IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

GEORGIACARRY.ORG, INC., and ZACHARY NELSON MEAD,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION FILE NO. CV108-145
RONALD STRENGTH, in his Official Capacity as Sheriff of Richmond County, Georgia and KADUM TOWNSEND,	)	
Defendants.	)	

CONSENT ORDER AND JUDGMENT

This is a Federal Civil Rights action pursuant to 42 U.S.C. § 1983, asserting causes of action for unreasonable searches and seizures. The parties hereto have reached an agreement and settlement which is adopted by the Court as follows:

CONTENTIONS OF THE PARTIES

Contentions and Legal Argument of Plaintiff

Plaintiff contends that the Defendant Kadum Townsend, a Richmond County Sheriff's Deputy, stopped Plaintiff Zachary Nelson Mead (hereinafter "Plaintiff") outside Kroger while Plaintiff was returning to his car from grocery shopping while carrying an exposed hand gun in a holster on his belt. Plaintiff serves in the military of the United States and therefore was exempt from the Georgia law requiring a person to have a firearm license in order to carry a pistol. See O.C.G.A. § 16-11-130. Nevertheless, Plaintiff had in his possession a firearms license issued by the Probate Court of Richmond County.

Deputy Townsend seized Plaintiff's pistol and ran the serial number through the Georgia Crime Information Center (GCIC). Plaintiff contends he did not consent to this seizure and Plaintiff presented both his military identification and firearms license to Deputy Townsend. Despite this, Deputy Townsend confiscated the firearm and informed Plaintiff he would need to present proof of purchase or ownership to retrieve his pistol from the Sheriff's Office. The pistol was eventually returned to Plaintiff weeks later without the need to present any proof of purchase.

Plaintiff contends that at the time of the stop, Deputy Townsend had no probable cause to believe that Plaintiff committed a crime and had no reasonable articulable suspicion that Plaintiff was committing or about to commit a crime. Plaintiff further contends that Deputy Townsend's actions were done pursuant to an official policy of the Richmond County Sheriff's Office.

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, ----, 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). While plenty of case law exists on what conduct justifies a stop under the Fourth Amendment, there is no case law in the Eleventh Circuit on whether the Fourth Amendment is violated when a person is stopped merely for the presence of a pistol in a holster, with no accompanying facts indicating the commission of a crime. The Supreme Court has instructed, however, 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, 120 S. Ct. 1375 (2000). The present case presents the situation of whether the officer had authority to make the initial stop, and, therefore, the propriety of the initial stop must be examined under the standards of *Terry*.

Although the Eleventh Circuit has given no instruction on this particular issue, district courts in other circuits have addressed this issue, and the cases are instructive. 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 justifying the stop, 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 was a crime:

> [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.

The court further noted that "if the stop itself is unlawful, neither *Terry* nor *Michigan v. Long* authorizes the police to search the suspects or the suspect's vehicle for weapons, even if the officers reasonably fear for their safety."

The Third Circuit Court of Appeals, with Northern District of Georgia Judge O'Kelley sitting by designation, unanimously held that a tip that a celebrant at a festival was carrying a pistol was not sufficient to justify a stop of the celebrant. *See 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 under Virgin Island law to possess a gun in public."** Id. at 218.

> This situation is no different than if Lockhart 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).

As in both *Dudley* and *Ubiles*, Plaintiff in this case contends he was stopped merely for possessing a firearm, and, going beyond the facts in *Dudley* and *Ubiles*, the firearm was seized even after the investigation revealed no crime whatsoever. Plaintiff further contends that at the time of the initial stop, Deputy Townsend was not in possession of any facts that would lead him to believe that Plaintiff was committing or about to commit a crime, and Deputy Townsend was not aware of any facts that would tend to indicate that Plaintiff was carrying the firearm or possessing the firearm unlawfully. There was nothing in Plaintiff's conduct that would lead a reasonable officer reasonably to suspect that criminal activity was afoot at the time Deputy Townsend stopped him. Plaintiff argues that the situation was the same during Deputy Townsend's investigation, when he checked the firearm's serial number, and even after Deputy Townsend's investigation was concluded, when he confiscated the firearm and departed with it, leaving Plaintiff standing in the Kroger parking lot with an empty holster.

It is undisputed that part of Deputy Townsend's investigation was to check the firearm's serial number through the Georgia Crime Information Center. The Georgia Court of Appeals has recently weighed in on the issue of seizing firearms and checking the serial number, in a case where the officer had a standard operating procedure of seizing all weapons and checking the serial numbers during stops. In *State v. Jones*, 289 Ga. App. 176 (2008), the court held that in order to seize a firearm, even 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. Reversing an earlier, non-binding decision, the Georgia Court of Appeals held that there is no "carte blanche authority" to seize all weapons during a routine traffic stop. Id. In the present case, Plaintiff contends that he did not engage in any furtive movements or other indications of danger to the officer.

Contentions and Legal Arguments of Defendants

According to Deputy Townsend, while on routine patrol of the parking lot of the Kroger grocery store on Washington Road in Augusta, Richmond County, Georgia, he was waved down by a customer who indicated there was an individual in Kroger acting in a bizarre and obnoxious manner and carrying a firearm. Deputy Townsend was informed that this individual was accompanied by another man wearing a sombrero and carrying a guitar. Deputy Townsend parked his patrol car and began to enter the Kroger store. As he was doing so, Deputy Townsend was stopped by another individual who made a similar complaint of an individual in the Kroger store with a gun whose conduct concerned the individual. Upon entering the store, Deputy Townsend was met by an unidentified employee of Kroger who indicated that the subject had been asked to pay for his groceries and leave the store due to his conduct and that this individual was carrying a gun. The subject was just leaving the Kroger store as Deputy Townsend was talking to the Kroger employee.

Deputy Townsend approached the individual, later identified as Plaintiff, and initially seized his firearm for Deputy Townsend's protection and safety. Plaintiff produced valid military identification and a firearm's license to Deputy Townsend. In addition, Deputy Townsend ran the serial numbers of the firearm through GCIC to determine if it was stolen and received a negative response. Deputy Townsend believed that he could smell alcohol on Plaintiff and questioned the Plaintiff about whether he had been drinking. Plaintiff denied that

he had been drinking but the officer noted that Plaintiff had purchased alcoholic beverages from the Kroger store. In the abundance of precaution, Deputy Townsend seized the firearm, gave the Plaintiff a property receipt and informed him that he could retrieve the firearm from the Sheriff's Office.

Defendant Townsend argues that he had a legal right to seize the firearm at the very least temporarily while he investigated the complaints he received concerning Plaintiff out of concern for his own safety. See *United States v. Newsome*, 475 F.3d 1221, 1226 (11th Cir. 2007); *United States v. Blount*, 123 F.3d 831, 837 (5th Cir. 1997); *U.S. v. Jefferson*, 2008 WL 1848798 (M.D.Ala.). Defendant Townsend contends that such a concern entitles him to the defense of qualified immunity from any claims against him arising out of his initial approach of Plaintiff and a temporary seizure of the gun for his own safety pending his investigation. Defendant also contends that the complaints of bizarre behavior by Plaintiff, as well as his alleged consumption of alcoholic beverages, would further entitle Townsend to the protection of qualified immunity from the remaining claims of Plaintiff. The seizure of Plaintiff's firearm by Deputy Townsend was done in the abundance of precaution for the safety of Plaintiff and the general public, was temporary in nature and there is a lack of prior case law with substantially similar facts putting Townsend on notice that such conduct violated the constitutional rights of Plaintiff. See generally, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982); *Hope v. Peltzer*, 536 U.S. 730, 122 S.Ct. 2508, 2515 (2002), quoting *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151, 2158 (2001).

Defendants deny that the actions of Deputy Townsend in making the decision to seize Plaintiff's firearms was done pursuant to any official policy or custom established by Sheriff Strength or the Richmond County Sheriff's Office.

HOLDING

Pursuant to the agreement and the terms of a settlement between the parties, Plaintiff's prayers for declaratory judgment are granted, in part, against Townsend and the Court declares that Deputy Townsend by the seizure of Plaintiff's firearm and requiring him to retrieve it at a later date from the Sheriff's Office under the facts and circumstances of this case violated Plaintiff's Fourth Amendment rights of the United States Constitution.

REMAINING CLAIMS

With regard to the remaining claims against Deputy Townsend and the claims against Sheriff Strength in his official capacity as Sheriff of Richmond County, pursuant to the agreement and consent of the parties, the Court hereby orders that upon payment of nominal damages to Plaintiff in the amount of $1,000, attorney's fees pursuant to 42 U.S.C. § 1988 in the amount of $3,450 and taxable costs of $350, to be paid within thirty (30) day of the entry of this Order, all the remaining claims of Plaintiff against Deputy Townsend and all claims against Sheriff Strength are dismissed with prejudice with each party to otherwise bear their own costs.

This 4th day of December, 2008.

HONORABLE J. RANDAL HALL
JUDGE, UNITED STATES DISTRICT COURT

CONSENTED TO:

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