IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

JESUS GONZALEZ,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE NO.
	)	
v.	)	09-CV-0384-LA
	)	
VILLAGE OF WEST MILWAUKEE, WISCONSIN, *et. al.*	)	
	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Argument

I. The Municipal Defendants are Liable

Defendants assert that Plaintiff's claims against the municipal Defendants should be dismissed because the municipalities were not responsible for the illegal arrests of Plaintiff. The problem with this assertion is that Plaintiff is not claiming against the municipalities for the illegal arrests. Plaintiff is claiming against both municipalities for the wrongful ***retention*** of Plaintiff's firearm and, in the case of Chilton, for violations of the Privacy Act. Plaintiff's claims for his arrest the ***initial***

seizure of his property applies to the individual officers alone.

Defendants state incorrectly that "the municipalities were sued only because they were alleged to be responsible for the officers' conduct." Doc. 25, p. 36. Again, 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. In addition, West Milwaukee is liable for the Privacy Act violations, which will be discussed in more detail below.

Officers from both municipalities testified that, once they seized Plaintiff's firearm, they turned it over to their respective municipal employers. Doc. 22-2, pp. 41-42; Doc. 22-4, pp. 61-62. Thus, while the municipalities were not liable for the arrests and initial seizures, they were liable for the continued wrongful retention of Plaintiff's property.

II. The Officers are Not Entitled to Qualified Immunity

Defendants lose sight of the fact that qualified immunity is a concept based on objective reasonableness. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). For this reason, the concept applies only to what the officers' actually knew at the time of the allegedly wrongful conduct. What witnesses may have told the officers (or the officers' attorney during a deposition) ***after the fact*** is irrelevant.

IIA. Defendant Donovan Had No Basis for Arresting Plaintiff

The West Milwaukee Defendants attempt to justify Plaintiff's ***arrest*** by saying they had reasonable suspicion to ***detain and frisk*** him, based on *Terry v. Ohio,* 392 U.S. 1 (1968). Doc. 25, pp. 40-43. A *Terry* analysis is not helpful in this case, however, because Defendant Donovan jumped from a brief consensual encounter (that does not implicate the 4th Amendment) to arresting Plaintiff. Donovan never conducted a "brief detention" contemplated in *Terry*, nor did Donovan search Plaintiff until after he had arrested Plaintiff.

The question becomes not whether Donovan had reasonable suspicion to detain Plaintiff, but whether he had probable cause to arrest Plaintiff. He did not.

As noted above, Donovan relies on facts he gleaned from witnesses after he arrested Plaintiff, and opinions his attorney induced from witnesses at their depositions to support the lawfulness of the arrest. Those facts and opinions do not matter, as Donovan can rely only on what he knew at the time of the arrest.

Donovan knew only that there had been some sort of argument at the Menards store and that some employees were "nervous" that Plaintiff wore a firearm in the store. He knew nothing about the nature of the argument. He knew nothing about the nature of the employee's "nervousness." Based on that, and the fact that he knew

Plaintiff to be armed in the store, he arrested Plaintiff for disorderly conduct, contrary to Sec. 947.01, Stats., which states:

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

The crime has two distinct elements. First, the conduct in question must be one of the six enumerated ones or "similar thereto in having a tendency to disrupt good order and to provoke a disturbance." *State v. Givens*, 28 Wis.2d 109, 115 (S.Ct. 1965). Second, the conduct must be engaged in under circumstances that tend to provoke a disturbance of public order. *Id.*, 28 Wis.2d at 117.

Defendants focus on the "disturbance" aspect of the statute, completely ignoring conduct requirement. It is not difficult to understand why Defendants gloss over the first part of the statute: Plaintiff engaged in no such conduct at all, and certainly none of which Donovan was aware at the time he arrested Plaintiff:

> Q. So did you receive any information from Officer Krafcheck that Mr. Gonzalez had been loud in the store?
> A. I received information that he had an argument with the manager.
> …
> Q. Did you have any information that he had been loud?
> A. I don't think that's necessary. But no, I did not have any information that he had been loud.

Q. Okay. What about that he had been profane?

A. No. I was provided information that he had an argument with the manager inside the store. Usually arguments are voices raised and escalated quite – maybe a little bit, but I had no information other than he had been involved in an argument.

Q. Did you have any information that he was boisterous?

A. No.

Donovan Depo., pp. 20-22

Donovan further admits that he does not know if he would have arrested Plaintiff if Plaintiff had not been armed. *Id.* The bottom line is that Donovan arrested Plaintiff because Plaintiff wore a gun in the store and some employees were nervous about it.

Defendants point to nothing indicating that the wearing of a gun is the type of behavior that satisfies the first element of the crime of disorderly conduct in Wisconsin. As this Court noted in 2003, it is not a crime merely to have a gun in Wisconsin. *Brown v. Milwaukee,* 288 F.Supp.2d 962, 971 (E.D.Wis. 2003). In *Brown,* this Court also determined that there is no gun exception to the 4th Amendment. *Id., citing Florida v. J.L.*, 529 U.S. 266, 268, 272, 146, L.Ed.2d 254, 120 S.Ct. 1375 (2000). Six years later, it is now well established that a person cannot be stopped in Wisconsin merely for carrying a firearm.

Moreover, Wisconsin's Constitution guarantees, "The people have the right to

keep and bear arms for security, defense, hunting, recreation, or any other lawful purpose." Art. I, § 25, Wisc. Const. The Supreme Court of Wisconsin has determined that the right is fundamental. *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (S.Ct. 2003).

Donovan arrested Plaintiff for exercising a fundamental constitutional right. While it is true there are limitations on this right, *Id.*, Donovan had no information at the time of the arrest that Plaintiff had exceeded such limitations. Donovan undertook no investigation or questioning of witnesses prior to arresting Plaintiff. Doc. 22-2, p. 26. This case is no different than if Donovan knew that Plaintiff had been carrying a Bible (another fundamental constitutional right) into Menards, had an argument, and left. It would be absurd to think Donovan should arrest Plaintiff in the parking lot under such circumstances, but that is exactly what Donovan did. Given that there is not firearm exception to the 4th Amendment, the same logic must apply.

IIB. Defendant Young Had No Basis for Arresting Plaintiff

Just like in the West Milwaukee incident, there was no "stop and frisk" involved in the Chilton incident. It is thus meaningless to discuss one. Defendant Young went straight to drawing his firearm against Plaintiff, searching him, handcuffing him, and escorting him out of the store to a squad car, in which Young

eventually drove Plaintiff to the police station and kept him in an interview room. Although he made such claims to Plaintiff at the time, Young does not even attempt to argue in his brief that he did not arrest Plaintiff. Like Donovan, Young arrested Plaintiff with very little information. All Young knew was that Plaintiff had gone to Walmart wearing a firearm and that some employees were nervous. He did not even speak with an employee that had first hand knowledge of anything. Doc. 22-4, p. 23.

Unlike the West Milwaukee Menards incident, the Chilton Walmart incident did not even involve the hint of an argument. Young does not claim that Plaintiff had engaged in ***any*** conduct of the type required to establish the first element of disorderly conduct. Plaintiff merely wore a firearm.

Moreover, just like in West Milwaukee, the only reaction from Plaintiff's wearing of the firearm is that some employees were "nervous." There is not allegation that any disturbance ensued, or even that the wearing of the firearm tended to cause a disturbance. Quite the contrary, Plaintiff calmly completed a purchase at the sporting goods counter just before Young drew his firearm and arrested Plaintiff.

III. West Milwaukee Violated the Privacy Act

West Milwaukee argues that it is not liable for violating the Privacy Act for five separate reasons, each of which will be refuted in turn below.

IIIA. Sections 7(a) and 7(b) of the Privacy Act Applies to Local Governments

West Milwaukee mistakenly relies on *Schmitt v. City of Detroit*, 395 F.3d 327, 330-331 (6th Cir. 2005) for the proposition that § 7 of the Privacy Act does not apply to local governments, despite the following wording:

> 7(a)(1) It shall be unlawful for any federal, state, ***or local*** government agency to deny any individual a right, benefit, or privilege provided by law because of such individual's refusal to disclose its Social Security Number.
>
> 7(b) Any federal, state, ***or local*** government agency which requests an individual to disclose his Social Security Account Number shall inform the individual whether that disclosure is mandatory or voluntary, by which statutory or other authority such number is solicited, and which uses will be made of it.

Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909 [Emphasis supplied].[1] The 6th Circuit's decision in *Schmitt* has been criticized for confusing the ***codified*** portion of the Privacy Act with the ***un-codified*** portion. See, e.g., *Ingerman v. Delaware River Port Authority*, 630 F. Supp. 2d 426, 433 (D. N.J. 2009).

The confusion comes from 5 U.S.C. § 552a(a)(1), which says, "***For the purposes of this section***, (1) the term "agency" means agency as defined in section 552[(f)](e) of this title. [Emphasis supplied]. If one overlooks the fact that § 7 of the

[1] Contrary to Defendant's assertion, §§ 7(a) and (b) were not codified by Congress. They have been placed by the Revisor of Statutes as notes at the end of

Privacy Act is not codified, and therefore not in "this section" (i.e., § 552a), one mistakenly attempts to apply the definition of § 552a(a)(1) to a different, uncodified, section of law. Moreover, the *Schmitt* opinion effectively writes the more specific language contained in §§ 7(a) and (b) of the Privacy Act (pertaining to federal, state or ***local*** governmental agencies) right out of the law by deferring to the more general definition that on its face applies only to other sections of the law.

IIIB. Sections 7(a) and (b) of the Privacy Act Permit Private Actions

Defendants rely on a string of cases holding that a § 1983 case cannot be maintained for violations of ***other sections*** of the Privacy Act for the proposition that a § 1983 case cannot be maintained for a violation of § 7 of the Privacy Act. Again, however, the uncodified portion (§ 7) of the Privacy Act has little in common with the remaining sections. The remaining sections contain their own remedies for violations, as Defendants point out (see, e.g., *United States v. Berney*, 713 F.2d 568, 572 (10th Cir. 1983)). Defendants stretch matters, however, when they claim that the exclusive remedies contained in the other sections (which do not even apply to § 7) somehow foreclose § 1983 remedies for § 7.

The 7th Circuit never has ruled on this issue directly, but it has pointed out that

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5 U.S.C. § 552a. For a discussion of how these sections were not codified yet

"a party may proceed under § 1983 to remedy a violation of a federal statutory right unless Congress intended to foreclose private enforcement of the statute or unless the statute does not create an enforceable "right" under § 1983." *Polchowski v. Gorris*, 714 F.2d 749, 751 (7th Cir. 1983), *citing Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 19 (1981). There is no indication that Congress intended to enforce private enforcement of the Privacy Act. Moreover, it is clear Congress created an enforceable right.

Several circuits and district courts around the country have permitted § 1983 suits for violations of §§ 7(a) and (b) of the Privacy Act. *Schwier v. Cox*, cited earlier; *Ingerman v. Delaware River Port Authority*, cited earlier; *Szymecki v. City of Norfolk*, 2008 U.S. Dist. LEXIS 86437 (E.D. Va, Sept. 8, 2008); *Stollenwerk v. Miller*, 2006 U.S.Dist. LEXIS 7048 (E.D. Pa., Feb. 24, 2006); *Krebs v. Rutgers University*, 797 F. supp. 1246, 1253 (D. NJ 1992); *Doe v. Sharp*, 491 F. supp. 346, 348 (D. Mass. 1982); *Doyle v. Wilson*, 529 F.Supp. 1343 (D. Del. 1982); *Greater Cleveland Welfare Rights Org. v. Bauer*, 462 F.Supp. 1313, 1320 (N.D. Ohio 1978); *Chambers v. Klein*, 419 F.Supp. 569, 579 (D. NJ 1976). Even the 9th Circuit case relied upon by Defendants, *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999), held that § 7 of the Privacy Act

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remain binding law, see *Schwier v. Cox*, 340 F. 3d 1284, 1288 (11th Cir. 2003).

created an enforceable right, just that the right could not be enforced via § 1983.

IIIC. Plaintiff is Not Seeking Damages for Privacy Act Violations

Defendants also seek to have Plaintiff's Privacy Act claims dismissed on several theories Defendants say foreclose damages under the Privacy Act. Fortunately for Defendants, Plaintiff is seeking only declaratory and injunctive relief for West Milwaukee's violations of the Privacy Act.

IIID. Qualified Immunity Does not Apply When Damages are not Sought

Defendants claim that the officers have qualified immunity from Plaintiff's Privacy Act claims. Again, however, Plaintiff is not seeking damages for these claims. Qualified immunity is a concept that applies only to claims for damages, not for declaratory or injunctive relief. *D'Aguamno 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").

IIIE. Defendants Violated the Purpose of the Privacy Act

Defendants try to downplay their Privacy Act violations by minimizing the purpose of the Privacy Act to "discourage improper uses of social security numbers." Apparently Defendants believe they can escape liability for violating the letter of a a

federal law as long as their violations do not violate the purpose. While they provide no legal authority for this novel argument, Defendants do not fully describe the purpose of the Privacy Act:

> In enacting [§ 7(b)], Congress intended to permit an individual to make an informed decision whether or not to disclose the social security account number and to bring recognition to, and discourage, unnecessary or improper uses of that number.

Doyle v. Wilson, 529 F.Supp. 1343, 1350 (D. Del. 1982) *citing Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, printed in 120 Cong.Rec. S21,817 (Dec. 17, 1974) and in 120 Cong.Rec. H12,243 (Dec. 18, 1974). By failing to provide Plaintiff with the information § 7(b) demands, Defendants deprived Plaintiff of the opportunity to make the informed decision Congress intended for Plaintiff to be able to make.

IIIF. West Milwaukee is Liable for Privacy Act Violations

As noted above, §§ 7(a) and (b) apply to actions of federal, state, and local government agencies. In this case, Defendants acknowledge that it was West Milwaukee's policy to request SSNs of everyone arrested. Defendant officers were thus acting pursuant to an official policy when they requested Plaintiff's SSN. Moreover, the remedy Plaintiff seeks, in addition to a declaration that the Privacy Act

was violated, is an injunction expunging his SSN from West Milwaukee's records. As the records are West Milwaukee's, and because West Milwaukee would not have Plaintiff's SSN in its records but for its illegal policy, West Milwaukee is an appropriate defendant for these claims.

IV. Plaintiff is Entitled to Declaratory Relief

Defendants throw several legal theories at the Court in a shotgun fashion, hoping that one will stick regarding declaratory relief. First, Defendants claim that Plaintiff "has not pled with any specificity what he wants this Court to declare." Doc. 25, p. 59. This simply is not true. In his Prayer for Relief in the Complaint [Doc. 1], Plaintiff clearly states in ¶¶ 32 and 33 exactly what he wants the Court to declare. If those requests were not clear to Defendants, they could have used the discovery process for more details, or they could have asked for a more definite statement.

Defendants also claim Plaintiff lacks standing for declaratory relief because it is prospective in nature. As to the Privacy Act claims, West Milwaukee continues to retain Plaintiff's SSN in its records. As to the illegal detention claims, even Defendants' Proposed Statement of Facts notes that Plaintiff continues to visit the Chilton Walmart while armed. Doc. 26, ¶ 37. Prospective relief is therefore appropriate.

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Certificate of Service

I certify that on January 4, 2010, I filed a copy of the foregoing using the ECF system, which automatically will send a copy via email to the following:

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