROM SUMMARY JUDGMENT BY THE EXISTENCE OF AT LEAST ARGUABLE PROBABLE CAUSE

A. CARRYING A CONCEALED WEAPON

In support of his Motion for Summary Judgment, Plaintiff argues that Deputy Brown did not have probable cause to arrest him for carrying a concealed

[2] The reasonableness of this conclusion is bolstered by the number of appellate decisions involving robbery cases where the following terms appear: pistol, gun, pants and waist!. Indeed, Westlaw returns at least 50 robbery cases when the following “terms and connectors” search is done in the “Georgia cases” database: pistol or gun /s pants or waist! /p robbery.

weapon. [Doc. 15-2 (Plaintiff MSJ Brief) at 14]. Specifically, he claims that the evidence available to Deputy Brown failed to show that the pistol was concealed and even suggests that the Defendants made the arrest because they "mistakenly believe[d] that a holster" was required. Id. at 15. Lastly, Plaintiff argues that two cases, one from 1861 and the other from 1901, authorize a person to carry a pistol in his/her "pantaloons." [Doc. 15-2 (Plaintif MSJ Brief) at 16](citing Stockdale v. State, 32 Ga. 225 (1861); Stripling v. State, 114 Ga 538, 40 S.E. 733 (1901)). Notably though, neither of these arguments is availing.

First of all, the specific beliefs and intentions of Deputies Brown and Payne are irrelevant. "There is no question that an officer's subjective intent is immaterial when there is an objectively reasonable basis for believing that an offense has occurred." Durruthy v. Pastor, 351 F.3d 1080, 1088 fn. 5 (11th Cir. 2003)(citing Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996)). "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action." Whren 517 U.S. at 813((quoting Scott v. United States, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978)).

Instead, the court must decide whether the objective facts available to the officers at the time of arrest were sufficient. That is, "[p]robable cause for arrest is to be decided by courts on the basis of collective information of the police involved in the arrest rather than upon the extent of knowledge of the particular officer making the arrest." Diamond v. Marland, 395 F.Supp. 432, 439 (S.D.Ga. 1975); United States v. Troutman, 458 F.2d 217 (10th Cir. 1972); United States v. Jones, 352 F.Supp. 369, 377 (S.D., Ga. 1972). Accordingly, as demonstrated in Defendants' Motion for Summary Judgment Brief, because the undisputed facts demonstrate that at least arguable probable cause existed to charge Plaintiff with carrying a concealed weapon, any perceived subjective intention by either Defendant will not preclude summary judgment.

Here, in support of his argument that he was arrested for not having the pistol in a holster, Plaintiff relies upon a statement made by Deputy Payne and the deposition testimony of Deputy Brown. [Doc. 15-2 (Plaintiff MSJ Brief) at 3, 15.] "Mr. Woodard asked whether there was a problem, and Defendant Payne responded that the problem was Mr. Woodard 'openly carrying a firearm.'" Id. This point, however, is irrelevant because Deputy Payne had just arrived on-scene; he had not interviewed any witnesses and it is obvious that he was just providing Plaintiff with a general response as to why they had been called out. Payne

Dashcam Video, attached as Exhibit "H" to Defendants' MSJ at 18:16:24. Moreover, as established above, even if Deputy Payne announced the wrong offense, the undisputed evidence demonstrates that he had at least arguable probable cause to arrest Plaintiff. See United States v. Saunders, 476 F.2d 5 (5th Cir.1973)("When an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest.").

Similarly, Plaintiff relies on a response given by Deputy Brown during his deposition to support his belief that the deputies arrested him for not having the gun in a holster. [Doc. 15-2 (Plaintiff MSJ Brief) at 15]. Deputy Brown, in response to being asked for the basis of the carrying a concealed weapons charge, answered: "Carrying concealed weapon, carrying a pistol in a waistband, not in any type of holster or retention device." Brown depo. at 32. Plaintiff fails to disclose to the Court that he was the one who made the holster an issue; he is the one who raised his concealed weapons permit as a defense to his actions.

In the video, Plaintiff and Deputy Payne have the following exchange:

Woodard: Can I ask what the problem is?

Payne: Right now, you're open carrying a handgun.

Woodard: With a concealed weapons permit, state law . . . .

Payne: What does a concealed weapons permit mean?

Woodard: It has to be concealed . . .

Payne: It has to be concealed in a holster.

Woodard: (gesturing to his waistline). . . or your best effort to conceal it.

Payne: I ain't going to argue with you right now.

Payne Dashcam Video, attached as Exhibit "H" to Defendants' MSJ at 18:16:24-18:16:40.

Clearly, Plaintiff thought that his concealed weapons permit allowed him to carry the weapon shoved into the back of his pants, so long as he gave it his best effort to conceal it. By telling the Plaintiff that he had to have the weapon holstered, it is obvious that both Payne and Brown were pointing out why the concealed weapons permit would be unavailing to the Plaintiff. In other words, they were explaining to the Plaintiff why his concealed weapons permit would not provide him refuge—because the weapon wasn't in a holster. The bottom line is that, this exchange, if anything, eviscerates Plaintiff's case because he essentially admits that he was making his best effort to conceal the weapon, *i.e.,* he made his best effort to make sure it wasn't fully exposed.

In addition to arguing that the deputies misapprehended the holster requirement, Plaintiff argues that the cases of Stockdale v. State, 32 Ga. 225 (1861) and Stripling v. State, 114 Ga 538, 40 S.E. 733 (1901) authorized him to carry his EAA Witness .45 caliber pistol shoved into the waistband of his "pantaloons." [Doc. 15-2 (Plaintif MSJ Brief) at 16]. However, Plaintiff neither advises the Court that those cases interpreted a completely different statute nor discloses the fact that contemporary rulings involving more modern versions of the statute hold otherwise.

In the case Summerlin v. State, 295 Ga.App. 748, 673 S.E.2d 118 (2009), a criminal defendant relied on Stockdale and Striping to challenge the sufficiency of evidence to convict him for carrying a concealed weapon. Specifically, relying on Stockdale and Stripling, he argued that his handgun was not concealed as a matter because the butt was fully exposed and because the arresting officer immediately recognized it as being a handgun. Id. at 119.

In rejecting Summerlin's argument—which happens to be the same argument that Plaintiff is advancing—the Court held:

> For two reasons, Summerlin's reliance on Stockdale and Stripling is misplaced. First, our Code now expressly provides that a person commits the offense of carrying a concealed weapon unless he carries the weapon "in an open manner and fully exposed to view." Cases such as Moody v. State and Ross v. State thus hold that a gun slightly protruding from the seat of a vehicle is not "fully exposed" within the

> statute governing such weapons. In both Moody and Ross, as here, partially concealed guns were recognizable to the arresting officers as weapons.

Id. at 119-120 (citations omitted).

Obviously, just as Summerlin's reliance on Stockdale and Stripling, was misplaced, Plaintiff Woodard's reliance on them is equally defective. That is to say, in light of the language of the current statute and the case law interpreting same, the undisputed fact that only the butt of Plaintiff's gun was sticking out of his "pantaloons" undeniably provided the Defendants with at least arguable probable cause.

B. DISORDERLY CONDUCT

Plaintiff argues that he is entitled to summary judgment because the Defendants did not have probable cause to arrest him for disorderly conduct. Specifically, he contends that Deputy Brown did not have any evidence that Plaintiff acted in a "violent or tumultuous manner" or that anyone was in fear of receiving an injury. [Doc. 15-2 (Plaintiff MSJ Brief) at 21]. Plaintiff suggests that Deputy Brown's own testimony proves as much. Id.

Importantly though, neither Deputy Brown's deposition testimony nor the remaining undisputed material facts bolster Plaintiff's argument. First of all, the un-rebutted testimony of Jackie Green, Vera Tenney and Chief Johnny Shirley

demonstrates that Plaintiff's conduct made them scared. See Declarations of Johnny Shirley (¶¶ 16, 17), Jackie Green (¶¶ 11-13, 16, 17) and Vera Tenney (¶¶ 16, 17) respectively attached as Exhibits "C", "D" and "E" to Defendants' MSJ. The affirmatively testimony of these witnesses demonstrate that Plaintiff's behavior made people fear for their own safety and the safety of other witnesses.

As for Plaintiff's claim that there was no evidence of "violent or tumultuous behavior," Defendants respond by first noting to the Court that the initial reports were that Plaintiff had pulled his Trans Am up onto the curb, partially blocking the entrance to Scott's Store. Defendants' Summary Judgment Exhibit "B" (Witness Statements) at 040-044; Exhibit "D" (Green Dec.) at ¶¶ 8, 11, 16, 17; Exhibit "E" (Tenney Dec.) at ¶ 11; Exhibit "C" (Shirley Dec.) at ¶ 16. Then, Plaintiff was constantly manipulating the gun as he entered and exited the store as many as five (5) separate times. Woodard depo. at 38; Defendants' Summary Judgment Exhibits "D" (Green Dec.) at ¶ 16; Exhibit "E" (Tenney Dec.) at ¶ 9; Exhibit "B" (Witness Stmts) at 040-044.

Indeed, Plaintiff's conduct was so tumultuous and threatening that one witness was in the midst of preparing to confront Plaintiff with his own weapon.

> Witnesses stated that they believed the store was being robbed. One witness, Mr. Johns, stated his daughter was in the store, that she was in danger, and that just prior to our arrival he was preparing to confront the subject with his own firearm. He said the Mr. Woodard was grabing the gun when entering the store.

Defendants' Summary Judgment Exhibit "B" (Brown Rpt.) at 038.

Accordingly, because the undisputed facts demonstrate that at least arguable probable cause existed to arrest Plaintiff for disorderly conduct, his Motion for Summary Judgment should be denied.

IV. PLAINTIFF CANNOT ASSERT A DUE PROCESS CLAIM BECAUSE ADEQUATE STATE LAW REMEDIES EXIST

Plaintiff alleges that the Defendants violated his Fourteenth Amendment due process rights by seizing his firearms incident to his arrest. Notably though, because an adequate state remedy exists, Plaintiff does not have a viable due process claim.

In McKinney v. Pate, 20 F.3d 1550 (11th Cir.1994) (*en banc*), the Eleventh Circuit held that there is no federal due process violation as long as the state provides a means to remedy the violation. Since Georgia law provides a remedy for immediate possession and conversion, Plaintiff has no federal due process claim. Carroll v. Henry County, Ga., 336 B.R. 578, 586 (NDGa.,2006).

CONCLUSION

For all the within and foregoing reasons, this Court should deny Plaintiff's Motion for Summary Judgment.

This 11th day of June, 2009.

[signature on next page]

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing ***DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT*** upon all parties by electronic filing through the CM/ECF system in accordance with the United States District Court rules to:

John R. Monroe
Attorney at Law
9640 Coleman Road
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This 11th day of June, 2009.

/s/ G. Kevin Morris