Docket No. 10-2356

The United States
Court of Appeals
For
The Seventh Circuit

Jesus Gonzalez, Appellant
v.
Village of West Milwaukee, *et.al.*, Appellees

Appeal from the United States District Court
For
The Eastern District of Wisconsin
The Hon. Lynn Adelman, District Judge

Brief of Appellant

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Disclosure Statement

Appellant certifies that he is not a corporation and that no law firm has appeared on his behalf. Appellant further certifies that Appellees have been represented by the law firm of Crivello Carlson in Milwaukee, Wisconsin.

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Statement of Jurisdiction

The District Court had federal question jurisdiction of this case under 28 U.S.C. § 1331, as the Plaintiff sought redress for civil rights violations under 42 U.S.C. § 1983, the Privacy Act under 5 U.S.C. § 552a (note) and under the Fourteenth Amendment to the Constitution.

The District Court action was dismissed (completely) on May 11, 2010, in an Order granting Defendants-Appellees' motion for summary judgment. The Clerk of the District Court entered a final judgment the same day. Appellant filed his notice of appeal on June 4, 2010, so this Court has jurisdiction under 28 U.S.C. § 1291. This appeal is from the final judgment entered by the Clerk of the District Court and from the Order granting summary judgment, both entered on May 11, 2010.

Statement of the Issues

1. The District Court erred in finding that Appellees had probable cause to arrest Appellant, and in finding that Appellees had qualified immunity. Both errors are errors of law that this Court reviews *de novo. Board of Education v. Illinois State Board of Education,* 41 F.3d 1162 (7th Cir. 1994).

2. The District Court erred in ruling that Appellant cannot sue to redress a violation of § 7(b) of the Privacy Act. This also is an error of law that the Court reviews *de novo.*

Statement of the Case

This is a civil rights case. Plaintiff-Appellant Jesus Gonzalez sued, under 42 U.S.C. § 1983, for 4th Amendment violations for wrongful seizure of his person and property when he was arrested while openly wearing a firearm on two different occasions in two different retail stores. He also sued for violations of the Privacy Act when Appellees refused to release him until he provided his social security number and when Appellees failed to inform him of several facts required by the Privacy Act.

The District Court dismissed all Appellant's claims and granted summary judgment to Appellees. Appellant now appeals.

Statement of the Facts

The facts of this case occurred in two incidents in different cities, almost a year apart.

(1) West Milwaukee Menards Incident

On May 14, 2008, Defendants Krafcheck and Donovan were on duty as officers with the West Milwaukee Police Department. Deposition of Patrick Krafcheck, p. 6; Deposition of Charles Donovan, p. 9. Ofc. Krafcheck received a telephone call from Jeffrey Jensen, the manager of a Menards home-improvement store in West Milwaukee. Jensen had called to ask if it were legal to carry a handgun in Wisconsin. Krafcheck Depo., p. 8. Deposition of Jeffrey Jensen, pp. 21-27. Jensen related to Krafcheck that Plaintiff-Appellant had been shopping in Menards wearing a handgun in a thigh holster and that it made Jensen nervous. *Id.* Krafcheck told Jensen he would go to the store to "check [Plaintiff] out." *Id.*

Krafcheck advised Donovan that Plaintiff had been in Menards wearing a firearm and that by legally carrying a holstered pistol Plaintiff "created a disturbance enough where the manager called the police, that the manager felt very uneasy and uncomfortable, and so did several employees." Donovan Depo., pp. 11-12. When Donovan arrived in the parking lot of Menards, Plaintiff and Plaintiff's brother were peacefully loading bricks they had purchased from Menards onto a pickup truck. *Id.*, p. 24. Donovan approached Plaintiff, who was wearing an empty holster but admitted that

he had been in the store wearing a firearm. *Id.,* p. 17. Donovan asked Plaintiff where his handgun was. *Id.* Plaintiff declined to answer, and Donovan arrested Plaintiff. *Id.* Prior to making the arrest, Donovan did not speak to any witnesses and did not obtain any information about the nature of the supposed "disturbance" in the store other than what Krafcheck had relayed to him second hand about the telephone call from Jeffrey Jensen. *Id.,* pp. 21-23.

Krafcheck seized Plaintiff's handgun, magazines, ammunition, and gun case from Plaintiff's vehicle after Plaintiff had been handcuffed and placed in a squad car. Krafcheck Depo., pp. 19-24; Donovan Depo., Exhs. 3-4. Krafcheck did not have a warrant and did not have Plaintiff's consent to take possession of Plaintiff's property. *Id.*

After Plaintiff was transported to the police station, Donovan "processed him." Donovan Depo., p. 36. As part of that processing, Donovan asked Plaintiff for his social security number ("SSN"). *Id.* Donovan did not advise Plaintiff whether disclosure of the SSN was optional or mandatory, by what statutory authority he was requesting it, or what uses would be made of it. *Id.,* p. 37. As a result of Donovan's request, Plaintiff's SSN was put into the records of the West Milwaukee Police Department. *Id.,* Exh. 2.

The Milwaukee County District Attorney ultimately declined to charge Plaintiff with any offenses arising from the Menards incident. Deposition of Jesus Gonzalez, pp. 115-116. While the arrest was pending, the West

Milwaukee Police Department retained possession of Plaintiff's firearm and other property for several months. *Id.,* p. 139.

(2) The Chilton Walmart Incident

On April 10, 2009, Defendant Young was on duty as a police officer for the City of Chilton Police Department. Deposition of Michael Young, p. 14. At approximately 11:47 p.m., Young received a dispatch that a person was at the Chilton Walmart store wearing a handgun and asking to purchase ammunition for a firearm other than the one he was carrying. *Id.,* pp. 17-18; *Id.,* Exh. 1. When Young arrived at the Walmart, the store manager, Jennifer Fairchild, told Young that Plaintiff was in the sporting goods department and that a store associate was "stalling" Plaintiff in the sporting goods department. Young deposed that Fairchild seemed upset. *Id.,* pp. 22-24.

Young approached Plaintiff in the sporting goods department as Plaintiff was innocently completing his purchase of ammunition. *Id.,* p. 25. Young drew his pistol and held Plaintiff at gun point while awaiting a backup officer. *Id.,* pp. 26-27. When the backup officer arrived, Young handcuffed Plaintiff and led him out of the store to Young's squad car. *Id.,* pp. 33-36, 46. Young transported Plaintiff to the Chilton Police station. *Id.,* p. 53. Young placed Plaintiff in an interview room, where Plaintiff was detained while Young made telephone calls. *Id.,* p. 56. Young attempted to call the Calumet County district attorney and assistant district attorney to ask for advice on

the situation, but he was not able to reach either one. *Id.,* pp. 56-57. After a total detention of approximately an hour Young released Plaintiff without booking him or citing him for any offenses, but retained possession of Plaintiff's firearm. *Id.,* pp. 58-60.

The Calumet County district attorney of course declined to bring any charges against Plaintiff for any offenses arising from the Walmart arrest. Letter dated April 23, 2009 from Calumet County District Attorney's Office (Young Depo, Exh. 3). Plaintiff's property was returned to him within a few weeks. Gonzalez Depo., p. 167.

Summary of the Argument

The District Court granted Appellees' motion for summary judgment based on its conclusion that Appellees had probable cause to arrest Appellant for disorderly conduct in each incident. The District Court also determined that Appellees had qualified immunity because the law was not clearly established. Appellant will show that there was no probable cause to arrest him, that the District Court's conclusion that openly carrying a firearm in public constitutes disorderly conduct *per se* is not the law in Wisconsin and is not consistent with Wisconsin's Constitution, and that the law is clearly established that a police officer must have probable cause to make a warrantless arrest and seizure (there being no 4th Amendment exception for firearms).

The District Court also ruled that a person may not sue for a violation of § 7(b) of the Privacy Act and that Appellant has not proven a case for a violation of § 7(a) of the Privacy Act. Appellant will show that he did make out a claim for a § 7(a) violation and that the District Court erred in ruling that a party may not sue under § 7(b) of the Act.

Argument and Citations of Authority

1. The District Court Erred in Granting Appellees' Motion for Summary Judgment and Denying Appellant's Motion for Summary Judgment

1A. Liability of Individual Officers

An appellate court reviews the granting of a motion for summary judgment *do novo. Morton Community Unit School v. J.M.,* 152 F.3d 583, 587 (7th Cir. 1998).

The District Court ruled that the officers in each instance had probable cause to arrest Appellant for disorderly conduct. The disorderly conduct statute in Wisconsin provides:

> Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which the conduct tends to provoke a disturbance is guilty of a Class B misdemeanor.

Wis. Stats. § 947.01. The District Court correctly determined that Appellant "did not engage in conduct within the specifically enumerated statutory categories." R 47-5. The District Court nevertheless ruled that Appellant's actions were "otherwise disorderly."

In order to be "otherwise disorderly," the conduct must be "similar thereto in having a tendency to disrupt good order and provoke a disturbance." *State v. Givens,* 28 Wis. 109, 115 (S.Ct. 1965). The conduct

must be of the type that "unreasonably offends the sense of decency or propriety of the community." *Id.* at 117.

Wisconsin courts have made clear that the crime has two distinct elements: 1) the conduct must be of the type enumerated in the statute, or be similar thereto (as discussed above); ***and*** 2) the conduct must be engaged in under circumstances which tend to cause or provoke a disturbance. *Oak Creek v. King,* 148 Wis. 2d 532, 540 (S.Ct. 1989).

Addressing the first element, the expression of the sense of decency of the people of Wisconsin perhaps can best be seen in their adoption of Art. I § 25 of their Constitution. There, they declared that the people have a right to bear arms for a variety of lawful purposes. The Supreme Court of Wisconsin has declared that right to be a fundamental one, and that "ample alternative channels" to concealed carry (which is banned) must be permitted in order to comply with the Amendment. *State v. Hamdan,* 2003 WI 113, 70 (S.Ct. 2003). When adopting the Amendment, the people of Wisconsin obviously new that the State had banned concealed carry, so the right they were reserving for themselves must have been the right to carry weapons openly.

Thus, the people have reserved for themselves the fundamental right to bear arms openly. It is inconceivable that they have reserved for themselves something that "unreasonably offends their sense of decency or propriety." The inescapable conclusion is that the people of Wisconsin

cherish the open carrying of firearms, rather than take offense to it as the District Court concluded.

The District Court likewise dismissed the possibility that the Second Amendment of the Constitutional of the United States can help Appellant, saying, "The Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home." R47-7. This conclusion is only true, if at all, in the most technical of senses. The Supreme Court has not had occasion to rule upon that issue directly. But, the sole case cited by the District Court, *District of Columbia v. Heller,* 128 S.Ct. 2783 (2008) comes quite close to just such a ruling. First, the *Heller* court determined that the Second Amendment protects an individual right to keep and bear arms. 128 S.Ct. at 2791. Second, *Heller* found that to "bear arms" is synonymous with "wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person." 128 S.Ct. at 2793. Finally, the *Heller* court said that its opinion should not be "taken to cast doubt on longstanding prohibitions … forbidding the carrying of firearms in sensitive places such as schools and government buildings." 128 S.Ct. at 2816-2817 (the very pages cited by the District Court).

The fact that the Supreme Court (in *dicta*) ratified bans on carrying firearms in "sensitive places" implies that the Second Amendment protects carrying firearms in places that are not "sensitive." Surely every place but

the home is not "sensitive." In addition, it is self-evident that the Founders could not have been concerned with being "armed and ready for offensive or defensive action in a case of conflict with another person" ***only in the home.*** Such a conclusion is absurd.

Addressing next the second element of the crime of disorderly conduct, the District Court essentially ruled that carrying a firearm in public in Wisconsin is disorderly conduct *per se.* In its order, the District Court stated:

> No reasonable person would dispute that walking into a retail store openly carrying a firearm is highly disruptive conduct which is virtually certain to create a disturbance. This is so because when employees and shoppers in retail stores see a person carrying a lethal weapon, they are likely to be frightened and possibly even panicky. Many employees and shoppers are likely to think that the person with the gun is either deranged or about to commit a felony or both. Further, it is almost certain that someone will call the police. And when police respond to a "man with a gun" call, they have no idea what the armed individual's intentions are. The volatility inherent in such a situation could easily lead to someone being seriously injured or killed.

R47-6. The District Court drew no meaningful distinctions between retail stores and any other public place, such as banks, restaurants, gas stations, or city streets. The same reasoning would apply anywhere. The subjective beliefs and attitudes of the District Court are readily apparent in this statement. Moreover, the District Court failed to address the constitutional ramifications of the District Court's conclusions.

As Appellant pointed out to the District Court (and as noted above), the Wisconsin Constitution states, "The people have the right to keep and

bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Const. Art. I § 25. The Supreme Court of Wisconsin has found the state constitutional right to bear arms to be a fundamental one. *State v. Cole,* 2003 WI 112, ¶ 20, 264 Wis.2d 520, 537, 665 N.W.2d 328, 336 (S. Ct. 2003).

The State of Wisconsin "completely bans the carrying of concealed weapons by all citizens in all circumstances." *State v. Hamdan,* 2003 WI 113, ¶ 51, 265 Wis.2d 433, 470, 665 N.W.2d 785, 803 (S.Ct. 3003). Thus, the only way to bear an arm in Wisconsin is to do so openly. In fact, *Hamdan* court noted that "the test for whether statutes or ordinances that restrict a fundamental right are constitutional is whether they leave open ample alternative channels by which the citizen may exercise the affected right." 2003 WI 113, ¶ 70. The State of Wisconsin argued in *Hamdan* that an absolute ban on concealed carry is constitutionally permissible because "a person lawfully in possession of a firearm will always retain the ability to keep the firearm in the open." 2003 WI 113, ¶ 72. Even Wisconsin's Chief Justice, ***dissenting*** in *Hamdan,* concluded that Wisconsin "does not prevent anyone from carrying a firearm" but merely "limits the manner of carrying weapons, by requiring that a weapon that is on a person … not be concealed." 2003 WI 113, ¶ 124 (Abrahamson, C.J., *dissenting*).

The Supreme Court of Wisconsin has disapproved of arrests for disorderly conduct for people exercising their fundamental constitutional rights:

> The defendants were legally exercising their first amendment rights…. The arrest made here was not based on any disorderly conduct. It was based on the defendants purporting views which were offensive to the commanding officer. We cannot hold that the mere exercise of one's rights to freedom of speech in communicating those views constitutes disorderly conduct.

State v. Werstein, 60 Wis 2d 668, 676 (S.Ct. 1973). In *Werstein,* when protesters filled an armed forces recruiting station, the employees in the station became frightened. The commanding officer called the police and the protesters were arrested. Consider the District Court's central opinion in the instant case, if the words in it are modified to fit the facts of *Werstein*:

> No reasonable person would dispute that walking into a [recruiting station] openly [protesting the draft] is highly disruptive conduct which is virtually certain to create a disturbance. This is so because when employees and [inductees] in [recruiting stations] see a person [protesting the draft], they are likely to be frightened and possibly even panicky. Many employees and [inductees] are likely to think that the person [protesting] is either deranged or about to commit a felony or both. Further, it is almost certain that someone will call the police. And when police respond to a ["group protest"] call, they have no idea what the [protestors'] intentions are. The volatility inherent in such a situation could easily lead to someone being seriously injured or killed.

The above exercise illustrates the danger of using personal sensibilities to evaluate disorderly conduct charges. One man's constitutional right is

another man's pet peeve. The Supreme Court of Wisconsin has carefully drawn the line to exclude such problems:

> The statute does not imply that all conduct which tends to annoy another is disorderly conduct. Only such conduct as unreasonably offends the sense of decency or propriety of the community is included. The statute does not punish a person for conduct which might possibly offend some hypercritical individual. The design of the disorderly conduct statute is to proscribe substantial intrusions which offend the normal sensibilities of average persons or which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons.

State v. Zwicker, 41 Wis.2d 497, 517 (S.Ct. 1969). In the instant case, Appellant peaceably entered two separate retail stores and made purchases. There were no "disturbances" until the store personnel created them by calling the police, who in turn arrested Appellant for no reason.

The District Court turned established Wisconsin law on its head by declaring that openly carrying a firearm in a public place is disorderly conduct. Because Wisconsin bans concealed carry of weapons, the Wisconsin Constitution must leave open "ample alternatives." Such alternatives must include the fundamental right to carry arms openly. By shutting the door on openly carrying in public, the District Court made the ban on publicly bearing arms a complete one, which is something the Supreme Court of Wisconsin has said is impermissible.

The District Court addressed this issue very briefly, in a one-sentence statement, "And nothing in Article I, § 25 of the Wisconsin Constitution

authorizes a person to openly carry a firearm under circumstances in which such conduct is likely to alarm others." R 47-7. The problem is that the District Court's reasoning results in the conclusion that all open carrying of firearms in public is likely to alarm others. The people of Wisconsin have reserved for themselves the fundamental right to carry arms openly, but the District Court concluded that carrying firearms openly is likely to alarm others. Thus, there are no "ample alternative channels," indeed, there are no alternative channels at all, for exercising this fundamental constitutional right.

The District Court also found that Appellee arresting officers had qualified immunity. In coming to that conclusion, the Court said that Appellant "cites no case holding or suggesting that a reasonable police officer in the position of Donovan or Young could not have reasonably believed that he had probable cause to arrest plaintiff for violating § 947.01."

This statement by the District Court is not quite true. Appellant cited multiple cases, including one where the very same District Judge had ruled six years earlier that it is not a crime in Wisconsin to have a gun in a car. *Brown v. Milwaukee,* 288 F.Supp. 2d 962, 971 (E.D. Wis 2003) (Adelman, District Judge). In making its ruling in the *Brown* case, the District Court relied in part upon *Florida v. J.L.,* 529 U.S. 266, 268 (2000) (declining to adopt a firearm exception to the 4th Amendment). The District Court also relied upon *United States v. Ubiles,* 224 F.3d 213 (3rd Cir 2000), which held

that information that a person was carrying a gun at a festival in the Virgin Islands was insufficient reason to detain the person. It stands to reason that if a person cannot even be ***detained*** for carrying a gun to a festival, a person could not be ***arrested*** for carrying a gun in a store.

In addition to citing *J.L.* and *Ubiles,* which the District Court relied upon when deciding *Brown,* Appellant cited several other cases to the District Court, including *United States v. Dudley,* 854 F.Supp. 570, 580 (S.D. Ind. 1994), which held, "A telephone report of citizens possessing guns or merely engaging in "suspicious" activity, standing alone, cannot amount to reasonable suspicion of a crime."

The District Court did not mention *Brown, J.L., Ubiles,* or *Dudley* in its opinion.

Consider the result in a similar case in the City of Alamogordo, New Mexico:

> In sum, Defendants had no reason for seizing Mr. St. John other than the fact that he was lawfully carrying a weapon in a public place. Because New Mexico law allows individuals to openly carry weapons in public – and Mr. St. John had done nothing to arouse suspicion, create tumult or endanger anyone's well-being – there were no articulable facts to indicate either criminal activity or a threat to safety. Accordingly, Defendant's seizure of Mr. St. John violated his Fourth Amendment rights.

St. John v. McColley, 653 F.Supp.2d 1155, 1162 (D. New Mex. 2009). The facts of *St. John* are quite similar to the facts of the instant case. St. John was a patron in a movie theater and he was openly wearing a firearm in a

holster. The theater manager called the police because customers were "upset." The police escorted St. John out of the theater and St. John sued the police for violating his 4th Amendment rights. In granting St. John's motion for summary judgment, the court observed:

> Defendants simply received a report that an individual was carrying a firearm in a location where individuals could lawfully carry firearms. They received no indication that Mr. St. John was behaving suspiciously or in a threatening manner. When Defendants arrived, they found Mr. St. John sitting peaceably in the Theater preparing to watch a movie. They had no basis for believing that Mr. St. John's use of the weapon was likely to become criminal, cause a disturbance or pose a threat to safety. Nor did anyone seem particularly alarmed by Mr. St. John's weapon. Indeed, the record does not reveal that anyone – including the lone customer who spoke to Officer MColley about Mr. St. John's gun – was even concerned enough to have left the Theater as a result.

Id. Likewise, in the instant case, store managers reported that people were frightened, but they do not report that anyone was concerned enough to have left the Menards or Walmart stores in which Appellant was shopping.

The crowded movie theater in *St. John* cannot be so different from the large retail stores in the instant case. If anything, the movie theater is a more extreme case, as theater patrons tend to share closer quarters than store customers do. In any event, the Constitution must mean the same thing in a retail store in Wisconsin that it means in a movie theater in New Mexico. "If that were not the case, citizens farming under the open skies of Washington or Vermont would generally have greater Fourth Amendment protections than their compatriots bustling to work in Manhattan or Boston.

As a general proposition of constitutional law, this cannot be so." *United States v. Ubiles,* 224 F.3d 213, 219 (3rd Cir 2000).

1B. Liability of Chilton and West Milwaukee

The District Court granted Appellees' Motion as to Chilton and West Milwaukee, holding, "Plaintiff asserts that the municipalities are liable for wrongful retention of his property, but he does not argue the point or cite any authority. Arguments not developed in any meaningful way are waived." R47-9.

This decision by the District Court does not take into account that Appellees, as the moving parties, bore the burden of establishing that the municipalities were ***not*** liable for the wrongful retention of Appellant's property. Appellees failed to raise this issue ***at all.*** Instead, Appellees argued against municipal liability on the grounds that *respondeat superior* does not apply in § 1983 actions ("The municipalities were only sued because they were alleged to be responsible for the officers' conduct and, if the officers committed no constitutional deprivation, the municipalities cannot be liable." R24-36). That is, Appellees created a straw man claim on behalf of Appellants and then Appellees attacked it.

Appellant clearly refuted the straw man. ("Plaintiff does not hold the municipalities liable for the officers' actions (for the wrongful searches and seizures). The municipalities are liable for the wrongful retention of Plaintiff's property." R37-2.) That is all Appellant was required to do in

response to Appellees' Motion. It is inappropriate to criticize Appellant's arguments in support of a claim that Appellees never attacked. Because Appellees failed to meet their burden of establishing that the municipalities were not liable, it was error for the District Court to grant summary judgment to the municipalities on this issue.

Consider the following example in illustration of this point. Jones sues Smith for a tort claim. Smith files for summary judgment, saying he never had a contract with Jones. Smith responds by saying that he is not suing Jones in contract; he is suing Jones in tort. The trial court grants summary judgment to Jones because Smith did not develop his tort arguments in Smith's opposition to Jones' motion. Clearly, that judgment is not appropriate. Jones cannot prevail on summary judgment by arguing against the wrong claim and then demanding that Smith prove his case. To do so shifts the burden on summary judgment to the non-moving party.

The District Court rested its decision on the principle that "Arguments not developed in any meaningful way are waived." R47-9, *citing Central States, SE & SW Areas Pension Fund v. Midwest Motor Express,* 181 F.3d 799, 808 (7th Cir 1999). While this is an accurate statement of the law, it applies to a party that bears a burden in the first place. In *Central States,* Midwest Motor Express contested a large bill and appealed its loss, but failed to argue one of its theories on appeal. As the appellant, it bore the burden of proving its case and failed to do so.

The District Court also cited to *Robyns v. Reliance Standard Life Insurance Company*, 130 F.3d 1231 (7th Cir 1997) for the proposition that "A party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered." First, this rule of law really applies, as this Court held in *Robyns,* to illustrate "that a plaintiff waives the right to argue an issue on appeal if she fails to raise the issue before a lower court." *Id.,* 130 F.3d at 1238. It is not a rule of deciding summary judgment motions. It is an appellate rule. Even so, Appellant did inform the District Court why Appellees' Motion should not be granted. The reason it should not have been granted is that Appellees attacked a claim that Appellant was not making.

Finally, the District Court observed that "plaintiff's claim seems to be based on the concept of a 'continuing seizure,' which the Seventh Circuit has rejected." R47-9, *citing Lee v. City of Chicago,* 330 F.3d 456, 466 (7th Cir 2003). In *Lee,* this Court rejected the concept that an ***initially valid*** seizure can become invalid over time ("Whether … a state actor's refusal to return ***once lawfully obtained*** property can amount to an unreasonable seizure, or alternatively, transform a seizure from reasonable to unreasonable.") 330 F.3d at 460 [Emphasis supplied].

In the instant case, however, Appellant is arguing that his property was not lawfully seized in the first place, and that the municipalities became

complicit in the illegal seizures by themselves taking and retaining possession of the property. *Lee* does not address this fact pattern.

2. The District Court Erred in Granting Appellees' Motion for Summary Judgment on Appellant's Privacy Act Claims

An appellate court reviews the granting of a motion for summary judgment *do novo. Morton Community Unit School v. J.M.,* 152 F.3d 583, 587 (7th Cir. 1998).

The District Court dismissed Appellant's Privacy Act claims as well. Although the District Court correctly found that the Privacy Act applies to state and local governments and that private actions can be maintained for violations of § 7(a) of the Privacy Act (Appellees have not objected to either of these findings by cross-appealing), the District Court nonetheless concluded that Appellant did not make out a valid claim for a § 7(a) violation.

Before addressing the merits of the Privacy Act claims, it is worthwhile to have a brief discussion about the Act. There seems to be a fair amount of confusion about the Act, owing mostly to its nature and its codification.

The bulk of the Privacy Act, Pub. L. 93-579, 88 Stat. 1896, 5 U.S.C. § 552a(note), deals with actions of the federal government and federal officials as they relate to information about individuals. All of this is codified in the United States Code, is somewhat straightforward, and has absolutely no bearing on the instant case. It is mentioned only to point out that all the

litigation dealing with this portion of the Act likewise has no bearing on the instant case.

Only § 7 of the Privacy Act is of interest in this case. Section 7 is not codified in the United States Code, which somewhat surprisingly has led to litigation about whether it even is in effect. The 11th Circuit addressed this issue as it relates to § 7 of the Act by noting, "[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent." *Schweir v. Cox,* 340 F.3d 1284, 1288 (11th Cir. 2003), *citing United States v. Welden,* 377 U.S. 95, 98, FN 4 (1964) ("*Schweir I*").

The combined effect of the bulk of the Act pertaining to federal government action and § 7 not being codified has led some courts to come to the erroneous conclusion that § 7 either is not in effect (as discussed above) or that it only applies to federal action. Section 7, by its own terms, applies to federal, state, and local governments. Section 7(a) begins, "It shall be unlawful for any Federal, State, or local government…." Section 7(b) begins, "Any Federal, State, or local government…." One simply cannot conclude from this language that §7 only applies to federal governments.

Turning to the merits of the Privacy Act claims, § 7(a) of the Privacy Act states, in pertinent part, "It shall be unlawful for any Federal, State, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number."

West Milwaukee officers told Appellant, when he refused to disclose his social security number, that he would be incarcerated over the weekend if he did not disclose the number. He thereupon informed the officers that his social security card was in his wallet, which the officers had in their possession.

The District Court ruled, however, "As an arrestee, plaintiff had no right to remain anonymous, and defendants did not violate § 7(a)(1)." R47-11. The District Court cited no authority for this proposition, nor did it explain why refusing to provide a social security number is equivalent to remaining anonymous. There is nothing in the record to indicate that Appellees were not aware of Appellant's identity without his social security number or that Appellant otherwise attempted to remain anonymous. Appellees did not argue to the District Court that they could not identify Appellant without Appellant's social security number.

Furthermore, the District Court's conclusion, that an arrestee is obligated to divulge his social security number, is a direct contradiction to the Privacy Act. While there are exceptions to § 7(a), Appellees did not raise any of them in their Motion, and the District Court did not rely on any. Absent an applicable exception, the dictates of the Privacy Act are that West Milwaukee was prohibited from denying Appellant a "right, privilege, or benefit" on account of Appellant's refusal to provide his social security number. Telling Appellant that he would remain in jail over the weekend for

his refusal to disclose his number clearly fits within the proscription of the Act. The case relied upon by the District Court even states:

> Apparently then, there are no statutes or regulations requiring the mandatory provision of social security numbers to the police at the time of arrest. While arrested persons may provide voluntarily their social security numbers, they may not be required to do so.

Connecticut v. Vickery, 191 Conn. Super. LEXIS 419, 15, 1991 WL 32153, 6, No. CR2-90-59545 (Conn. Super. Ct. Feb. 15, 1991). *See also Szymecki v. City of Norfolk,* 2008 U.S. Dist. LEXIS 86437, 26, No. 2:08-CV-142 (E.D. Virg. September 11, 2008) ("Mr. Szmecki now alleges facts that are sufficient to allow his case to go forward…. [H]e also alleges that he was informed that he would be incarcerated and his property would not be returned to him if he did not comply [by providing his social security number]"); *LaBella v. Chatham County,* No. 4:09-CV-92 (S.D. Ga. January 20, 2010) ("Defendant Chatham county will not require the disclosure of social security numbers … from persons being booked into the Chatham County Detention Center.").

Thus, Appellees violated § 7(a) of the Privacy Act by depriving Appellant of his freedom when he refused to disclose his social security number.

§ 7(b) of the Privacy Act

Section 7(b) of the Privacy Act states, "Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure

is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it." It is undisputed that Appellees did not inform Appellant of any of the three required items when they asked him to disclose his SSN.

The District Court erroneously concluded that § 7(b) of the Privacy Act may not be enforced via 42 U.S.C. § 1983. R47-11. As grounds for this conclusion, the District Court relied on an unpublished opinion of the Eastern District of Pennsylvania. It is odd the District Court relied on such an opinion, when the District Court relied on *Schweir I,* a published sister circuit opinion in concluding that § 7 of the Privacy Act confers a private right of action under § 1983. *Schwier I,* 340 F.3d at 1289 ("Therefore, we conclude that the district court erred in finding that the remedial scheme of section 3 of the Privacy Act precluded a private right of action via § 1983 for violations of section 7 of the Privacy Act").

Schweir I did not distinguish between § 7(a) claims and § 7(b) claims. It simply stated that § 7 claims were subject to § 1983 enforcement. Further opinions in the Schweir case made clear that a party may sue under § 7(b). On remand from *Schweir I,* the district court granted summary judgment against the Secretary of State in Georgia on a § 7 (b) claim, finding that "the forms [for voter registration that do not provide the § 7(b) information] in use violated section 7(b) of the Privacy Act." *Schwier v. Cox,* 412 F.Supp.2d 1266, 1276 (N.D. Ga. 2005) ("*Schweir II*").

The District Court further concluded that, even if Appellant could bring a § 7(b) claim, he could not bring it against the Village of West Milwaukee. The District Court said that Appellant "presents no evidence that the Village had a policy or practice of failing to disclose the information required by § 7(b)." R47, p. 12. The District Court relied on the general proposition that a municipality is not liable pursuant 42 U.S.C. § 1983 under a *respondeat superior* theory absent such a policy or practice.

The District Court erred in this conclusion for two reasons. First, the Village did have such a policy or practice. Appellee Krafcheck testified that he asked Appellant for his SSN by going down a departmental checklist, and he further testified that he did not provide any of the information required by the Privacy Act. R 22-3, p. 30. If Appellee Krafcheck was following departmental policy, as he swore he was doing, then it can be fairly inferred that compliance with the Privacy Act was not part of the policy.

Secondly, the wording of § 7(b) of the Act makes clear that it is the government agencies themselves, not the persons through which agencies act, that are responsible for compliance with the Act. Because an agency only acts through its employees, it follows that government agencies are liable for the violations of § 7 of the Privacy Act that are committed by government employees.

Conclusion

The District Court erred in granting Appellees' motion for summary judgment and denying Appellant's motion ("Final judgment necessarily denies pending motions…." *Dunn v. Truck World, Inc.,* 929 F.2d 311, 313 (7th Cir 1991)). Appellant has shown that Appellees lacked probable cause to arrest him and seize his property, and that they violated the Privacy Act by refusing to release him without disclosure of his social security number and by failing to provide the information required by Section 7(b) of the Act. For the foregoing reasons, the judgment of the District Court should be reversed, with instructions to grant Appellant's motion for summary judgment.

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Certificate of Compliance

I certify that this Brief of Appellant complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Brief of Appellant contains fewer than 14,000 words as determined by the word processing system used to create this Brief of Appellant.

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Certificate of Service

I certify that I served a copy of the foregoing Brief of Appellant electronically using the Court's ECF system and via U.S. Mail on September 7, 2010 upon:

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Certificate of Completion of Appendix

I certify that an appendix in compliance with Cir. R. 30(a) &(b) is attached to this Brief of Appellant.

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Appendix

1. District Court Clerk's Judgment dated May 11, 2010

2. District Court's Order Granting Appellees' Motion for Summary Judgment