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

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

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Summary

Defendants' opposition [Doc. 21] to Plaintiff's Motion is in four parts. Parts I, II, and III address "clearly established law," "arguable probable cause," and "arguable reasonable suspicion," respectively. Those three concepts all fall in the rubric of qualified immunity, the doctrine on which Defendants' largely rely in opposing Plaintiff's Motion. Defendants overlook, however, that qualified immunity only applies to claims for damages and not to claims for declaratory and injunctive relief. Plaintiff seeks only nominal damages in this case, mainly seeking declaratory and injunctive relief. Thus, even if Defendants are correct that they are entitled to qualified immunity (which they are not), they only are immune from Plaintiff's damages claim.

Defendants' final part of their Brief, Part IV, addresses only Plaintiff's Due Process claim for the deprivation of his property. Even if Defendants are correct that Plaintiff may not bring a Due Process claim for the deprivation of his property because an adequate state remedy exists (which they are not), this defense only addresses Plaintiff's 14th Amendment property rights claim. It does not address Plaintiff's 4th Amendment property rights claim (which is his primary property rights claim). More importantly, it does not address his illegal search and seizure (of his person) claims.

Thus, Defendants lodge no opposition to Plaintiff's Motion as it relates to his claims for declaratory and injunctive relief for illegal search and seizure of his person and for his 4th Amendment property rights claim. At the very least, Plaintiff's Motion for these claims must be granted. Moreover, Plaintiff will show that Defendants' narrow opposition to Plaintiff's remaining claims is unavailing.

Argument

I. Qualified Immunity Only Applies to Damages Claims

Defendants rely heavily on the doctrine of qualified immunity to shield them from liability completely in this case. They mistakenly believe that qualified immunity is an absolute bar to all types of claims. [Doc. 21] It is not. *D'Aguanno v. Gallagher*, 50 F. 3d 877, 879 (11th Cir. 1995) ("because qualified immunity is a

defense only to claims for monetary relief, the district court erred in granting summary judgment on plaintiff's claims for injunctive and declaratory relief").

Plaintiff requests several forms of relief in his Complaint [Doc. 1]. He primarily seeks declaratory and injunctive relief, with an additional claim for damages for being arrested and having his property seized, resulting in the loss of his firearms license for several months. Only Plaintiff's damages claim is subject to Defendants' qualified immunity defense.

II. Defendants Are Not Entitled to Qualified Immunity

Only now, in response to Plaintiff's Motion, have Defendants elaborated on their qualified immunity defense. Thus, this is the first opportunity Plaintiff has had to address it.[1]

IIA. Plaintiff Had a Clearly Established Right to Carry His Firearm in His Waistband

Despite Defendants' assertion to the contrary [Doc. 21, p. 3], Plaintiff showed that the law on carrying a firearm in Georgia is clearly established. Indeed, Plaintiff showed over 140 years of case law in Georgia indicating that a

[1] Defendants have been remiss in waiting to assert their defense now. The Supreme Court has made clear that qualified immunity claims should be made "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

person may carry a pistol with the butt end sticking out of his clothing without violating the concealed weapon statute.

Defendants attack Plaintiff's case citations by pointing out that some of them "interpreted a completely different statute." Doc. 21, p. 14. Defendants also claim (erroneously) that "contemporary rulings involving more modern versions of the statute hold otherwise." *Id.* This simply is not true. Defendants must know that, as they make no attempt to discuss the contemporary cases that Plaintiff cited nor to distinguish the current statute from the historical versions. Because Defendants have raised the issue of the clarity of the case law and to what statutes they relate, Plaintiff will provide the Court a history of Georgia's concealed carry statutes and show that Georgia courts have consistently ruled that carrying a pistol with the butt protruding is not "carrying a concealed weapon."

In 1851, Georgia passed its first concealed weapon prohibition. "No person or persons shall have or carry about their persons, any one or more of the weapons … except such person or persons shall have or carry such weapon or weapons in ***an open manner and fully exposed to view***." 1851 Ga. Law 269.[2] [Emphasis

[2] It is this law that Defendants call a "completely different statute" from the current O.C.G.A. § 16-11-126. While the statute has evolved over the years, the operative phrase was, and continues to be "in an open manner and fully exposed to view." Compare the 1851 law to the current O.C.G.A. § 16-11-126(a) which prohibits carrying a weapon "unless in an open manner and fully exposed to view." Court

supplied]. It was this law that was at issue in *Stockdale v. State,* 32 Ga. 225 (1861). In *Stockdale,* the defendant (charged with violating the quoted law) was convicted with the following charge to the jury:

> [T]hat the meaning of the statute was, that the defendant had to carry the pistol (if at all) entirely exposed to view; that no matter if the butt and cock of the pistol were exposed, and any one could tell and know that it was a pistol, yet, if any part was concealed, if any part of the barrel was stuck down beneath the pants, that it was a violation of law.

Stockdale, 32 Ga. at 227. This charge to the jury, which largely mirrors Defendants' view of the law, was rejected by the Supreme Court of Georgia, which reversed the conviction and ruled:

> [F]or it is impossible for one to have and bear about his person a pistol or weapon of any kind without having some part of the weapon concealed from view. If one holds it in his hand, some part of it is hidden from the view, yet it is not concealed. So, if the barrel be pushed behind a belt or waistband of the pants, the whole pistol can not be seen by a third person; yet, such person, from the parts of the pistol exposed to view, can see at a glance that it is a pistol….What the Legislature did intend, was to compel persons who carried those weapons to so wear them about their persons, that others, who might come in contact with them, might see that they were armed….

Id.

The Supreme Court of Georgia likewise reversed a conviction under the same law when the defendant had "the pistol at his side, under the waistband of his

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interpretations of this phrase throughout the years are not as irrelevant as Defendants would have this Court believe.

pantaloons, with the butt sticking out and the barrel concealed." *Killet v. State*, 32 Ga. 292 (1861).

Another case decided under the 1851 law is *Stripling v. State*, 114 Ga. 538 (1901). In *Stripling,* the court determined that, when "witnesses testified that they saw a sufficient part of the object to recognize it as a pistol," their testimony "shows that the pistol was not concealed." *Id.*

In 1968, Georgia overhauled its criminal code with 1968 Ga. Law 1249 (House Bill 5). The new code included Section 26-2902, "A person commits a misdemeanor when he knowingly has or carries about his person, outside of his own home, unless in ***an open manner and fully exposed to view*** [a weapon]." [Emphasis supplied]. Except for some minor changes that are not germane to the instant case, the 1968 law is identical to the current O.C.G.A. § 16-11-126(a).

All modern cases addressing what constitutes "open manner and fully exposed to view" continue to follow the *Stockdale, Killet,* and *Stripling* reasoning. For example, in *McCroy v. State,* 155 Ga. App. 777 (1980), the arresting officer testified that the defendant "had the butt end of a pistol sticking out of [his] pocket." 155 Ga. App. at 779. The court said, "As there is no indication that the arresting law enforcement officer or anyone else failed to immediately recognize upon approaching defendant that he carrier a pistol, we cannot say that the

defendant failed to carry the pistol 'in an open manner and fully exposed to view.'" *Id.* The *McCroy* court cited and relied upon *Stripling*, *Kilet*, and *Stockdale*.

Likewise, in *Goss v. State*, 165 Ga. App. 448 (1983), the court said, "Does the carrying of a pistol in a pants pocket with the handle exposed such that all witnesses recognize it as a pistol constitute carrying a concealed weapon under [the Code]? We think not. A person violates the prohibition of carrying a concealed weapon when he carries a weapon 'completely concealed' such that it is 'not obvious as a weapon.'" 165 Ga. App. at 450. The *Goss* court quoted, relied upon, and reaffirmed *McCroy*.

Lastly, in *Gay v. State*, 233 Ga. App. 738, 739 (1998), the court reaffirmed that "Georgia law does not prohibiting carrying a pistol in a pants pocket with the butt exposed," even though the facts of the case before the *Gay* court supported a conviction (the gun was not exposed at all). The *Gay* court cited *Goss* and *McCroy* as authority for the quoted language.

Thus, from 1861 to the present, Georgia courts have consistently and uniformly ruled that "open manner and fully exposed to view" in the context of weapons includes firearms whose butt ends are protruding from clothing event though the barrels and other portions of the firearms are concealed. Contrary to

Defendants' assertion that the law is not clearly established, the law has been clearly established for generations.

Defendants believe this long and distinguished line of cases does not apply "in light of the language of the current statute." Doc. 21, p. 15. Defendants fail to advise the Court how the same operative language that has been in place since 1851 ("open manner and fully exposed to view") meant something different in the 19th Century than in the 21st Century. In fact, Defendants fail to identify any difference at all between the 1851 statute and the current Code.

Defendants rely on several cases they believe show that carrying as Plaintiff did is prohibited, but each and every one can be distinguished easily:

***Summerlin v. State,* 295 Ga. App. 748 (2009).** In this case, the defendant had a gun with the butt protruding from between the two front seats of his car. The arresting officer testified, however, that "until Summerlin had exited his car, the gun was fully concealed from the officer's view by Summerlin's body." That is, at one point the gun was not exposed at all. Thus, *Summerlin* is fully consistent with the line of cases Plaintiff relies upon to show the clearly established right.

***Moody v. State,* 184 Ga. App. 768 (1987) and *Ross v. State,* 255 Ga. App. 462 (2002).** These two cases have similar facts. During a traffic stop, the officer noticed a gun partially visible to him as he looked in the car window. The *Moody*

court applied the logic of the pedestrian and horse-mounted days of 1851 to the realities of automobile transportation of today. ***Citing and relying on*** **Stockdale** ***and*** **Stripling,** the Moody court recalled that:

> As was pointed out in *Stripling*, the law forbidding the carrying of concealed weapons was designed to put those dealing with such persons on notice so that they could govern themselves accordingly. Here, a gun slightly protruding from under the seat of a vehicle does not put others on notice and, therefore, is not 'fully exposed' within the statute governing such weapons.

184 Ga. App. at 768. The *Ross* court, following *Moody,* likewise found that a partially exposed gun in an automobile does not put others on notice that the driver is armed.

Thus, *Moody* and *Ross,* and later *Summerlin*, do no more than create a new rule for automobiles. A partially exposed gun in a car does not put others on notice that a person is armed the way a partially exposed gun on someone's person (outside of a car) does. A gun protruding from a pants pocket of a pedestrian is not concealed. A gun protruding from a pants pocket of a car driver (or passenger) is concealed.[3] *Stockdale, Kilet, Stripling, McCroy, Goss,* and *Gay* are all still good case law, and they still stand for the 140-year-old proposition that a firearm

[3] The Georgia General Assembly has addressed this issue. In an exception to the general rule of O.C.G.A. § 16-11-126(a) a person who is eligible for a Georgia firearms license ("GFL") may carry a firearm in a car "in any private passenger motor vehicle," without violating § 126(a).

protruding from a person's clothing is not concealed if it is recognizable to others as a firearm. Under *Moody*, *Ross*, and, *Summerlin*, it is doubtful that a firearm protruding from a person's clothing, while in a car, is recognizable to others as a firearm. Of course, *Moody*, *Ross*, and *Summerlin* have nothing to do with the instant case, because Plaintiff was not arrested for carrying a firearm in his car.[4]

IIB. There Was No Arguable Probable Cause That Plaintiff Was Disorderly

Defendants try to fit Plaintiff into the disorderly conduct statute by calling anything they can find "tumultuous." Defendants label the following as "tumultuous:" 1) parking on a curb (that does not exist); 2) partially blocking an entrance; 3) manipulating a gun in his waistband (without drawing it or threatening with it); 4) entering and exiting a store five times; and 5) that fact that a third party contemplated committing aggravated assault on Plaintiff by threatening Plaintiff with a weapon of his own.

There was no violence, turbulence, uproar, and outburst (see *Webster's New Collegiate Dictionary)*. Defendants have not been able to identify a single action on Plaintiff's part that was violent, turbulent, or uproarious. They have not even claimed that he made contact with anyone or made any movements toward anyone.

[4] Nor could he have been, because, as a GFL holder, Plaintiff could have carried a firearm in any manner he wished in his car without violating the concealed weapons statute.

In fact, the arresting officer, Defendant Brown, testified at his deposition that Plaintiff was not tumultuous:

Q. Did you receive any information that Mr. Woodard made any tumultuous actions towards any person?
[Objection]
A. Tumultuous from towards any single person, no.
Q. What about towards a group of people?
[Objection]
A. Directly toward a specific entity, I would say no.

Brown Depo., pp. 22-23.

After testifying in his deposition that Plaintiff was not tumultuous, it is rather disingenuous for him now to claim that Plaintiff was. Moreover, the alleged parking on the curb and partially blocking the entrance to Scott's Store with his car is not possible. Doc. 24-4, Exhibit A (showing photograph of entrance to Scott's Store, where no curb exists). The most casual glance at the entrance to the store reveals there is no curb anywhere near the entrance.

Moreover, Defendants are relying on statements made by witnesses at the end of May and beginning of June, ***2009.*** Defendants did not have the benefit of these statements in May, ***2008.*** Probable cause, and even arguable probable cause, must be based on information known to the officers at the time they make their warrantless arrest. It cannot be based on information they learn later.

Finally, Brown (the arresting officer) cannot claim he had this information in May, 2008, because he admitted in his deposition that he did not speak to any of the witnesses at the scene:

Q. You didn't speak directly with any of the witnesses?

A. Not to my recollection.

Brown Depo, p. 16. He also did not learn this information from the officers that did speak with the witnesses (see quotations above, from Brown Depo., pp. 22-23). In fact, when asked what factors led to his arrest decision, Brown makes no mention of the curb or the entrance at all, relying solely on the fact that some witnesses were frightened of Plaintiff:

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. Okay. Did they specify what particular actions made them think he was going to hurt someone?
A. The fact that he was acting agitated, walking in and out of the store. He was manipulating the weapon in his pants or his waist when he was going into the store. And that in general was – they were very scared by that.
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.

Brown Depo., pp. 20-22.

Perhaps most damning to Brown's position are the statements he made (or failed to make) in his application for a warrant (after the arrest) for disorderly conduct, "Subject did commit offense of disorderly conduct when his action placed others in fear of receiving injury." Brown Dep., p. 42. That is all Brown had to go on when applying for a warrant. There is no mention of a tumultuous action or violence.

III. Plaintiff Has a Valid Due Process Claim

Defendants confuse Plaintiff's ***substantive*** due process claim with ***procedural*** due process jurisprudence, coming to the jumbled conclusion that Plaintiff cannot make a ***substantive*** due process claim for the illegal seizure of his property on the theory that Georgia provides a ***procedure*** for recovery of property. Plaintiff will untangle Defendants' web below.

Defendants' own primary case in this area explains the law fairly thoroughly. In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *en banc*, the 11th

Circuit provides an excellent discussion of the difference between substantive and procedural due process and their relationship to state remedies:

> A violation of a substantive due process right, for instance, is complete when it occurs; hence, the availability *vel non* of an adequate post-deprivation state remedy is irrelevant. Because the right is "fundamental," no amount of process can justify its infringement. By contrast, a procedural due process violation is not complete "unless and until the State fails to provide due process." In other words, the state may cure a procedural deprivation by providing a later procedural remedy….

20 F. 3d at 1556. [citations omitted].

A deprivation of property is a procedural due process issue when the process used to take the property is unfair. It is a substantive due process issue when the deprivation is improper no matter how fair the process used to take it. Plaintiff's due process claim is that it was improper for Defendants to seize Plaintiff's property, period. Plaintiff does not complain that he should have had a hearing, or should have been afforded some other kind of process. Thus, Plaintiff's claim is one for substantive due process.

Because Plaintiff's claim is a substantive due process claim, it cannot be cured by affording Plaintiff additional procedures, as Defendants suggest. The deprivation was complete when Plaintiff's property was seized. The availability of state remedies is wholly immaterial.

Defendants' secondary case, *Carroll v. Henry County*, 336 B.R. 578 (N.D. Ga. 2006) is likewise unavailing, for the same reasons. In *Carroll*, the plaintiff complained that his vehicle was repossessed by a private entity, arguably with some assistance by the police (when the plaintiff became unruly during the repossession). 336 B.R. at 582. The court, relying on *McKinney*, ruled that no (procedural due process) § 1983 action could lie for the deprivation of the property, because Georgia has a process for reviewing repossessions. 336 B.R. at 586.

Conclusion

Plaintiff has shown that Defendants' qualified immunity defense only protects them from his small damages claim and not from his claims for declaratory and injunctive relief. Plaintiff also has shown that Defendants are not entitled to qualified immunity in any event, because Brown lacked arguable probable cause to arrest Plaintiff on either charge.[5] Finally, Plaintiff has shown that he has a valid substantive due process claim for the deprivation of his property. For the foregoing reasons, Plaintiff's Motion must be granted.

[5] If the Court somehow concludes that arrest for one charge was supported by arguable probable cause and one was not, the case is not therefore settled. Plaintiff was unable to renew his GFL because of the concealed weapons arrest pending against him. He would not have suffered the same plight from only a disorderly conduct charge.

/s/ John R. Monroe

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing 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 June 25, 2009, I filed the foregoing, together with accompanying documents, using the ECF system, which automatically will send a copy to:

G. Kevin Morris
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/s/ John R. Monroe
John R. Monroe