**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| **GEORGIACARRY.ORG, INC., And CHRISTOPHER RAISSI,** | ) | |
| **Plaintiffs** | ) | |
| **v.** | ) | **CIVIL ACTION FILE NO. 1:09-CV-0594-TWT** |
| **RAPID TRANSIT AUTHORITY, et al.** | ) | |
| **Defendants** | ) | |

**DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendants, by and through their undersigned counsel, and submit their Brief in Opposition to Plaintiffs' Second Motion for Summary Judgment. Instead of re-hashing their entire brief for the Court, Defendants incorporate "Defendants' Brief in Support of Their Second Motion for Summary Judgment" into this brief, as many of the arguments within that brief addressed the issues raised by Plaintiffs. Doc. 43.

**I. DETENTION OF RAISSI**[1]

For purposes of summary judgment, Defendants concede that Plaintiff Raissi felt that he was not free to leave, and was therefore detained. However, Defendants Nicholas and Milton assert that they had reasonable suspicion to stop and detain Plaintiff Raissi. The reasonable suspicion included that Raissi

[1] See Doc. 43-2 for the facts related to this issue.

was observed with a firearm stuck in the back of his pants, there is known crime at the MARTA stations, and the officers owe the patrons of MARTA an extraordinary duty of care for their safety.

While addressing reasonable suspicion, Plaintiffs failed to examine the totality of the circumstances. "A determination of reasonable suspicion is based on the totality of the circumstances, and '[i]t does not require officers to catch the suspect in a crime. Instead [a] reasonable suspicion may be formed by observing exclusively legal activity.'" United States v. Harris, 526 F.3d 1334,1337 (11th Cir. 2008) (quoting United States v. Acosta, 363 F.3d 1141, 1145 (11th Cir. 2004)(alteration in original)). Whether the officer involved "'actually and subjectively has the pertinent reasonable suspicion," is not the relevant inquiry; but instead, the Court asks whether "given the circumstances, reasonable suspicion objectively existed to justify,'" the stop. United States v. Nunez, 455 F.3d 1223, 1226 (11th cir. 2006)(quoting Hicks v. Moore, 422 F.3d 1246, 1252 (11th Cir. 2005)).

Plaintiffs failed to look at the totality of the circumstances, choosing to only focus on the fact that Defendant Nicholas saw Plaintiff with a gun, and suspected that he could be carrying it without a valid firearms license. Although such suspicion is clearly reasonable enough for a stop, it does not

encompass the totality of the circumstances. There is no dispute that Defendants, and apparently even Plaintiff Raissi, were aware of crimes occurring at MARTA stations. Affidavit of Joseph Dorsey, "Dorsey aff." ¶¶ 4-6; Affidavit of Terry Milton, "Milton aff." ¶¶ 6-8; Deposition of Malcom Nicholas, "Nicholas depo." p.9 and Deposition of Christopher Raissi, "Raissi depo." p.10. Furthermore, MARTA, as a transit authority, is a common carrier with the duty to protect passenger from unreasonable risk of harm. Robertson v. Metropolitan Atlanta Rapid Transit Authority, 199 Ga. App. 681 (1991); Walker v. Metropolitan Atlanta Rapid Transit Authority, 226 Ga. App. 793, 795 (1997). Because public transportation is a target of terroristic acts, and other violent activity, as part of their training, MARTA police officers are taught to look for suspicious activity, weapons, and objects which may seem innocent to the average person. Milton aff. ¶5.

Given the potential for crime and danger imposed by armed criminals where individuals are held as a captive audience, such as a train, if the police officers had done nothing and continued on their way after observing a weapon the officers would have been remiss. People are entitled to be free from the fear of victimization and have police investigate before shootings occur. United States v. Valentine, 232 F.3d 350, 356

(3rd Cir. 2000). Taking into account the totality of the circumstances, Defendants did what prudent, well-trained officers should do.

Plaintiffs state that Defendants did not have "objective reasonable suspicion of unlawful activity". Plaintiffs base this on the assertion that Defendants had no reason to believe that Raissi was committing or about to commit any crime. However both Defendants state that they believed he might have been committing the crime of carrying a pistol without a license. Doc.34, pp. 28-30; Doc. 35, pp.42-44. Plaintiffs apparently would prefer that MARTA Police wait until an individual, sniper or potential terrorist with a gun, actually starts shooting people at a MARTA station before they take action. The fact that Plaintiffs do not want police to take these minimally intrusive protective steps is particularly puzzling since the reason Plaintiff Raissi was carrying the gun was for protection because he had heard bad things about MARTA. Raissi depo. p. 10.

Plaintiffs have analogized this incident to driving without a license. However, Plaintiffs have not found any cases that support the theory that simply because it is not proper to stop a motorist to check for a valid driver's license, that one cannot stop a person knowingly carrying a firearm to check for a firearm license. Courts have recognized that firearms are

dangerous, and extraordinary dangers sometimes justify unusual precautions. These decisions have recognized the serious threat that armed criminals posed to police officers and courts have held that reasonable stops and protective searches can be performed. Florida v. J.L., 529 U.S. 266, 272, 120 S.Ct. 1375, 1379 (2000).

Plaintiffs make reference to a few cases where Courts have found that there was not enough reasonable suspicion to stop and search someone based on allegations of gun possession. Such cases can be distinguished from the present case. Plaintiffs state that there is "no gun exception" to the reasonable suspicion requirement, citing Florida v. J.L. What the Supreme Court in J.L. actually found was that there is no general exception to the "indicia of reliability" requirement for anonymous tips alleging possession of firearms. Id. at 274. The Supreme Court clearly focused its decision on the reliability of informant tips and whether such reliability may be lowered if the tip indicates the possibility of a gun. Id. More importantly, the Court did not preclude that the known existence of a gun could be a factor contributing to reasonable suspicion. The Court specifically points out that the "officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own" but solely from an unknown source. Id. at 270.

Such is not the case with Plaintiff Raissi. Sgt. Nicholas observed the gun.

Plaintiffs further assert that an officer may not stop someone known to have a gun out of some generalized suspicion that the possession of the gun might be illegal. Plaintiffs cite an Indiana District Court case for this proposition. United States v. Dudley, 854 F.Supp. 570, 580 (S.D. Indiana 1994). The Dudley court stated that "[a] telephone report of citizens possessing guns or merely engaging in 'suspicious' activity, standing alone, cannot amount to reasonable suspicion of a crime. Id. The court goes further to state that the other circumstances like the officer seeing a truck overloaded with goods, and converted into a camper, though odd, was not enough to amount to reasonable suspicion. Id. Dudley is distinguishable from the current case because once again, the Dudley officer never saw a gun, until after he conducted his search. Nicholas observed the gun shoved into the waistband in the back of Plaintiff Raissi's pants. Nicholas depo. pp.11-12.

Lastly, Plaintiffs cited to the United States v. Ubiles, 224 F.3d 213 (3rd Cir. 2000), a case from the Virgin Islands. In Ubiles, a police officer received an anonymous tip that Ubiles was carrying a gun during a street festival. The Ubiles Court found that the officer did not have reasonable suspicion to stop and search Ubilies.

A few months later the same Court found that if the anonymous tip occurs in a broader context, such as a high crime area, then there is reasonable suspicion to stop the person allegedly carrying a firearm. United States v. Valentine, 232 F.3d 350 (3rd Cir. 2000). In Valentine, similar to Ubiles, a police officer was flagged down and told by an informant that he had seen a man with a gun, and given a description. The police officer stopped Valentine, who fit the informant's description. The Court found that there was reasonable suspicion for the stop because it was a "very bad" area. Similarly, to the present case, the broader context of the circumstances shows that incidents with firearms occur regularly at MARTA stations and Defendants were aware of such. Dorsey aff. ¶¶4-6, Milton aff. ¶¶5-8; Nicholas depo. p.9.

In 2008, the Third Circuit ultimately found that the actual observance of a firearm by the police officer was enough to detain a person. An officer's observance of a person's possession of a firearm in a public place is sufficient to create reasonable suspicion to detain that person for further investigation. United States v. Cooper, 293 Fed. Appx. 117, 2008 WL 4276904 (3rd Cir. 2008). Similar to Georgia, the law in Pennsylvania provides that no person shall carry a firearm upon any public property unless such person is licensed to carry a firearm. 18 Pa. Cons.Stat § 6108. "Possession of a concealed

firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed." Cooper, at 117 quoting Commonwealth v. Robinson, 410 Pa. Super. 614, 600 A.2d 957, 959 (1991). In Cooper, similar to the present case, the officer observed that Cooper had a handgun under his shirt in his waistband. Cooper was stopped, the weapon was taken from his waistband, and he was asked by the officer for a license. Despite the fact that a person can carry a gun in public in Pennsylvania with a valid licenses, the Court found the stop to be reasonable. See also, United States v. Bond, 173 Fed. Appx. 114, 2006 WL 751509 (3rd Cir. 2006). (police officer had reasonable suspicion of criminal activity to justify automobile stop where officer observed the handle of a gun protruding from his waistband). The Third Circuit's 2000 holding in Ubiles, is not relevant to the case at hand. The more recent opinions in Cooper and Bond properly address an officer's action when he observes a firearm.

Similarly, the Georgia Court of Appeals found that an officer seeing a bulge under a suspect's shirt at the waist had a founded suspicion justifying the stop. Edwards v. State, 165 Ga.App.527, 528 (1983). The officer stopped the suspect for no other reason than he saw the bulge and thought he might be

carrying a concealed weapon. The court found that this was reasonable suspicion. Id. Clearly, where an officer actually sees the gun tucked in the waist band in the back, as in this case, there is enough reasonable suspicion of carrying a weapon without a license, or possibly some other illegal activity, to justify further investigation.

It is an undisputed fact that Plaintiff Raissi had a firearm. Raissi depo. p.10. It is also undisputed that Defendant Sgt. Nicholas **witnessed** Raissi place the firearm in the small of his back, and pull his shirt over it, while in the MARTA parking lot. Nicholas depo. pp.11-12. This is clearly not a situation where the officer received some potentially unreliable information from an anonymous person, as in all the cases cited by Plaintiffs. Sgt. Nicholas felt that it was suspicious for Raissi to have the gun in the middle of his back. Nicholas depo. p.44. Defendants were concerned that Raissi could possibly endanger the public, himself or another officer. Id.; Milton aff. ¶9. Seeing an individual with a gun, place it in the small of his back and cover it with his shirt is enough reasonable suspicion to stop the individual to ensure that he has a valid firearms license prior to him entering a train with a dangerous weapon, where he will have a captive audience.

**II. MARTA'S PRACTICE OR POLICY DOES NOT VIOLATE CONSTITUTIONAL LAW.**

Plaintiffs have failed to show that MARTA maintained a policy, practice or custom that resulted in the deprivation of their constitutional rights. The MARTA Police Department does not have an actual written policy regarding the policing of individuals possessing firearms on MARTA property. Dorsey depo. pp. 18-19. However, officers have been trained on the issue. Dorsey aff. ¶8, Exh.C. The training material states: "It is important that officers recognize elements of their cases which could be viewed as infringements upon the right of citizens who are lawfully carrying firearm. It is also crucial for officer safety that officers are able to conduct investigations of armed citizens in a safe manner that remains within Constitutional parameters." Dorsey aff. ¶8, Exh.C p.1. It also states that for a stop based on reasonable suspicion, the officer must show articuable facts, which, when taken together, would lead any police officer to believe that a crime has been or is about to be committed, and for a frisk the officer must be able to articulate a reasonable belief that the suspect is both armed and dangerous. Id. at p.3. Defendant Dorsey further verified that an investigation is conducted when a gun is **observed** by an officer. Dorsey depo. pp.6-7. As noted above in Section I, Courts have found that observation of a person carrying a

firearm by officers provides reasonable suspicion for a stop. If a person fails to cooperate with the investigation, they are not arrested, nor detained, but must leave the MARTA property. Dorsey depo. pp.10-11. There is no policy or practice promulgated by MARTA that violated Plaintiff Raissi's constitutional rights. The MARTA police practice is consistent with the Fourth Amendment. Plaintiffs have failed to show that MARTA maintained a policy, practice or custom that resulted in the deprivation of their constitutional rights.

**III. DEFENDANT NICHOLAS HAD A RIGHT TO SEIZE WEAPON.**

Where a police officer believes that a suspect may be armed and dangerous, he is entitled for the safety of himself and others in the area to conduct a reasonable search in an attempt to discover weapons which might be used to harm him, and such a search is reasonable under the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S.Ct. 1868 (1968). Sgt. Nicholas obviously knew that Raissi was armed and possibly dangerous because after seeing the weapon, he took precautions not to encounter him in the parking lot, but let him walk towards the station. Nicholas depo. p. 15. Nicholas then gave a radio signal of person being armed. Id. He followed from a distance, and did not want to encounter until he was in the safety standpoint of having two officers present. Id. pp. 16-17. When Nicholas stopped Raissi, he "removed the threat away" by taking the gun. Nicholas depo.

p. 18. This action did not violate the constitutional rights of Plaintiff Raissi.

**IV. OPEN RECORDS ACT**

This Court lacks jurisdiction to hear Plaintiffs Open Records Act claim because it is not part of the same case or controversy as the Fourth Amendment claim. Ford v. City of Oakwood, Georgia, 905 F.Supp.1063 (N.D.Ga., 1995). Plaintiff urges the Court to hear the claim because it would be "wasteful for the Court to decline to exercise jurisdiction over these claims at this point in the litigation". However the Court does not have discretion to assert pendant jurisdiction over the state Open Records Act claim.[2]

If the Court were to assert supplemental jurisdiction, Plaintiffs' Summary Judgment Motion on the Open Records Act claims still fails as a matter of law. The e-mails sent to Defendant Dorsey by John Monroe are not Open Records Act requests. Monroe alleges to have had a conversation with Defendant Dorsey on June 20, 2008 requesting the Police Department's gun policy. (Complaint ¶12). Monroe sent an e-mail on June 20, 2009 asking "please send me your policy regarding encounters with people carrying firearms on the MARTA system **after you develop one** for the post-July 1, 2008 world". (Exhibit

[2] The jurisdictional issue has been fully briefed and addressed in Defendants' Motion to Dismiss. See Doc. 10-2.

A to Complaint). It is clear from the language in the e-mail that Monroe had previously been told that a policy did not exist. On June 27, 2008 and July 8, 2008, Plaintiffs' counsel sent e-mails to Defendant Dorsey asking questions regarding MARTA's policy. (Complaint ¶¶ 14 & 15; Exhibits B & C attached to Complaint). No Police Department policy was developed or provided to Plaintiffs' counsel. Dorsey depo. pp. 6-7. The Open Records Act applies to existing records. O.C.G.A. §50-18-70(d). No public officer is required to prepare reports, compilations or policies not in existence at the time of the Open Records request. Howard v. Sumter Free Press, Inc., 272 Ga. 521 (2000). Plaintiffs insist that Defendant Dorsey draws an artificial distinction between a policy and a procedure. However, there is no evidence of a "written" procedure. There simply was no written document regarding carrying firearms on MARTA's system in existence at this time. Defendant Dorsey did not violate the Open Records Act when he did not produce a document that was not in existence. Not only was Monroe requesting something that did not exist, but the context of the entire e-mail would not lend one to believe that it was an Open Records Act request. Furthermore, it never indicates that it is being made pursuant to the Open Records Act. Due the informally and the fact that it was not stated to be an open records request, Defendant

Dorsey did not recognize it to be an Open Records request. Dorsey depo. p.20.

Plaintiff Raissi sent an Open Records Act request dated October 16, 2008, certified mail to Chief Dunham. It is clear from the receipt that Defendant Dunham was not the person that signed the document. Doc. 40-5, Exh. A. Plaintiff has failed to establish that Defendant Dunham ever received the request. As such, Dunham cannot be found to have violated the Open Records Act request. Defendants do admit that someone at MARTA received the document. Pursuant to a directive from the General Manager of MARTA, this request was sent to the Office of Legal Services, presumably by facsimile. (Morgan aff. ¶¶4 &6, Exh.A; Doc.16-2). There is no record of Legal Services receiving the fax for the request. Morgan aff. ¶6. As such, the request was not answered. Neither Plaintiff Raissi nor his attorney followed–up about the request. Raissi depo. p.28.

On March 12, 2009, a few days after being served with the lawsuit, Defendants' attorney, Paula Nash e-mailed the documents responsive to the Open Records Act request to Plaintiffs' attorney. Affidavit of Paula Nash, "Nash aff." ¶3. Documents produced also included the Police Training Bulletin and an informational brochure provided to MARTA employees. Doc. 45-5 Exhs. A&B. Furthermore, on June 11, 2009, in response to discovery requests, Defendants' attorney mailed another copy of

the documents to Plaintiffs' attorney. Doc. 16-2. Plaintiffs are not entitled to any injunctive, or other relief because the documents have been produced.

Whether Plaintiffs are entitled to attorney's fees and court costs is a question of fact for the jury. In order for the Plaintiffs to receive attorney's fees for an open records request violation Plaintiffs must first prove that the Act was violated. Then they must prove the violation was completely without merit as to law or fact. GMS Air Conditioning, Inc. v. Dept. of Human Resources, 201 Ga. App. 136, 138 (1991). Plaintiffs must show that Defendants lacked substantial justification for the violation. The question of whether the violation was without merit or lacked substantial justification is question for the jury. Id. Of course it Defendants' position that the Court never gets to that point because the Court does not have jurisdiction to hear the Open Records Act cause of action, and because there was no violation. However, if the Court finds that there has been a violation, Defendants have expressed substantial justification for not responding to the e-mail requests. Defendant Dunham has expressed substantial justification for not responding to the request from Raissi. Defendant Dunham never received the request. Doc. 16-3, ¶13. Furthermore, someone from the Police Department sent it to the Legal Department as required. Id. The Legal Department has no

record of receiving the request, which is substantial justification for not responding.

## V. DEFENDANTS MILTON AND NICHOLAS ARE ENTITLED TO QUALIFIED IMMUNITY.

The MARTA Act provides MARTA police officers with the same immunities as a peace officer of a county or municipality. Ga. L. 2002 p.5683. The evidence in the record clearly demonstrates that officers Milton and Nicholas are entitled to qualified immunity. So long as a government official acts within the scope of his discretionary authority and does not violate clearly established law of which a reasonable person should have known, the doctrine of qualified immunity protects him. Harlow v. Fitzgerald, 457 U.S. 800, 818. A plaintiff seeking to overcome the defense of qualified immunity must first establish the violation of a constitutional right. Saucier v. Katz, 533 U.S. 194, 201, (2001). Then, he must be able to demonstrate that the right was so clearly established at the time of the alleged violation that a reasonable public official in a similar situation would be aware that his conduct was unconstitutional. Id.; Siegert v. Gilley, 500 U.S. 226, 232, (1991). This is a "purely legal question." Id.

It is undisputed that Defendants Nicholas and Milton were acting within the scope of their discretionary authority. The actions were clearly taken in the performance of their duties as

MARTA police officers. Nicholas depo. p.9; Milton aff. ¶4. Even if the Court accepts Plaintiff's contention that Defendants Milton and Nicholas' conduct constituted a constitutional violation, Plaintiffs cannot demonstrate that Defendants' stop and seizure of Plaintiff, after seeing him with a firearm at a MARTA station, violates law that is clearly established. The Eleventh Circuit has not directly addressed the issue where an officer observes a gun. Other Courts in cases such as Cooper and Edwards have held that officers can stop a person after merely observing a gun. Furthermore, considering that Defendants owe an extraordinary duty of care to the patrons of MARTA, it is not clearly established as to how Defendants are to exercise their duty of extraordinary diligence in light of the recent gun law allowing firearms on MARTA. Plaintiffs have failed to identify a specific source sufficient to place Defendants Milton and Nicholas on notice of how to balance these two laws, therefore Defendants are entitled to qualified immunity.

**CONCLUSION**

For the above stated reasons Plaintiffs' Second Motion for Summary Judgment should be denied.

This 28th day of September, 2009.

Respectfully Submitted,

/S/ Paula Morgan Nash
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**CERTIFICATE OF FONT TYPE, SIZE AND SERVICE**

I hereby certify that on September 28, 2009, I served Plaintiffs' counsel by e-filing "DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT" in 12-point Courier New for filing and uploading to the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorney of record:

John R. Monroe
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This 28th day of Sept., 2009

/s/ Paula Morgan Nash

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