Docket No. 08-15571-A

The United States
Court of Appeals
For
The Eleventh Circuit

GeorgiaCarry.Org, Inc., Appellant
v.
City of Atlanta, Appellee

Appeal from the United States District Court
For
The Northern District of Georgia
The Hon. Marvin H. Shoob, Senior Judge

Brief of Appellants

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Certificate of Interested Persons

Appellants certify that the following persons are known to Appellants to have an interest in the outcome of this case:

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The City of Atlanta, Georgia
Shirley Franklin
Benjamin DeCosta

Statement on Oral Argument

Appellants are not seeking oral argument in this case.

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Statement Regarding Adoption of Briefs of Other Parties

Appellants do not adopt the brief of any party.

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 the Fourth Amendment to the Constitution.

The District Court action was finally disposed of by order of the court on September 26, 2008. A judgment was entered by the clerk the same day. Appellants filed a Notice of Appeal on September 30, 2008, so their appeal is timely. F.R.A.P. § 4(a)(1)(A).

Statement of the Issues

1. The District Court erred in considering evidence outside the pleadings when deciding a motion for judgment on the pleadings.
2. The District Court Erred in Holding that HB 89 does not Apply to Airports.

Statement of the Case

Nature of the Case

This is a civil rights case. Plaintiffs-Appellants GeorgiaCarry.Org, Inc. and Timothy Bearden seek declaratory and injunctive relief for Appellees' threats to arrest (illegally) anyone seen carrying a firearm at the Hartsfield-Jackson Atlanta International Airport.

Proceedings Below

Appellants commenced the action below, in the United States District Court for the Northern District of Georgia on July 1, 2008, against the Airport[1], the City of Atlanta, Atlanta Mayor Shirley Franklin, and Atlanta Aviation General Manager Benjamin DeCosta. July 1 was the day that Georgia House Bill 89 (2008 Ga. Act. 802) took effect, which means that it was the day there was no longer any state law crime applicable to a person who carries a firearm in the airport if the person has a Georgia firearms license.[2] Appellees had declared the day before that, despite changes in Georgia law that took effect on July 1, the Airport was a "gun-free zone,"

[1] The Airport filed counterclaims against Appellants despite its contention that it lacked the legal capacity to sue or be sued. The parties entered into a consent order dropping the Airport as a party and dismissing the Airport's counterclaims. R2-44.

[2] There is no federal law pertaining to carrying forearms in the unsecured areas of the airport. In fact, it is legal to carry firearms in airport terminals in the vast majority of states.

and anyone found to be carrying a firearm at the airport would be arrested. Appellee DeCosta specifically named Appellant Bearden as someone who would be arrested. Because the Georgia General Assembly repealed the law prohibiting holders of Georgia firearms licenses ("GFLs") from carrying firearms in the Airport, Appellants filed suit to prevent illegal enforcement of Appellees policy.

Appellees filed a motion for judgment on the pleadings, which the District Court granted, and a judgment was entered against Appellants. Appellants appeal the granting of Appellees' motion and subsequent entry of judgment.

Statement of the Facts[3]

On April 4. 2008, both houses of the General Assembly of Georgia passed House Bill 89, 2008 Georgia Act 802 ("HB 89"), which, *inter alia*, decriminalized the carrying of firearms in certain places within the state for people with Georgia firearms licenses ("GFLs"). The newly-decriminalized places included "public transportation," and, just so that there would be no mistaking the General Assembly's intention, the new statute specifically listed both the Georgia statute that defines airport terminals and the Georgia

[3] Because this appeal concerns the District Court's grant of a motion for judgment on the pleadings, all facts stated in the complaint must be taken to be true. *Stanton v. Larsh*, 239 F.2d 104, 106 (5th Cir 1956). The statement of facts therefore draws largely on the Amended Complaint, R1-18.

statute that made carrying a firearm in an airport terminal a felony. Governor Sonny Perdue signed the bill into law on May 14, 2008, and the bill took effect July 1, 2008.

On June 30, 2008, Appellees Franklin and DeCosta announced in a press release that, notwithstanding HB 89, the Airport was a "gun-free zone," and that anyone seen carrying a firearm in the Airport would be subject to arrest and prosecution. In a press interview, DeCosta specifically named Appellant Bearden (a member of the Georgia House of Representatives, the principal author of HB 89, and a GFL holder), as someone who would be arrested. On July 1, 2008, the day HB 89 took effect, Appellees Franklin and DeCosta held a press conference at the Airport repeating their announcement. Appellants commenced this action the same morning, seeking declaratory and injunctive relief from the threatened arrest and prosecution of Appellants for activities that are not criminal conduct, in violation of the Fourth Amendment. The District Court granted Appellees' Motion for Judgment on the Pleadings, and Appellants appeal this ruling.

Statement on the Standard of Review

The District Court's grant of a judgment on the pleadings is reviewed *de novo. Moore v. Liberty National Life Insurance Company,* 267 F.3d 1209, 1213 (11th Cir 2001). In addition, the District Court's interpretation of state law is reviewed *de novo. Mega Life & Health Ins. Co. v. Pieniozek*, 516 F.3d 985, 989 (11th Cir 2008).

Summary of the Argument

The District Court granted Appellees' Motion for Judgment on the Pleadings based on its finding Appellants' "evidence" of legislative intent regarding HB 89 to be inadequate. Appellants had no opportunity, in responding to a motion for judgment on the pleadings, to present any evidence at all. In addition, the District Court misinterpreted the plain meaning of HB 89 and disregarded Georgia jurisprudence indicating that the phrase "public transportation" includes airports.

Argument and Citations of Authority

1. The District Court erred in granting a motion for judgment on the pleadings based on Appellants' failure to introduce evidence in opposition.

. In deciding a motion for judgment on the pleadings, the trial court is not a fact finder, but the facts alleged in the complaint must be taken to be true. *Stanton v. Larsh,* 239 F.2d 104, 106 (5th Cir 1956). Such facts must be viewed in a light most favorable to the plaintiffs. *Mega Life & Health Ins. Co. v. Pieniozek*, 516 F.3d 985, 989 (11th Cir 2008). Moreover the court must ***not*** consider evidence outside the pleadings unless the motion is converted to one for summary judgment, in which case all parties must be given notice of such conversion. Rule 12(d), Fed. R. Civ. Pr. In this case,

the District Court considered evidence outside the pleadings and gave no such notice.

Because the District Court did not give notice that it intended to treat Appellees' motion as one for summary judgment, and given that the District Court stated in its order (R2-50-13) that it was granting judgment on the pleadings, it can only be assumed that the District Court intended for the Motion to remain a motion for judgment on pleadings pursuant to Rule 12(c), Fed. R. Civ. Pr. Despite this, the District Court based its Order in part because "there is no clear evidence that the Georgia General Assembly intended the law to apply to airports…." R2-50-13. That is, the District Court granted a motion for judgment on the pleadings against Appellants for Appellants' failure to introduce sufficient evidence to overcome the motion, when Appellants were precluded by procedural rules from introducing any evidence at all. The District Court took it upon itself to analyze evidence placed in the record by Appellants for other purposes (while acknowledging that Appellants did not cite such evidence in opposition to the Motion – R2-50-10 (FN 5)) and the District Court determined that such evidence was insufficient. The District Court committed clear error by imposing an evidence requirement on Appellants when none existed.

The Georgia House of Representatives author of the bill intended for HB 89 to decriminalize the carry of firearms in airports, and the Senate openly debated the wisdom of decriminalizing the carry of firearms in airports moments before voting on the bill. In addition, the Governor of Georgia made highly publicized statements to the press that he understood the bill to have that affect when he signed it, and that he believed decriminalizing the carry of firearms in the airport was desirable. None of this, however, is in the pleadings. Appellants' believe the evidence of legislative intent (if the text of the bill were not clear enough) is overwhelming, given the positions of the House, Senate, and the Governor, but the fact remains that this sort of consideration is irrelevant to a motion for judgment on the pleadings, and the district court should not have weighed the evidence of legislative intent.

2. The District Court Erred in Holding that HB 89 does not Apply to Airports.

The General Assembly, in looking for the broadest possible effect of HB 89 on mass transit, chose to use the words "public transportation" in referring to the Code sections that are under article 4, "Offenses Against Public Transportation." This is the article that includes both the statute defining an airport terminal, O.C.G.A. § 16-12-122(10), and the Code

section that made it a criminal offense for a license holder to carry a firearm into an airport terminal, O.C.G.A. § 16-12-127.[4] In addition, the General Assembly actually listed the statutes from the Article on Offenses Against Public transportation in the new statute, including Code section 16-11-127. It is difficult to contemplate what else the General Assembly would have to do in order to decriminalize the carry of firearms by licensed Georgians in Airport terminals beyond listing the very statute in a list making such conduct legal, but the District Court decided that the plain meaning of "public transportation" does not include airport terminals.[5] The District Court failed to consider previous case law in Georgia on the meaning of the phrase "public transportation." The District Court also ignored the

[4] As will be seen below, the district court omitted any real discussion of O.C.G.A. § 16-12-127 from its judgment, focusing its discussion instead on O.C.G.A. § 16-12-123, relating to the actual boarding of bus, rail, or aircraft. Section 123 does not mention terminals at all. This deficiency means that the district court never really examined or discussed the statute criminalizing the carry of firearms in the airport terminal when it made its determination that HB 89 had no effect on it.

[5] The district court gave no explanation in its ruling for how one is to get on a bus or rail vehicle, since the terminal section for those two modes of transportation is ***exactly*** the same Code section, 16-12-127. In fact, the definition of "terminal" at 16-12-127(10) includes even a "reasonable distance immediately adjacent to" a bus stop. The district court opinion declares that HB 89 had its intended effect on bus and rail public transportation (and presumably the related bus and rail terminals, as it cannot reasonably be concluded that the district court intended to hold that Georgia firearms licensees are legal to ride MARTA trains but felons subject to a twenty year prison term if they enter the terminal to board the train).

surplusage in the statute that arises out of the District Court's interpretation. The District Court concluded that HB 89 unambiguously does ***not*** apply to airports, despite the fact that the District Court also identified an ambiguity in the legislative intent. Finally, the District Court did not follow the basic tenet of strictly construing a criminal statute against the state (i.e., against criminalization of conduct).

2.A. "Public Transportation" Includes Airports

To understand the significance of H.B. 89, a very brief history of certain gun laws in Georgia is necessary. Before 1870, Georgia had very few laws restricting the ownership and carrying of firearms. In 1870, the state passed a law making it illegal to carry a firearm to a "public gathering." Ga. L. 1870, p. 421. The original Public Gathering law did not define a "public gathering" to include publicly owned buildings. There was no crime preventing a licensee from carrying a pistol in a Georgia public airport until 1976,[6] when the Public Gathering law was modified to include publicly owned and operated buildings. Ga. L. 1976, p. 1430, which modified the definition of "public gathering" in what is now designated as O.C.G.A. § 16-11-127. In 2002, the General Assembly passed the Transportation Passenger

[6] 1972 was the year the FAA asked airlines to stop permitting people to carry firearms into aircraft, and, in December, to begin universal magnetometer screening of passengers.

Safety Act of 2002 ("TPSA 2002"), making it a felony to carry a firearm in an airport "terminal," which was already defined to include the surrounding areas, including parking lots. O.C.G.A. §§ 16-12-122 through 16-12-127 ("Offenses Against Public Transportation").

The TPSA 2002 covered the whole area of state law pertaining to weapons in airport terminals. It therefore repealed the earlier-enacted statute, O.C.G.A. § 16-11-127, to the extent it applied to airports. *See, e.g., Hooks v. Cobb Center Pawn & Jewelry, Inc.,* 241 Ga. App. 305, 309 (1999) ("while not favored, a statute may be deemed to have repealed an earlier statute where the statute later in time appears to give comprehensive expression to the whole law on the subject"); *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 21, 148 S.E.2d 402 (1966) (In the final analysis . . . the intention of the legislature will control the question as to repeal by implication"); *State v. Shepard Constr. Co., Inc.*, 248 Ga. 1, 4, 281 S.E. 151, 155-56 (1981). The legislature may express its intent on the subject when enacting a later statute by inserting a section that provides that "all laws and parts of laws in conflict with this Act are hereby repealed." *See Ezzard v. State*, 229 Ga. 465, 466, 192 S.E.2d 374, 376 (1972) (overruled on other grounds). The TPSA 2002 was comprehensive in that it permits people to check firearms in luggage at transportation terminals, which is something that the public

gathering law does not permit. Even Appellees concede that they will permit passengers to check firearms in luggage. The General Assembly expressed its intent by repealing all laws and parts of laws in conflict with the TPSA 2002, *see* Section 7, and, as will be seen below, did so again this year when enacting H.B. 89.[7]

There were no further changes relevant to this history until this year, when H.B. 89 was passed, creating a new subsection (e) to O.C.G.A. § 16-11-127, the public gathering law, that says a GFL holder "shall be permitted to carry such firearm … in public transportation notwithstanding Code sections 16-12-122 through 16-12-127; provided however, that a person

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[7] Perhaps recognizing that a new law specifically pointing to the felony terminal law and declaring that licensed Georgians can carry a firearm "notwithstanding" the felony terminal law means that no felony is committed when a licensed Georgian carries a firearm into a terminal, the City of Atlanta adopted a backup argument to buttress its position in this litigation. The City of Atlanta declared that the old law, from 1976, would still be violated by the carry of a firearm in the airport terminal. The City of Atlanta argued that repeal by implication is "not favored" and that therefore the TPSA 2002 did not repeal by implication the public gathering law (as it formerly applied to airports). The district court opinion appears to have accepted this argument, although it did not rule on the issue. R2-50-4, FN 3. The district court did note, however, that O.C.G.A. § 16-12-128 says that the Part titled "Transportation Passenger Safety" is "cumulative and supplemental," without also pointing out that O.C.G.A. § 16-12-127 is not one of the criminal offenses listed in O.C.G.A. § 16-12-128(a) that is no bar to further prosecution under a different criminal statute, such as the public gathering law. The court also failed to observe that this Code section was not part of the TPSA, as the wording was unchanged from 1981, although the TPSA 2002 did move it from 16-12-125.

shall not carry a firearm into a place prohibited by federal law." The single phrase quoted above was inserted into § 16-11-127, so it clearly modified that Code section. Moreover, it specifically referenced § 16-12-127 (indeed, it specifically referenced every Code section in Article 4, Offenses Against Public Transportation, that has anything to do with carrying weapons in airports or the definition of an airport building). The inescapable conclusion is that both code sections were modified by H.B. 89. Thus, H.B. 89 decriminalized the carrying of firearms in airports by people with GFLs. Section 9 of H.B. 89 states, "All laws and parts of laws in conflict with this Act are repealed." This is an express declaration of legislative intent that controls the question of whether Code sections 16-12-127 and 16-11-127 are repealed to the extent that they conflict with the Act.

Ignoring this history, the District Court summarily concluded that "the ordinary signification of 'public transportation' does not include airports." R2-50-6. The District Court based this erroneous conclusion on its belief that the Airport does not provide actual transportation and the air carriers are not public entities[8]. Aside from the obvious observation that this is a very

[8] Even a cursory reading of the definition of terminal in Code section 16-12-122(10) reveals that it includes private transportation companies as well as public. In fact, the definition is expanded in subsections 10 and 11 to include government authorities and public entities. The analysis of the word

narrow reading of the words "public transportation," it also is factually incorrect. It is well within judicial notice that the Airport operates a "Park and Ride" system, whereby visitors to the Airport can park their cars in a remote parking lot and take a shuttle bus to the Airport terminal building. That is, the Airport, an entity that is unequivocally public, will transport any person, upon request, between the Park and Ride parking lot and the Airport terminal building. Thus, the Airport provides "public transportation" even under the District Court's definition of that term.

It is clear from case law and Appellee Atlanta's own past actions, however, that the term "public transportation" has a much more inclusive meaning. In *Clayton County Airport Authority v. State*, 265 Ga. 24, 453 S.E.2d 8 (1995), the Supreme Court of Georgia had occasion to interpret the meaning of the phrase "public transportation." In *Clayton County*, a group of taxpayers challenged the validity of bonds issued by the county to be used for construction at a county-owned airport. The Supreme Court had no trouble finding that the Georgia Constitution's provision for counties to provide "public transportation" included airports.[9] 265 Ga. At 25 ("Pursuant to Art. IX, Sec. II, Par. III (a) (9) of our constitution, the County is

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"public" to mean ownership, rather than "for hire" transportation of the public, misses the meaning of the Georgia statutes at issue in this case.

[9] Ga. Const. Art IX, § 2, ¶ 3 (a)(9) empowers counties and cities to provide "public transportation."

authorized generally to undertake to provide for "[p]ublic transportation" and, pursuant to OCGA 48-5-220 (14), the County is authorized specifically to expend tax revenues to provide for an airport facility. The County's contract for the use of the airport facility to be acquired and expanded by the Authority is, therefore, a valid intergovernmental contract.")

Even more telling is Appellee Atlanta's use of the phrase "public road and other transportation purposes." In *City of Atlanta v. Yusen Air & Sea Service Holdings, Inc.,* 263 Ga. App. 82, 587 S.E.2d 230 (2003), Atlanta condemned property to build a fifth runway at the Airport. In condemning the property, Atlanta relied on a state statute that permits condemnations of land "for public road and other transportation purposes." O.C.G.A. § 32-3-2. The Court of Appeals of Georgia affirmed the City's power to condemn property pursuant to this statute, but the condemnation at issue in that case was reversed for procedural reasons. 263 Ga. App. At 83.

Finally, state law at O.C.G.A. § 32-1-3(18) specifically defines "public transportation" to include "airport facilities."

The District Court also dismissed the argument that because O.C.G.A. § 16-12-127 (the law prohibiting carrying guns in airports as a felony) is a "crime against public transportation," as defined by the General Assembly, HB 89 was intended to alter that provision. The Court said, "The title of an

article within the Georgia Code cannot alter the plain language of the statute." R2-50-8. Appellants did not argue, and are not now saying, that the title of the article ***alters*** the meaning. The plain meaning of Code section 16-12-127, which HB 89 listed after the word "notwithstanding," includes airport terminals. *See also* the definition of "terminal" in O.C.G.A. § 16-12-122(10). Appellants cite the title, Offenses Against Public Transportation, not in an effort to pervert the plain meaning of the statute, but as authority for the proposition that when the General Assembly uses the phrase "public transportation," it was pointing at the Offenses Against Public Transportation article, which includes airports. To top it off, the General Assembly listed the specific Code sections, which removes any lingering doubt about the intention to apply HB 89 to airport terminals.

2.B. The District Court's Interpretation Creates Surplusage

The District Court characterized as "misleading" Appellants' pointing out that HB 89's pertinent language says "notwithstanding Code section 16-12-122 through 16-12-127." R2-50-9. More specifically, the district court accuses Appellants of "misleadingly focus[ing] only on O.C.G.A. § 16-12-127." R2-50-9. This remark is surprising given that this Code section is the only law in the entire Offenses Against Public Transportation article that makes it a crime to carry a firearm into an airport terminal. The other Code

section discussed by the court, O.C.G.A. § 16-12-123, has no application to carrying a firearm in the unsecured areas of an airport terminal at all.

By including O.C.G.A. § 16-12-127 (the code section prohibiting carrying firearms in the airport) in HB 89's "notwithstanding" language, the General Assembly clearly intended to create an exception for GFL holders. The district court completely ignores § 127, however, and inexplicably focuses on the remaining code sections (i.e., §§ 122-126), none of which apply to airport terminals (other than the definition in § 122). Leaving out any serious discussion of the airport terminal law in a case about the airport terminal misses the point, and in the process emphasizes it.

The federal law exception in HB 89 likewise is rendered surplusage by the District Court's interpretation. The District Court erroneously concluded that this exception was in place to protect against any conflict with 36 C.F.R. § 2.4. There is no conflict, however, because HB 89 does not purport to apply to national parks. The District Court overlooked that the portion of HB 89 that decriminalizes carrying firearms in parks and historic sites for GFL holders only applies to state parks and state historic sites. The operative language says, "A person licensed or permitted to carry a firearm… shall be permitted to carry such firearm … in all parks, historic

sites, and recreational areas … notwithstanding Code Section 12-3-10."[10] Thus, the General Assembly limited the decriminalization to those parks, historic sites, and recreational areas that are covered by O.C.G.A. § 12-3-10. O.C.G.A. § 12-3-10(a) defines "park, historic site, or recreational area" to mean "a park, historic site, or recreational areas which is operated by or for and is under the custody and control of the department." The "department" is the Georgia Department of Natural Resources. O.C.G.A. § 12-3-1. Thus, contrary to the belief of the District Court, HB 89 has no application to national parks and recreational areas, and it was not necessary to include the federal law exception of HB 89 for that purpose. The only reason for the federal law exception in HB 89 was to make clear that, even though a GFL holder now can carry a firearm in an airport, she may not carry into the secured area in which federal law prohibits carrying. The District Court's interpretation renders the federal law exception surplusage.

2.C. HB 89 is At Least Ambiguous

[10] A similar structure was used throughout subsection (e). The subsection decriminalized licensed carry in parks, historic sites, and recreational areas "notwithstanding Code section 12-3-10" (the Code section relating to firearms in state parks, historic sites, and recreational areas), in wildlife management areas, "notwithstanding Code section 27-3-1.1 and 27-3-6" (the Code sections relating to firearms in wildlife management areas and while hunting during bow season), and in public transportation, "notwithstanding Code sections 16-12-122 through 16-12-127" (the Code sections relating to firearms in terminals and on mass transit generally).

The District Court concluded that there is no ambiguity surrounding HB 89, and thus no construction is necessary. "Statutory language is ambiguous if it is susceptible to more than one reasonable interpretation." *Medical Transportation Management Corp. v. Commissioner*, 506 F.3d 1364, 1367 (11th Cir. 2007). While Appellants believe the only reasonable interpretation of HB 89 is that it applies to airport terminals, the very existence of this lawsuit and Atlanta threatening to imprison Georgians must lead a reviewing court to conclude that the statute is ambiguous.

If HB 89 is ambiguous, a court interpreting it must look to extrinsic evidence of legislative intent (as noted by the District Court in citing to *Moore v. American Federation of Television & Radio Artists*, 216 F.3d 1236, 1245 (11th Cir. 2000)). Because the Motion before the District Court was one for judgment on the pleadings, however, it was improper for the District Court to grant the motion on such a basis. The parties were not at liberty to introduce evidence of legislative intent for this Motion, so the District Court was not able to make a determination of the statute's meaning.

2.D. Criminal Statutes Must be Strictly Construed

In Georgia, criminal statutes are to be strictly construed ***against*** the state. "The liberty of a citizen is not to be abridged by implication, nor is any statute, making an act a crime, to be extended beyond its express terms."

Dorsey v. State, 259 Ga. App. 254, 256 (2003). If there is any ambiguity in the statute, therefore, it must be construed against criminalization and in favor of Appellants. This must be even more true when the statute at issue provides for a draconian penalty of 20 years in prison and a $15,000 fine. O.C.G.A. § 16-12-127(b).

Conclusion

The District Court erred by creating a non-existent burden for Appellants to introduce evidence in opposition to a motion for judgment on the pleadings. The District Court also erred in its interpretation of the meaning of HB 89. For these reasons, the judgment of the District Court must be vacated and this case must be remanded to District Court for further proceedings.

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Certificate of Compliance

I certify that this Brief of Appellant complies with Rule 32(a)(7)(B) length limitations, and that this Brief of Appellant contains 4,319 words as determined by the word processing system used to create this Brief of Appellant.

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Certificate of Service

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