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

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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR 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 Reply Brief in Support of their Motion for Summary Judgment as follows:

I. PLAINTIFF'S EVIDENTIARY CHALLENGES ARE PROCEDURALLY DEFECTIVE AND IN ANY EVENT HIS ARGUMENTS ARE MERITLESS

A. PROCEDURAL DEFICIENCIES

It is well-settled that the proper method for challenging the admissibility of evidence in an affidavit or declaration submitted with a motion for summary judgment on substantive rather than procedural grounds is to file a notice of objection to the challenged testimony. Morgan v. Sears, Roebuck & Co., 700 F.Supp. 1574, 1576 (N.D.Ga.1988)(citing Pinkerton & Laws Co. v. Roadway Express, Inc., 650

F.Supp. 1138, 1141 (N.D.Ga.1986); see also Benton v. Cousins Properties, Inc., 2002 WL 31681813 (N.D.Ga.,2002).

In opposition to summary judgment, Plaintiff seemingly objects to the admissibility of evidence relied upon by the Defendants. Response Brief at 22. However, Plaintiff has failed to adhere to the procedureal requirement that said objections be raised by way of a Notice of Objection; accordingly, this Court should summarily disregard said evidentiary challenges.

B. THE DEFENDANTS' EVIDENCE IS ADMISSIBLE

Plaintiff argues in Sec. VI. of his Response Brief that Defendants' Exhibits A, B, F, G, H, and I are inadmissible because they are unauthenticated and contain hearsay. Response Brief at 22-23. Notably though, the documents relied upon by the Defendants have been authenticated; the statements in said Exhibits are not hearsay and the evidence could be reduced to an admissble format at trial.

1. Authenticity

The law has long recognized that when a party produces or relies upon documents during discovery, those items are deemed to have been sufficiently authenticated. U.S. v. Doe, 465 U.S. 605, 614, 104 S.Ct. 1237, 1243 (1984)("By producing the documents, respondent would relieve the Government of the need for authentication."); Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d

881, 889 n. 12 (9th Cir.1996). In fact, because the authenticity requirement evaluates the genuineness of a document, some courts consider a party's production of and reliance on same during discovery to be a judicial admission of authenticity. "Authentication can also be accomplished through judicial admissions such as . . . production of items in response to . . . [a] discovery request." Cooper v. Southern Co., 260 F.Supp.2d 1258, 1272 (N.D.Ga., 2003)(quoting 31 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 7105 (2000)).

In this case, Plaintiff was provided with the dashcam video, the 911 audio and the Paulding County records related to Plaintiff's underlying criminal charges prior to Defendants Brown and Payne's depositions. In fact, Plaintiff's counsel referred to many of the items during the course of said deposition. Brown depo. at 12, 41 (Video), 25, 27, 32, and 41 (P.C. Records). And then, when Plaintiff responded to Defendants' Interrogatories and Document Requests less than a month after said depositions, he provided the following:

> 7. Do you have in your possession, custody, or control any written statement by any of the Defendants, any employee of the Paulding County Sheriff's Department, or any other witness(es) that concern any issue of liability or damages in this case? If so, identify each statement by setting forth the name, address, and telephone number of the individual who made the statement, as well as the date of the statement.
>
> **Response:** No, other than documents obtained from Defendants.
>
> 8. Please list and describe any and all documents, videotapes, photographs, diaries, notes, books, records or any other evidence supporting the allegations contained in your Complaint.

> **Response:** Plaintiff is not aware of any such evidence not already identified by the parties.

Plaintiff's Interrogatory Responses, attached hereto as Exhibit 1.

Accordingly, because Plaintiff has affirmatively produced and relied upon the items which he now objects, this Court should overrule his objection and treat Defendant's Exhibits said items as authentic.

2. Reduced to An Admissible Form

At the summary judgment stage, courts may only consider "that evidence which can be reduced to an admissible form." See Macuba v. Deboer, 193 F.3d 1316, 1324-25 (11th Cir. 1999) (evidence that is otherwise admissible may be accepted in an inadmissible form at summary judgment stage); Rowell v. BellSouth Corp., 433 F.3d 794, 800 (11th Cir. 2005). This means that, if the evidence is not presented in an admissible form at the summary judgment stage, the court may consider it, so long as it ***could*** be reduced to an admissible form at trial. Id.

Here, it obvious that each of the exhibits to which the Plaintiff objects could be reduced to an admissible form for trial and thus should be considered in support of Defendants' Motion for Summary Judgment. For example, the 911 Audio could be authenticated at trial simply by having the custodian of said recordings appear and swear that same are authentic. Likewise, the video from the Defendants' patrol cars could be authenticated by the Defendants and the records related to the underlying

criminal charges could be authenticated by the District Attorney or Clerk of Court. Simply put, the authenticity of these documents could be easily reduced to an admissible form by having the custodian appear at trial.

Accordingly, because it obvious the Dashcam video, 911 audio and Paulding County records could be reduced to an admissible form at trial, this Court should consider same in support of Defendants' Motion for Summary Judgment.

3. Hearsay

In addition to raising an authenticity objection to the Defendants' Exhibits, Plaintiff mistakenly argues that these exhibits contain "inadmissible hearsay." Plaintiff's Response Brief at 22. Specifically, he suggests that the statements received by the Defendants from witnesses, 911 and other law enforcment could not form the basis of probable cause because those statements were hearsay. Id. at 23.

Notably though, Plaintiff fails to recognize that the statements have not been offered for the truth of the matter asserted; the Defendants are not relying upon these various statements to prove Plaintiff's conduct; instead, the statements have been introduced to explain the deputies' subsequent investigative actions, which is clearly permissible.

> Statements by out of court witnesses to law enforcement officials may be admitted as non-hearsay if they are relevant to explain the course of the officials' subsequent investigative actions, and the probative value of the evidence's non-hearsay purpose is not substantially outweighed by the

> danger of unfair prejudice caused by the impermissible hearsay use of the statement. Ryan v. Miller, 303 F.3d 231, 252-53 (2d Cir.2002); see also United States v. Valencia, 957 F.2d 1189, 1198 (5th Cir.1992); United States v. Hawkins, 905 F.2d 1489, 1495 (11th Cir.1990); United States v. Love, 767 F.2d 1052, 1063 (4th Cir.1985); United States v. Lubrano, 529 F.2d 633, 637 (2nd Cir. 1975).

U.S. v. Baker, 432 F.3d 1189, 1209 (11th Cir. 2005).

Here, the reasonableness of the deputies' actions is at the heart of their qualified immunity defense; that is, "the question is whether the officers' actions [were] 'objectively reasonable' **in light of the facts and circumstances confronting them.**" Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (emphasis added).

Accordingly, because the Defendants have not offered these various statements to prove or establish as fact the statements uttered therein, said statements are not hearsay and are admissible.

II. PLAINTIFF "COMPLETED HIS PRE-TRIAL DIVERSION PROGRAM" AND HE CANNOT NOW DISCLAIM SUCH

Surprisingly, Plaintiff argues in oppositon to Defendants' summary judgment motion that he did not enter into any type of "plea agreement" because there was no criminal proceeding against him and because the case terminated in his favor. These arguments, however, lack credibility and are belied by the undisputed facts.

The undisputed evidence demonstrates that the Pre-Trial Agreement was made on September 5, 2008 and required that the Plaintiff serve six (6) months of probation, ten (10) hours of community service and complete a gun safety course. Paulding Def. Exhibit "B" (Pre-Trial Diversion Agrmt.) at 018; Plaintiff depo. at 100. Further, it is undisputed that completed the gun safety course and community service. Plaintiff depo. at 97, 101. Accordingly, the only thing that is established by Plaintiff's Response Brief, wherein he denies serving probation or paying a fine, is that he did not comply with the Pre-Trial Diversion Agreement and subject to further criminal prosecution.

III. ARGUABLE PROBABLE CAUSE EXISTED TO ARREST UNDER O.C.G.A. § 16-11-126

A. GEORGIA'S CONCEALED WEAPON LAW DOES NOT DISTINGUISH BETWEEN GUNS STOWED IN CARS VERSUS GUNS STOWED IN WAISTBANDS

According to Plaintiff, Georgia law holds that partially exposed pistols *in vehicles* may violate O.C.G.A. § 16-11-126, but a partially exposed pistol *in a waistband* never violates O.C.G.A. § 16-11-126. Plaintiff's Brief at 10. The primary problem with Plaintiff's position is that O.C.G.A. § 16-11-126 (a) makes no distinction between vehicles and waistbands. With exceptions not applicable to Plaintiff's contention, weapons stowed in *both* places must be carried "in an open manner and fully exposed to view." Id.

Weapons that are only partially exposed have been found to violate O.C.G.A. § 16-11-126 (a), whether in vehicles or in waistbands. Summerlin v. State, 295 Ga.App. 748, 673 S.E.2d 118 (2009) (vehicle); Ross v. State, 255 Ga.App. 462, 566 S.E.2d 47 (2002) (vehicle); Parrish v. State, 228 Ga.App. 177, 491 S.E.2d 433 (1997) (vehicle); Moody v. State, 184 Ga.App. 768, 362 S.E.2d 499 (1987) (vehicle); Marshall v. State, 129 Ga.App. 733, 200 S.E.2d 902 (1973) (waistband), *superseded based on adoption of new statute, see* Goss v. State, 165 Ga.App. 448, 301 S.E.2d 662 (1983). According to the Georgia Court of Appeals, cases such as Stockdale v. State, 32 Ga. 225 (1861), and Stripling v. State, 114 Ga. 538, 40 S.E. 733 (1902), were decided under a different statute and do not control. Summerlin v. State, 295 Ga.App. 748, 749, 673 S.E.2d 118, 120 (2009); Goss v. State, 165 Ga.App. 448, 301 S.E.2d 662 (1983).

Perhaps a better synthesis than "automobiles are different" is Plaintiff's contention that O.C.G.A. § 16-11-126 (a) requires that guns in public must be *visible to all onlookers*, whether stowed in a car or in a waistband. See Plaintiff's Brief at 11. Indeed, the Supreme Court holds that "an armed person does not comply with the mandate of the statute unless his or her weapon is displayed so as to be visible to all observers." Lindsey v. State, 277 Ga. 772, 773, 596 S.E.2d 140, 142 (2004). "If the

weapon is only exposed to the view of some," it does not comply with O.C.G.A. § 16-11-126 (a). Id. at 774.

Far from helping Plaintiff, however, the rule in Lindsey cuts in Defendants' favor. Here, Plaintiff stowed his gun *behind his back*. That is, nobody facing Plaintiff *from the front* could see that he had a gun hidden in his back waistband. Accordingly, this case basically tracks Summerlin, Ross, Parrish, Moody and Marshall, where persons were convicted even though generally speaking *some but not all* onlookers could see a portion of the gun. Thus, Plaintiff's conduct subjected him to arrest and conviction under O.C.G.A. § 16-11-126 (a). That likely is why Plaintiff submitted to pretrial conversion rather than chance a trial.

B. QUALIFIED IMMUNITY BARS PLAINTIFF'S FALSE ARREST CLAIM

If anything is "clear" from review of Georgia case law, it is that application of O.C.G.A. § 16-11-126 (a) is highly fact-specific and often subject to judgment calls. It is telling that able counsel for the parties find it necessary to debate (1) the statute's real meaning, (2) the statute's application to this case, and (3) the vitality (or lack thereof) of case law stretching back to 1861. In contrast to attorneys with sufficient time and resources to canvass Georgia law, the officers in this case had only the plain text of the statute (which uses the phrase "fully exposed to view"), and a brief time to

make a decision. Whichever side has the better view on actual probable cause, this is qualified immunity territory.

At a minimum, Plaintiff has not shown that "no reasonable officer, faced with the situation before [Defendants], could have believed that probable cause to arrest existed." Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993); see also Wood v. Kesler, 323 F.3d 872, 878 (11th Cir. 2003) (detailing arguable probable cause standard). In other words, under the current, murky state of Georgia law, Defendants reasonably *could have believed* that stowing a gun in a waistband behind one's back in public violated O.C.G.A. § 16-11-126 (a).

That is so even if this Court eventually finds otherwise. The final answer to "probable cause" is immaterial, because when Defendants had to act the answer was unknown and subject to substantial debate. "If judges … disagree on a [legal] question, it is unfair to subject police to money damages for picking the losing side of the controversy." Wilson v. Layne, 526 U.S. 603, 617-618, 119 S.Ct. 1692, 1701 (1999); see also Hudson v. Hall, 231 F.3d 1289, 1295-96 (11th Cir. 2000) (holding that a Georgia traffic statute was too unclear to hold an officer liable for enforcing it in the situation he faced); Radich v. Goode, 886 F.2d 1391, 1398 (3rd Cir.1989) ("[W]e cannot impose upon a police officer … the duty to correctly predict how a court will answer this unresolved and complex legal issue."); Saldana v. Garza,

684 F.2d 1159, 1165 (5th Cir.1982), *cert. denied*, 460 U.S. 1012 (1983) (police officers "cannot be held to ... a legal scholar's expertise in constitutional law.").

Accordingly, qualified immunity bars Plaintiff's money damages claim, because Defendants had at least arguable probable cause to arrest him under O.C.G.A. § 16-11-126 (a).

IV. PLAINTIFF'S INJUNCTIVE AND DECLARATORY RELIEF CLAIMS FAIL FOR LACK OF A CONSTITUTIONAL VIOLATION AND LACK OF STANDING

Plaintiff asserts that qualified immunity is not a defense to his requests for declaratory or injunctive relief. Plaintiff's Brief at 18. However, in reviewing qualified immunity courts often consider whether a constitutional right was violated. See Pearson v. Callahan, 555 U.S. ----, 129 S.Ct. 808, 821 (2009). Here the answer is "no"—there was no constitutional violation.

Lack of a constitutional violation is a sufficient ground for dismissing Plaintiff's injunctive and declaratory relief prayers. Defendants moved for complete summary judgment, and Defendants maintain that there was no constitutional violation. Defendants' motion included all forms of relief requested in the Complaint. See Case v. Eslinger, 555 F.3d 1317, 1329 (11th Cir. 2009)(holding that in response to motion for complete judgment, nonmovant had burden to raise and articulate all arguments in support of its claims). Therefore, the Court should dismiss Plaintiff's

prayers for declaratory and injunctive relief, based on lack of a constitutional violation.

Aside from lack of a constitutional violation, Plaintiff lacks standing to obtain declaratory or injunctive relief. Lack of standing deprives the Court of subject matter jurisdiction and is a ground for dismissal at any point in the proceeding. Cone Corp. v. Fla. Dep't of Transp., 921 F.2d 1190, 1203 n. 42 (11th Cir.1991); Latin American Property & Casualty Ins. Co. v. Hi-Lift Marina, Inc., 887 F.2d 1477, 1479 (11th Cir.1989).

Plaintiff lacks standing because he challenges an isolated arrest incident, and provides no reason to suppose that he is in danger of receiving a similar, imminent injury through unconstitutional conduct at the hands of any Defendant. It is well-settled that declaratory and injunctive relief is unavailable under these circumstances. See City of Los Angeles v. Lyons, 461 U.S. 95, 105, 103 S.Ct. 1660 (1983)(where a plaintiff seeks prospective relief, he must demonstrate a "real and immediate threat" of future injury); 31 Foster Children v. Bush, 329 F.3d 1255, 1265 (11th Cir. 2003)("When a plaintiff cannot show that an injury is likely to occur immediately, the plaintiff does not have standing to seek prospective relief even if he has suffered a past injury."); Bowen v. First Family Fin. Servs., 233 F.3d 1331, 1340 (11th

Cir.2000)(observing that a "perhaps or maybe chance" of an injury occurring is not enough for standing); Cone Corp., 921 F.2d at 1203.

Finally, Plaintiff's injunctive relief claim suffers from other fatal defects. The Complaint seeks "an injunction prohibiting Defendants from detaining anyone seen merely carrying a firearm" in the absence of reasonable suspicion or probable cause. Complaint at 8. This appears to be a request to order Defendants to "follow the law," which is not the proper subject of an injunction. Elend v. Basham, 471 F.3d 1199, 1209 (11th Cir. 2006)("It is well-established in this circuit that an injunction demanding that a party do nothing more specific than "obey the law" is impermissible.").

For these reasons, Plaintiff's prayers for injunctive and declaratory relief must be dismissed.

V. PLAINTIFF'S FEDERAL PROPERTY SEIZURE SUBSTANTIVE DUE PROCESS CLAIM IS WITHOUT MERIT

In moving for summary judgment, Plaintiff asserted that seizure and retention of his guns was "improper" and supports a "substantive due process" claim. Plaintiff's Brief [Doc. 15-2] at 23-24; Reply Brief [Doc. 25] at 14.[1] Plaintiff's presentation is muddled, but he appears to abandon any claim relating to *retention* of

[1] Invocation of "due process" is a surprise, because the Complaint fails to mention any such claim. Instead, the Complaint claims that seizure of Plaintiff's EAA Witness handgun was an "unreasonable search and seizure," tracking the language of the Fourth Amendment. Complaint [Doc. 1] at 7 ¶36.

the guns. See Reply Brief [Doc. 25] at 14. A retention-based claim would be barred by the existence of adequate state remedies.[2]

On the other hand, initial seizure of the guns is governed by the Fourth Amendment, not "substantive due process." Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct.1865 (1989)(Fourth Amendment rather than "substantive due process" governs claims based on intentional physical intrusion by government officials); Lindsey v. Storey, 936 F.2d 554, 559 (11th Cir. 1991)(analyzing arrest-based property seizure claims under the Fourth Amendment). On that ground alone, Plaintiff's seizure-based "substantive due process" claim must be dismissed.

Finally, Plaintiff appears to abandon any Fourth Amendment claim relating to gun seizure. Regardless, such a claim would be meritless. Officers have a well-recognized interest in seizing and safeguarding property at an arrest scene, including firearms found in the possession of an arrestee. Colorado v. Bertine, 479 U.S. 367, 372 (1987); U.S. v. Gravitt, 484 F.2d 375 (5th Cir.1973). Such a procedure does not violate the Fourth Amendment.

Independent of the inventory rationale in Bertine and Gravitt, police are entitled to qualified immunity for seizure of materials found in an automobile where

[2] Property retention by government actors—whether negligent or intentional—cannot ground a claim under 42 U.S.C. § 1983 because adequate post-deprivation remedies exist under Georgia law. Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984); Lindsey v. Storey, 936 F.2d 554, 561 (11th Cir. 1991)(dismissing federal property deprivation claims in light of Hudson and adequate state post-deprivation remedies under Georgia law).

"arguable reasonable suspicion" exists tying the property to criminal activity. Lindsey v. Storey, 936 F.2d 554, 560 (11th Cir.1991). Here, Plaintiff was arrested based in part on conduct involving a firearm, and therefore at least "arguable reasonable suspicion" linked any firearms to the offense(s), thereby justifying seizure.

Finally, police are entitled to seize materials that threaten their safety in the course of a traffic stop. Michigan v. Long, 463 U.S. 1032, 1051 (1983)(finding that a protective search of passenger compartment of motor vehicle during a lawful investigatory stop of a vehicle was reasonable); see Arizona v. Gant, 129 S.Ct. 1710, 1721 (2009)(detailing authority justifying search for and seizure of weapons that threaten officer safety). Firearms plainly pose a sufficient threat to the safety of officers and bystanders to justify seizure.

For each of these reasons, Defendants are entitled to summary judgment against any claim based on seizure of Plaintiff's guns.

This ___ day of JULY, 2009.

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	)	
Plaintiff,	)	
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TYLER DURHAM BROWN, and	)	
ALTON RABON PAYNE,	)	
	)	
Defendants.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing ***ANSWER TO PLAINTIFF'S COMPLAINT*** upon all parties by electronic filing through the CM/ECF system in accordance with the US District Court rules to:

John R. Monroe
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This ___ day of JULY, 2009.

/s/ G. Kevin Morris

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