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

Reply Brief of Appellants

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Certificate of Interested Persons

Appellants certify that the Certificates of Interested Persons initially filed by Appellants, together with such Certificates filed by Appellees and their *amici*, contain a complete list of persons known to Appellants to have an interest in the outcome of this case.

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Summary of the Argument

Appellees ("Atlanta")[1] filed a brief in two parts. Part I is devoted to attempting to convince the Court that Georgia regulates the carrying of firearms in the Airport. Part II is devoted to attempting to convince the Court that Georgia is preempted under federal law from regulating the carrying of firearms in the Airport. Appellants will show why Part I of Atlanta's brief is incorrect even without the obvious conclusion that Part II undermines the entire premise of Part I. Appellants will further show that federal law does not preempt the field and, even if it did, there is no federal law prohibiting holders of Georgia firearms licenses ("GFLs") from carrying firearms in the unsecured areas of the Airport. For these reasons, the judgment of the District Court must be reversed.

[1] For the sake of clarity, the Appellees collectively are referred to as "Atlanta" and the actual airport facility is referred to as the "Airport."

Argument and Citations of Authority

Atlanta fundamentally misunderstands the foundations of government in Georgia, perhaps leading to Atlanta's misconception of Appellants' ("GCO's")[2] position both in the District Court and in this Court.

Atlanta continues to assert, incorrectly, that GCO claims that House Bill 89 granted the right to carry concealed, loaded, firearms into unsecured areas of the Airport.[3] Atlanta Brief at 4. The Georgia General Assembly does not "grant rights." Rights, and power, originate with the people. *Green v. Atlanta,* 162 Ga. 641, 647 (1926) ("All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."); *Echols v. DeKalb County,* 146 Ga. App. 560, 565 (1978), *Deen, P.J., Dissenting* ("The … American-adopted concept makes crystal clear that all inherent power and rights originate in the people, not the sovereign.").

As the fundamental tool to create ordered liberty, the people constitute governments. In their written constitutions, the people grant certain, circumscribed powers to government to restrict the rights of the people for

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[2] Appellants and plaintiffs below, GeorgiaCarry.Org, Inc. and Timothy Bearden are referred to collectively as "GCO."

[3] GCO never has specified in any document in this case that only concealed, loaded firearms are at issue, and GCO has advised Atlanta of this fact. In fact, GCO informed the District Court that Atlanta's refusal to address this discrepancy as a hindrance to settlement discussions. R2-46-10.

the common good. At times, governments repeal laws and thereby cease restricting a right.

Through its legislative powers, the General Assembly has chosen to restrict the right of the people to carry firearms. By H.B. 89, the General Assembly relaxed the restriction as it applied to GFL holders in the unsecured areas of airports. H.B. 89 granted no rights because the General Assembly has no power to grant rights. It may restrict rights, and it may loosen previously enacted restrictions, but it may not grant rights. Thus, regardless of the particular words used in H.B. 89, one thing it cannot have been was the creation of a right. The right originated with and existed always with the people. It is especially disappointing that Atlanta (collectively, a governmental entity and its officers) does not recognize this. While this may seem to be a pedantic and irrelevant discussion, its significance will become clear in the discussion of federal preemption, below.

Atlanta Misstates the Facts of This Case

Although Atlanta claims in its Brief (p. 5) to draw its facts from the Complaint[4], Atlanta's statement of the facts is largely incorrect when compared to the Amended Complaint [R1-18]. While Atlanta's short

[4] Atlanta overlooks that GCO filed an Amended Complaint (R1-18) in this case, thus rendering the original Complaint (R1-1) a nullity.

discussion of the history of gun control in the Airport is somewhat accurate, it is not true that since 1976 the "Airport has prohibited the carrying of concealed, loaded weapons at the Airport." Atlanta's Brief, p. 5. Nothing in the Amendment Complaint indicates that the ***Airport*** (i.e., Atlanta) attempted to prohibit carrying firearms (loaded or unloaded, openly or concealed) until June 30, 2008. The Amended Complaint only indicates that this policy was established by Atlanta in a media advisory on that date. R1-18-4. Moreover, the Amended Complaint does not indicate (as Atlanta claims) that the media advisory was issued in response to Appellant Timothy Bearden's plans to "violate the Airport's firearm restriction by bringing a concealed, loaded weapon into the Airport." If anything, one could infer from the Amended Complaint that the information regarding Bearden's plans came to light after the media advisory had been issued. Again, there is nothing in the Amended Complaint regarding whether Bearden's gun would be loaded or unloaded, concealed or unconcealed.

Finally, contrary to Atlanta's claim on p. 6 of its Brief, GCO did not allege in its Complaint (or Amended Complaint) "that H.B. 89 creates an affirmative right to carry concealed, loaded weapons in the Airport, and therefore superseded the Airport's longstanding prohibition on dangerous guns in the Airport." Once again, GCO never has claimed that H.B. 89

creates an affirmative right, for the General Assembly has no power to do so. GCO never has discussed whether guns are loaded or unloaded or concealed or unconcealed in the Airport, GCO never has asserted that Atlanta has a "longstanding prohibition" on any guns at the Airport, and GCO never has understood even Atlanta's less-than-six-months-old prohibition to apply only to "dangerous" guns.

As an interesting aside, Atlanta has conceded that it does not (and the law does not) prohibit checking firearms in baggage. Atlanta's Brief, p. 11. In fact, federal law only prohibits carrying a firearm on an airplane if it is accessible to the passenger while in flight. 49 C.F.R. § 1544.201(d). Because checked baggage must be delivered to an airline at the Airport, the only way for a passenger to check a firearm in her baggage is to carry the firearm into the Airport.[5]

Thus, neither the federal government, the state government, nor Atlanta prohibit carrying a firearm into the Airport for the purpose of checking it in baggage. The Transportation Security Administration generally requires that, at the time of checking the baggage, the firearm be

[5] Amazingly, the head of Airport security testified that he had no idea whether people who wish to check firearms in their baggage actually bring firearms into the Airport. R4-41-50.

unloaded and placed in a case[6], but no regulations appear to be have been promulgated on this subject. No rules pertain to how the firearm is carried into the Airport up until it is checked at the baggage counter. It could be loaded or unloaded. It could be carried on the person or already in the baggage. No law prohibits any combination of the foregoing as long as the firearm is unloaded and in a case when it is presented at the baggage counter.

H.B. 89 Applies to the Airport

Atlanta relies solely on the District Court's Order [R2-50] for the proposition that the Airport is not "public transportation." Atlanta's Brief, p.11. Atlanta makes no independent attempt to apply the "ordinary signification" to the words "public transportation." Because both the District Court and Atlanta claim the "ordinary signification" of the phrase "public transportation" excludes airports, it is appropriate to test that claim.

The word "public" means:

> Of, relating to or affecting all the people or the whole area of a nation or state; of or relating to mankind in general (universal); of or relating to business or community interests as opposed to private affairs; devoted to the general or national welfare (humanitarian); accessible to or shared by all members of the community; capitalized in shares that can be freely traded on the open market; exposed to open view.

[6] http://www.tsa.gov/travelers/airtravel/assistant/editorial_1666.shtm

Webster's New Collegiate Dictionary. Any of the definitions that could be applied in this scenario would support the Airport as being "public." "Public" does not, as Atlanta implies in its Brief at p. 11, mean "government-owned." It is, therefore, irrelevant that "The airlines are not owned or operated by any governmental entity." *Id. See, e.g.,* "public utility," which means "a business organization performing a public service and subject to special governmental regulation." *Webster's New Collegiate Dictionary.* Given that a public utility is decidedly not "owned or operated by any governmental entity," it is difficult to understand why Atlanta believes that "public transportation" must be.

> "Transportation" means:
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> an act, process, or instance of transporting or being transported; banishment to a penal colony; means of conveyance or travel from one place to another; public conveyance of passengers or goods esp. as a commercial enterprise.

Webster's New Collegiate Dictionary. Again, the definitions of "transportation" support the Airport as being "public transportation." The Airport is part of the "process" of transporting both "passengers" and "goods." And, contrary to Atlanta's assertion, nothing about the definition would indicate that "public transportation" must apply only to those traveling. People use the Airport to ship and receive goods. People use the

Airport to drop off and pick up passengers. Both applications are part of the "process" of transporting.

Thus, using the "ordinary signification" of the words "public transportation" yields the conclusion that they include the Airport. It certainly does not support the notion that the only meaning is government-owned means of transporting people, which is the definition both the District Court and Atlanta mistakenly apply. At the very least, there is an ambiguity that cannot be resolved solely by looking at the words of the bill.

It is important to bear in mind that H.B. 89 modified sections of Title 16 of O.C.G.A. This is the criminal code, and the sections at issue (O.C.G.A. §§ 16-11-127 and 16-12-127) are both criminal provisions. It is well-settled that ambiguities in a criminal provision must be resolved against criminality (and against the government). For this reason alone, one must conclude that it no longer is illegal under Georgia law for a GFL holder to carry a firearm in the unsecured areas of the Airport. To find otherwise would be to construe an ambiguity in favor of criminalization.

Moreover, there are several extrinsic aids to assist the Court in determining the meaning of "public transportation." For one, the Part of the Code to which H.B. 89 refers (O.C.G.A. § 16-12-122 through 16-12-127) is entitled "crimes against public transportation." The felony of carrying a

firearm in an airport terminal is in O.C.G.A. § 16-12-127. That is, the General Assembly said one with a GFL is not prohibited from carrying a firearm in public transportation notwithstanding O.C.G.A. § 16-12-127 (carrying a firearm in an airport terminal, which is defined to be a crime against public transportation).

Atlanta interprets this portion of the bill quite differently and quite illogically. Under Atlanta's interpretation, a GFL holder only is permitted to carry a firearm on the actual modes of transportation of passengers provided by a governmental entity, and not in the terminals. Brief of Atlanta, p. 12. That is, Atlanta believes a GFL holder is prohibited from carrying a firearm in a MARTA terminal (and presumably in a MARTA parking lot), but is not prohibited from carrying a firearm on a MARTA bus or train. Atlanta does not address how a person is supposed to accomplish this feat of legerdemain. It is not possible to enter or exit a MARTA train without being present in a MARTA terminal.

Federal Law Does Not Preempt State Law in this Matter

Atlanta and its *amici* all urge this Court to rule that "States, including Georgia, also do not have the power to regulate guns at airports because such regulation would conflict with the federal scheme of regulations and would thereby be preempted." Brief of Atlanta, p. 34. GCO presented

complete arguments against this logic in the District Court [R2-37, pp. 1-14] and will not burden the Court by repeating them here. While GCO stands by its position, it is worthwhile exploring the impact of a ruling agreeing with Atlanta on this subject.

Assume, *arguendo,* that Atlanta and its *amici* are correct and the federal government has completely occupied the field of airport security, leaving no room for states to supplement. *See, e.g., English v. General Electric Company,* 496 U.S. 72 (1990) and *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000), both cited by Atlanta. If that is the case, then Georgia has no power to regulate carrying guns in the Airport ***at all.*** The two statutes found by the District Court (and urged by Atlanta) to prohibit guns in the Airport, O.C.G.A. §§ 16-11-127 and 16-12-127 are then preempted by federal law. This is so because if Congress has completed occupied the field, leaving no room for states to supplement, then ***Georgia cannot criminalize carrying guns in the Airport.*** Any attempt to do so would be an invasion of the field that Congress has reserved for itself.

Thus, while GCO does not agree that federal law does "occupy the field" of airport gun regulation, a contrary finding would necessitate reversal of the District Court. There are no federal laws criminalizing carrying guns in the unsecured areas of the Airport. With any potential state laws doing so

preempted by field occupation, GCO is correct that no laws criminalize carrying guns in the unsecured areas of the Airport and it is a 4th Amendment violation for Atlanta to threaten arrest for that behavior.

Amcici's Public Policy Discussion is Irrelevant

Amici Brady Center to Prevent Gun Violence and Georgians for Gun Safety ("*Amici*") argue that guns in the Airport would be a threat to public safety. Aside from the fact that *Amici* base their arguments largely on "evidence" not contained in the pleadings (and thus cannot be considered by a court in a motion for judgment on the pleadings), the arguments are irrelevant.

This case is not, and never has been, about public policy. The public policy debate already took place in the General Assembly of Georgia and the Governor's Office. H.B. 89 passed and was signed by Governor Sonny Perdue, and is now the law of the land. Georgia's public policy is to allow GFL holders to carry firearms into the unsecured areas of the Airport. It is not this Court's or any federal court's province to second-guess that policy (unless the policy runs afoul of federal law, the ramifications of which are discussed above). This Court may not decide whether it is a good idea or a bad idea to carry guns in the Airport, for common law crimes have been abolished for nearly 200 years. *United States v. Hudson and Goodwin*, 11

U.S. (7 Cranch) 32, 34 (1812). Moreover, *Amici* went to great lengths to discuss congressional intentions to occupy the field of guns in airports. If Congress intended to criminalize carrying guns in the unsecured areas, it would have done so. Because it did not, this Court may not "interpret the law to prevent gun violence," as *Amici* urge [Brief of *Amici*, p. 1]. "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach." *Viereck v. United States,* 318 U.S. 236, 243-245 (1943).

Conclusion

Atlanta urges this Court to apply the same "ordinary signification" of the words "public transportation," and assume without citation that those words mean what Atlanta wants them to mean. They do not. Because the ordinary signification of the words "public transportation" would include the Airport, Georgia has decriminalized carrying firearms in the Airport by GFL holders. If, as Atlanta urges, federal law has occupied the field with regard to firearms in airports, then H.B. 89 is irrelevant and Georgia is preempted from criminalizing guns in airports. Because the federal government has not criminalized them (in unsecured areas) then no law does so. Either way, the

District Court must be reversed with instructions that no law prohibits GFL holders from carrying firearms in the unsecured areas of the Airport.

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Certificate of Compliance

I certify that this Reply Brief of Appellant complies with Rule 32(a)(7)(B) length limitations, and that this Brief of Appellant contains 2,920 words as determined by the word processing system used to create this Reply Brief of Appellant.

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