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

GEORGIACARRY.ORG, INC., *et. al.*	)	
	)	CIVIL ACTION FILE NO.
v.	)	
	)	1:09-CV-594-TWT
METROPOLITAN ATLANTA	)	
RAPID TRANSIT AUTHORITY, *et. al.*	)	
	)	
Defendants	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Defendants argue for the elimination of Fourth Amendment protections for lawfully armed persons. Essentially, they are asking this Court to hold, as a matter of law, that a citizen assumes the risk of the police using force against him or her anytime he or she carries a firearm. Plaintiffs will show that Defendants' position is not supported by the law and that Defendants' Motion must be denied.

Argument

I. Detention of Plaintiff Raissi

Defendants finally concede that Raissi was "seized" within the meaning of the 4th Amendment. *See* Defendants' response to Plaintiffs' Second Motion for Summary Judgment (Doc. 45-2, p. 1). The Court must therefore determine only whether that seizure was reasonable.

In order for a detention to be valid, it must be supported by "objective reasonable suspicion of unlawful activity." *United States v. Thompson*, 712 F.2d 1356, 1359 (11th Cir. 1983). Defendants state multiple times in their Brief that they had "reasonable suspicion," but time and again they leave the reader asking, "Reasonable suspicion ***of what***?" The answer under the Fourth Amendment has to be "of a crime." It is not enough for officers to believe that a particular behavior is inappropriate, they must believe that the behavior is unlawful:

> No matter how peculiar, abrasive, unruly, or distasteful a person's conduct may be, it cannot justify a police stop unless it suggests that some ***specific*** crime has been, or is about to be, committed or that there is imminent danger to persons or property.

Duran v. Douglas, 904 F.2d 1372, 1378 (9th Cir 1990). [Emphasis supplied].

In the instant case, there is only one specific crime mentioned by Defendants, and that is the crime of carrying a pistol without a license. Defendants point to no evidence in the record, however, of objective facts or inferences drawn from those facts that would lead them to a reasonable suspicion they can articulate that Raissi was unlicensed. In fact, Defendants Nicholas and Milton clearly testified that they had no such facts to articulate. Defendant Nicholas, the officer who first detained Raissi, admitted he had no reason to believe Raissi was committing or about to commit any crime, but he stopped Raissi just to see if Raissi had a firearms license:

> A. At that point he did not commit a crime but I had stopped him in order to verify that if he had a permit or not.
> …
> Q. Did you have any reason to believe that he was about to commit a crime?
> …
> A. From – no. Other than unknown if he had a permit or not.
> Q. Okay. Just to distill it down then. Is it fair to say you stopped him because you knew he was carrying a gun and you didn't know if he had a license?
> A. Yes.

Doc. 35, pp. 42-44. Likewise, Defendant Milton, who acted as Nicholas' backup, did not have reasonable suspicion of a crime:

> Q. Before Mr. Raissi was stopped and checked out, did you have any reason to believe he had committed a crime?
> . . .
> A. No, sir.
> …
> Q. So, does it boil down to you had information that he was carrying a gun, you didn't know if he had a license, so he might have been committing the crime of carrying a pistol without a license?
> A. We wanted to check and see, yes sir.

Doc. 34, pp. 28-30. When Defendants' argument is reduced to its essentials, Defendants are asking this Court to rule that the mere presence of a firearm, without more, is reasonable suspicion that the person carrying it does not have a license to carry it. Defendants contend that they are entitled to use force against any Georgian spotted with a holstered firearm, even if that Georgian is peaceably

going about his business and the officers admit they have no individualized suspicion that criminal activity is afoot.

Defendants rely on two arguments: (1) carrying a gun creates an exception to 4th Amendment jurisprudence, and (2) a generalized concern for people's safety justifies detaining anybody carrying a gun, disarming that person, and "checking" him. Both arguments have been considered and rejected by other courts.

IA. There is No "Gun Exception" to the Fourth Amendment

In *Florida v. J.L.*, 529 U.S. 266 (2000), the Supreme Court declined to make an exception for the requirements of anonymous tips if the tip pertained to a firearm. 529 U.S. at 273. The Court went on to observe that "the reasons for creating an exception in one category of Fourth Amendment cases can, relatively easily, be applied to others, thus allowing the exception to swallow the rule." *Id.* [internal citations omitted]. It follows, therefore, that because there is no gun exception to the Fourth Amendment for anonymous tip purposes, there likewise is no exception to the same Amendment in other categories of Terry stop cases.

The 10th Circuit has likewise rejected the idea that carrying of a firearm, by itself, is sufficient reason to make a forcible stop:

> The government's argument [that the Fourth Amendment permits stopping any armed citizen] would … allow police officers to seize any citizen whom the officers have any articulable reason to believe presents a threat to their safety…. [T]he government's argument

> would effectively eliminate *Fourth Amendment* protections for lawfully armed persons. Moreover, the government's "reasonableness" standard would render toothless the additional requirement that the scope and duration of detention be carefully tailored to its underlying justification. For example, if a police officer's safety could justify the detention of an otherwise lawfully armed person, the detention could last indefinitely because a lawfully armed person would perpetually present a threat to the safety of the officer. In short, while the safety of police officers is no doubt an important government interest, it can only justify a *Fourth Amendment* intrusion into a person's liberty ***so long as the officer is entitled to make a forcible stop*** . . . .

United States v. King, 990 F.2d 1552, 1559 (10th Cir. 1993). [citations omitted] [emphasis supplied].

The Third Circuit, with Northern District of Georgia Judge O'Kelley sitting by designation, unanimously held that a tip that a celebrant at a festival was carrying a pistol was not sufficient to justify a stop of the celebrant. *See United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000). "For all the officers knew, ***even assuming the reliability of the tip that Ubiles possessed a gun***,[1] Ubiles was another celebrant lawfully exercising his right under Virgin Island law to possess a gun in public." *Id*. at 218. [Emphasis supplied].

[1] This emphasized portion of the quotation is important, because Defendants are attempting to distinguish *Ubiles* on the basis that the information came to the officers from a tipster. As can be seen from the court's own language, however, their analysis conceded the reliability of the tip and did not rely upon the existence of the tip for their reasoning. Rather, the court held that an officer's knowledge of the mere possession of a gun in a public place, without more, does not constitute reasonable suspicion of a crime.

> [T]he authorities … did not testify that it is common for people who carry guns in crowds -- or crowds of drunken people -- to either alter or fail to register their guns, or to use them to commit further crimes -- all of which would be additional evidence giving rise to the inference that Ubiles may have illegally possessed his gun or that criminal activity was afoot. Therefore … the authorities in this case had no reason to believe that Ubiles was engaged in or planning or preparing to engage in illegal activity due to his possession of a gun. Accordingly, ***in stopping him and subsequently searching him, the authorities infringed on Ubiles's Fourth Amendment rights***.

Id. at 218 (emphasis added).

The *Ubiles* case essentially parallels the case at bar. Ubiles was stopped solely because he was carrying a firearm. As it turns out, Ubiles was not carrying the firearm lawfully (it was unregistered) but the officers had no way of knowing that at the time they stopped Ubiles. As the Court noted:

> [I]t is not a crime to possess a firearm in the Virgin Islands; nor does a mere allegation that a suspect possesses a firearm, as dangerous as firearms may be, justify an officer in stopping a suspect absent the reasonable suspicion required by Terry, see *Florida v. J.L.*…. [T]he … tipster who approached the authorities said nothing that would indicate that Ubiles possessed the gun unlawfully (e.g., without registration)…. Therefore the stop and subsequent search were unjustified….

Id .at 217. A license is required to carry a firearm in the Virgin Islands. 23 V.I.C. § 454.

In addition to the Supreme Court and federal circuit courts cited above, several lower courts also have concluded that carrying a firearm cannot alone

justify a Terry stop. The Court of Appeals of Georgia ruled in *State v. Jones*, 289 Ga. App. 176 (2008) that an officer's knowledge of the mere presence of a firearm does not justify detaining a citizen and securing the firearm for a "check":

> Here, no evidence was presented of furtive movements or danger; in fact, the officer candidly acknowledged that the search was merely his standard procedure because any firearm might be stolen. On its face … this policy justifies the search of any vehicle occupied by hunters or sport shooters with their firearms, or any pickup truck with a rifle or shotgun on the rear window rack. This is precisely the danger of carte blanche authority to `secure' all weapons during a routine traffic stop….

Id.

The United States District Court for the District of New Mexico recently ruled that police knowledge of a person carrying a firearm, without more, cannot justify seizing the person. *St. John v. McColley*, _ F.Supp.2d _ (D. New Mex. September 8, 2009) (available on WestLaw at 2009 WL 2949302). In *St. John*, the facts were that the police knew Mr. St. John was carrying a pistol openly and fully exposed to view in a movie theater. The police seized him, disarmed him, and proceeded to "check" him. The defendants argued that they had a duty to the public, to keep them safe, and that they must, as police officers, check out citizens carrying guns. The court disagreed:

> The undisputed facts establish that Mr. St. John's seizure was unreasonable. Defendants lacked a justifiable suspicion that Mr. St. John had committed a crime, was committing a crime or was about to

> commit a crime. Indeed, Officer McColley conceded that he did not observe Mr. St. John committing any crimes and that he arrived at the theater with the suspicion that Mr. St. John was merely "showing a gun", which is not illegal in the State of New Mexico.

Id. [Internal citations omitted]. The court denied the officers qualifed immunity.

The United States District Court for the Eastern District of Wisconsin has likewise ruled that it is not reasonable to detain someone reported to be in possession of a gun, without more, because that "is not necessarily a crime." *Brown v. Milwaukee*, 288 F.Supp. 2d 962, 971 (E.D. Wis. 2003). "It has been well established since 1968 that in order to justify a Terry stop the activity of which the detainee is suspected must actually be criminal." *Id.* at 974.

Moreover, 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:

> [T]he possession of firearms is not, generally speaking, a crime unless you happen to be a convicted felon, the firearms are otherwise illegal, or you are not licensed to possess the gun. [Officer] Martin, presumably not clairvoyant, could not have known, and did not know, the Dudleys and their guns met all three of these criteria. In fact he testified he had absolutely no knowledge, or suspicion, that the Dudleys were engaged in any criminal activity until he discovered the first sawed-off shotgun.

United States v. Dudley, 854 F.Supp. 570, 580 (S.D.Ind. 1994). Like Ofc. Martin in *Dudley*, Defendants Nicholas and Milton cannot base reasonable suspicion of a

crime merely on their knowledge that Raissi was armed – (legally, it turns out, as opposed to the Dudleys).

Against this large body of case law, Defendants cite two unreported cases from the 3rd Circuit finding stops of people in Philadelphia for carrying firearms to be reasonable. What Defendants fail to disclose to this Court is that the law in Philadelphia is very different from the law in most jurisdictions:

> No person shall carry a firearm, rifle, or shotgun at any time upon the public streets or upon any public property in a city of the first class unless: 1) Such person is licensed to carry a firearm….

18 PA. C.S.A. § 6108[2]. [Philadelphia is the only city of the first class in Pennsylvania, *see Ranson v. Marrazzo*, 848 F.2d 398, 405 (3rd Cir. 1988)]. What is crucial to the analysis of Defendants' cases is that the Pennsylvania Supreme Court has ruled that lack of a license is ***not*** an element of the crime in § 6108. *Commonwealth v. Bigelow*, 484 Pa. 476, 484 (1979). Under *Bigelow*, therefore, police may ***arrest*** anyone in Philadelphia seen carrying a gun. In one of the unreported cases cited by Defendants for example, "When [officers] observed Bond in possession of a firearm on a public street in Philadelphia, they observed the commission of a completed crime and had probable cause to arrest him." *U.S.*

[2] Defendants conveniently omitted the language after "public property" from their brief, thus giving the Court the impression that the cases they cite apply to Pennsylvania as a whole.

v. Bond, 173 Fed. Appx. 144, 146 (3rd Cir. 2006). Surely, it is reasonable to ***stop*** someone under circumstances where it is reasonable to go ahead and ***arrest*** someone.

It is doubtful, however, that *Bigelow* is still good law. In 1996, the Supreme Court of Pennsylvania rejected the notion that someone seen carrying a gun in Philadelphia may be stopped, saying:

> The Commonwealth takes the radical position that police have a duty to stop and frisk when they receive information from any source that a suspect has a gun. Since it is not illegal to carry a licensed gun in Pennsylvania, it is difficult to see where this shocking idea originates, notwithstanding the Commonwealth's fanciful and histrionic references to maniacs who may spray schoolyards with gunfire and assassins of public figures who may otherwise go undetected. Even if the Constitution of Pennsylvania would permit such invasive police activity as the Commonwealth proposes – which it does not – such activity seems more likely to endanger than to protect the public. Unnecessary police intervention, by definition, produces the possibility of conflict where none need exist.

Commonwealth v. Hawkins, 547 Pa. 652, 657 (1996). The Third Circuit cases cited by Defendants rely on *Bigelow,* thus calling into question their continuing validity as well.

There also have been lower state court opinions in Pennsylvania that hold that detention of someone seen carrying a firearm was lawful, although those cases also pre-date *Hawkins* and are of questionable validity. The Pennsylvania cases also must be considered in light of the fact that Pennsylvania has a statute, unlike

Georgia, that requires firearms license holders to display such licenses to police on demand and creates a presumption of nonlicensure if a license is not produced. 18 Pa. C.S.A. § 6122(a).

In short, Defendants' reliance on Pennsylvania cases is misplaced. Regardless of the tension between two Supreme Court of Pennsylvania cases, we do not have the same situation in Georgia. It is not illegal to carry a rifle or shotgun in Georgia without a license and it is not illegal *per se* to carry a pistol in Georgia. It is only a crime in Georgia to carry a pistol ***without a license.*** O.C.G.A. § 16-11-128. That code section states, in pertinent part:

> (a) A person commits the offense of carrying a pistol without a license when he has or carries on or about his person … any pistol or revolver without having on his person a valid license…..

The Supreme Court of Georgia has ruled that the lack of a license is an element of the crime that must be proven by the state. *Head v. State*, 235 Ga. 677, 679 (1975) (explicitly overruling a string of earlier cases that had held the opposite position). Because the lack of a license is an element of the crime in Georgia (unlike the situation in Philadelphia), an officer must have reason to believe that a person lacks a license in order to stop the person.

Defendants do not contend that they were in possession of any facts leading them to suspect that Raissi had no license. Defendants did not observe Raissi

behaving suspiciously or in a threatening manner. They had no basis for believing that Raissi's carriage of a weapon was likely to become criminal, cause a public disturbance, or pose a threat to safety. Defendants argue in their Brief:

> Viewing the totality of the circumstances, including the observation of a gun, Sgt. Nicholas' training and experience, the previous criminal activity at MARTA stations, and the duty to provide extraordinary diligence for the safety of patrons, it was reasonable for Defendants to conduct a brief investigative stop of Plaintiff Raissi.

Doc. 43-2, p. 8. The major fallacy with Defendants' argument is that they overlook the fundamental premise that must be present whenever there is a Terry stop: a reasonable, articulable suspicion that the person in question is committing or about to commit ***a crime***.

> When applicable law does not ban carrying a firearm, however, the Fourth Amendment does not permit a stop-and-frisk regardless of any indication that a suspect is armed or potentially dangerous ***because there is no indication that the suspect is violating the law***.

Second Amendment Plumbing After Heller: Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, 41 Urb. Law. 1, 37 (2009). [Emphasis supplied].

The Officers' Experience

While law enforcement experience can be relied upon to some extent to support suspicions, "If there is one irreducible minimum in our Fourth Amendment jurisprudence, it is that a police officer may not detain an individual simply on the

basis of suspicion in the air." *Duran v. Douglas,* 904 F.2d 1372, 1378 (9th Cir. 1990). "Reasonable suspicion . . . may not be derived from inchoate suspicions or unparticularized hunches. *United States v. Lyons,* 510 F.3d 1225, 1237 (10th Cir. 2007).

Neither officer has articulated anything about his experience that would help to supply the missing element of a crime – lack of a firearms license. The Supreme Court has ruled that it is unreasonable under the Fourth Amendment to stop a motorist just to see if he has a valid driver's license "except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed." *Delaware v. Prouse,* 440 U.S. 648, 673 (1979). Here, there was no articulable and reasonable suspicion that Raissi was unlicensed. Defendant Nicholas stated only that it was "suspicious" that Raissi placed his holster in the small of his back, as opposed to on his ankle or on his side. Doc. 35, p. 44. Nicholas admitted, however, that the holster was an "inside the waistband" type of holster [Doc. 35, p. 12], so it is unclear how Nicholas believed such a holster would be worn on the ankle. Nicholas further testified in his deposition that there was the only thing suspicious about the holster location was that it was "unusual" in his experience. Doc. 35, p. 45. Just as the *Ubiles* court noted the officers' failure to claim that people in a drunken crowd frequently do not register their

guns, Sgt. Nicholas did not claim that people with holsters in the small of their backs commit crimes (nor could he make such a statement, given that he had no experience with people wearing their holsters in the small of their backs). In short, waving the banner of "officer experience" is ineffective at establishing reasonable suspicion unless that experience allows the officer to correlate the instant behavior with criminal conduct. *See*, *e.g.*, *Terry*, in which Officer McFadden observed ostensibly legal behavior that lead him reasonably to conclude, in light of his experience, that the suspects were preparing to commit armed robbery.

MARTA's Crime Record

Defendants attempt to pass MARTA off has a dangerous, crime-ridden aberration requiring heightened police intrusions and, in the process, less 4th Amendment protection. These intrusions are ostensibly justified in the name of protecting the public and the police. Defendants even claim that Plaintiff may have posed a danger to ***himself***, without citation to any facts to support that outlandish claim. Both the premise and the conclusion for Defendants' exercise of a "community caretaker function" are flawed.

Defendants claim there were 34 "gun-related incidents" on MARTA involving people with no firearms license in 2008, Doc. 43-2, p. 11, and argue, "There is clearly an issue regarding people with guns on the MARTA system

without a valid gun license." Doc. 43-2, p. 12. Defendants do not attempt to put their statistic into perspective. In 2008, MARTA had 158,590,900 riders (trips).[3] This means MARTA had 0.021 "gun-related incidents" per 100,000 riders. According to the FBI's crime statistics for the entire state of Georgia for 2008, there were 435 firearms murders, 9,677 firearms robberies, and 5,476 firearms aggravated assaults in a population of 7,263,407.[4] This is a total of 215 firearms crimes per 100,000 people in the entire state of Georgia, meaning that Georgia as a whole has a "gun-related incident" rate of more than 10,000 times that of MARTA.[5]

Even if there really were a "gun problem" on MARTA, as Defendants would have the Court believe, that would not justify Defendants' detention of Raissi:

> ***Defendants' actions are not protected by the community caretaker exception because they had no basis for believing that anyone's safety was at risk.*** 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.

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[3] American Public Transportation Association 's "Public Transportation Ridership Report," available at http://www.apta.com/resources/statistics/Documents/Ridership/2008_q4_ridership_APTA.pdf.

[4] The FBI's "Crimes in the United States," available at http://www.fbi.gov/ucr/cius2008/index.html.

[5] Plaintiffs recognize that a "trip" count is not the same as a population count, but emphasize that MARTA is not necessarily more of a "high crime area," as Defendants make it out to be, than the city that surrounds it.

> St. John was behaving suspiciously or in a threatening manner…. They had no basis for believing that Mr. St. John's use of the weapon was likely to become criminal, cause a public disturbance or pose a threat to safety.

St. John v. McColley, __ F.Supp.2d __, 2009 WL 2949302 (D.N.M. 2009) [Emphasis supplied].

Finally, Defendants' contention that the nature of passengers on MARTA compels a greater intrusion into citizens' liberties is misplaced:

> We believe that … heightened safety concerns … [do not] obtain any time a crowd of adults congregates. 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 constitution law, this cannot be so.

Ubiles, 224 F.3d. at 219.

MARTA's Duties as a Common Carrier

Defendants also attempt to justify their detention of people seen carrying firearms based on MARTA's duty as a common carrier to exercise "extraordinary diligence" for the safety of passengers. Defendants do not cite a single case that stands for the proposition that a government agency such as MARTA is excused from the confines of the 4th Amendment because the State of Georgia imposes tort liability upon it. Indeed, such a proposition flies in the face of the Supremacy Clause. If a state or local governmental agency could escape its obligations to

respect a citizen's federal constitutional rights by imposing tort liability upon itself under its own laws, then those constitutional rights would be repealable at the whim of the state or local government. *See, e.g., United States v. Gargotto,* 476 F.2d 1009(6th Cir. 1973) (Regardless of state authority, when challenged on Fourth Amendment grounds, acts of state officers must be judged by federal standards).

II. Defendant Officers Do Not Have Qualified Immunity

Defendant officers claim to be entitled to qualified immunity. In order to overcome such a claim, Plaintiffs must show that the officers violated Raissi's constitutional rights and that such rights were clearly established. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Plaintiffs already showed above that the Defendant officers detained Raissi without a warrant and without probable cause or even reasonable suspicion that Raissi was committing about to commit a crime.

"The relevant, dispositive inquiry in determining whether the right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

The Supreme Court has declared that stopping a driver to check a driver's license violates the Fourth Amendment unless the officer has reasonable and articulable suspicion that the driver is unlicensed. *Delaware v. Prouse,* 440 U.S. 648, 673 (1979). The present case involves a firearms license. However, it is not

necessary that the "very action in question has been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). As the Supreme Court stated:

> Officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, . . . we [have] expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, . . . the salient question . . . is whether the state of the law [at the time of the alleged conduct] gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional.

Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508 (2002).

Defendants would have this Court believe that because carrying firearms on MARTA had been decriminalized for only a few months when the incident occurred, they had no idea how to deal with a situation in which they had no facts to support a reasonable and articulable suspicion of a crime. Thus, they argue, they are entitled to apply "anything goes" until a body of case law is established for firearms on MARTA. These officers, however, deal with search and seizure law on a daily basis. Defendants' position is nothing short of incredible. MARTA police officers receive the same Peace Officer Standards and Training Council training that all other law enforcement officers in the state receive. Doc. 35, p. 7.

Defendant Nicholas testified in his deposition that he was a MARTA field training officer for four years. *Id.* He has a bachelor's degree, some graduate courses, and 13 years' experience in law enforcement, with 10 of those as a MARTA police officer [*Id.*, pp. 5-7], yet he claims to be entitled to qualified immunity because he does not know what the bounds of his search and seizure powers are under the 4th Amendment.

The law as it pertains to search and seizure in general, and regarding people with firearms specifically, is well established in Georgia and throughout the nation. Defendants have no reason to believe that the law on MARTA, with carrying firearms being decriminalized, is any different from the law in the rest of the state. The general law pertaining to carrying firearms in Georgia has not changed significantly (for the purposes of this case) for several years. In order to show that the law is clearly established, however, it may be useful to review the recent history of those laws. Defendants rely on a case dealing with Georgia's concealed weapons law, so that law will be explored.

Georgia's criminal code was completely re-written in 1968. Ga. L. 1968, pp. 1249, *et. seq.* In that version of the code, it was unlawful to carry a concealed weapon:

> **26-2901. Carrying a Concealed Weapon**. A person commits a misdemeanor when he knowingly has or carries about his person,

> outside of his own home, unless in an open manner and fully exposed to view, any bludgeon, metal knuckles, firearm, knife designed for the purpose of offense and defense, or any other dangerous or deadly weapon or instrument of like character.

Id. at p. 1323. Although licenses were available (§ 26-2904), they only enabled a person to carry a pistol openly.

In 1976, the law changed, allowing a person to carry a handgun with a license, but only in a holster or closed container. 1976 Ga. L. 1430. Then in 1996, the law changed to allow a person to conceal a handgun on the person's body and concealed by the person's clothing. 1996 Ga. L. 108. (inserting "may be concealed by the person's clothing").

So, for the last 13 years, the law in Georgia has been that a person with a license could carry a pistol, openly or concealed. Until 1996, therefore, Georgia was something like Philadelphia when it came to concealed handguns.

Now that Georgia licenses allow a person to carry a handgun either openly or concealed, it is not sufficient for an officer merely to suspect that a person is armed. *Head v. State,* discussed above, made clear that lack of a license is an element of the crime, with the burden of proof on the state. Because the Defendant officers admit they had no reason to believe that Raissi lacked a license, and clearly established law required that they have a reasonable and articulable suspicion, they are not entitled to qualified immunity.

Defendants cite *Edwards v. State*, 165 Ga. App. 527, 528 (1983) for the dubious proposition that someone may be stopped "for no other reason than that he saw the bulge and thought he might be carrying a concealed weapon." Doc. 43-2, p. 11. In context, Edwards had just committed an armed robbery. Edwards roughly matched the description of the robber when the officer encountered him walking away from the scene with a "bulge" that the officer thought might be a concealed weapon. The officer testified that he was not relying on the facts set out above, relating to the armed robbery and description, but was stopping Edwards ***at gunpoint*** merely because of a bulge in his clothing. Reasonable suspicion is always an objective standard, not a subjective standard, and the court will examine the totality of the circumstances. Thus, although the officer did not believe Edwards was a robbery suspect, a reasonable officer would have believed so.

Moreover, *Edwards* was decided long ***before*** it became legal for a firearms license holder to conceal a firearm with his clothing (1983 v. 1996). In other words, back in 1983, an officer's knowledge of a concealed weapon meant that an officer knew that the suspect was committing a crime under Georgia law. That is why the opinion states, "The carrying of a concealed weapon is a crime in this

state." As a result, this is a strange case for Defendants to cite.[6] *Edwards* is not helpful in the instant case and does not create any confusion on the issue of clearly established law.

III. MARTA Has an Unconstitutional Practice of Detaining Anyone Seen Carrying a Firearm

While Defendants claim they have no policy of forcibly detaining persons with firearms, their witnesses admitted otherwise. Assistant Chief Dorsey admitted that MARTA has a practice of stopping everyone on MARTA property seen with a firearm. *Deposition of Joseph Dorsey*, pp. 6-8. That practice extends even to long guns and not just hand guns. *Id.* If such a person does not engage the MARTA officer voluntarily, then the officer orders the person to stop under force of law. *Id.* The person is required to produce a photo ID and a firearms license or be ejected from the property. *Id.*, p. 10. This practice was approved by Chief Dunham. *Id.*, p. 14. At a minimum, Asst. Chief Dorsey's testimony means that Defendants are not entitled to summary judgment on this issue.

IV. Open Records Act

IVA. Defendant Dunham Violated the Open Records Act

[6] It is extremely doubtful that a court today would reach the conclusion that a mere bulge in a person's clothing is sufficient for an officer to point a gun at a citizen and search him.

The Georgia Open Records Act allows no more than three business days for an entity subject to the Act to determine if the records requested are subject to public access. O.C.G.A. § 50-18-70(f). Thus, even if an entity claims some exemption, it must report this fact to the requestor within three days. O.C.G.A. § 50-18-70(h).

> If the person or agency having custody of the records fails to affirmatively respond to an open records request within three business days by notifying the requesting party of the determination as to whether access will be granted, the Open Records Act has been violated.

Benefit Support, Inc. v. Hall County, 218 Ga. App. 825, 833 (2006).

Raissi sent his request, return receipt requested, to Dunham. It was signed for by someone in Dunham's office. Doc. 4-5, p. 1. Neither Dunham nor anyone else at MARTA responded to Raissi's request. *Id.* Outright failure to follow through on the request cannot constitute substantial justification.

Defendants assert that this claim is moot because they now have provided Raissi some of the records he requested. Doc. 43-2, p. 25. The law requires a response within three days. Failure to abide by that requirement cannot be "cured" by responding several months late, and it is frivolous for Defendants to suggest that it can. *Jaraysi v. City of Marietta*, 294 Ga. App. 6 (2008):

> Marietta contends that appellants' [Open Records Act] action is moot because the requested records have already been given to appellants.

> This argument is without merit…. [T]he record indicates that Marietta violated the ORA by failing to respond within the statutory time frame, even if Marietta later made all the requested documents available. The trial court thus erred in granting summary judgment to Marietta.

294 Ga. App. at 10.

IVB. Defendant Dorsey Violated the Open Records Act

Dorsey contends he is entitled to summary judgment because (1) he believes that an open records request cannot be sent via email, and (2) the request must state that it is made pursuant to the Open Records Act. Deposition of Joseph Dorsey, p. 20. There is no particular form or format specified in the Open Records Act for a request. It has been established, however, that oral requests are permitted nd requests need not be in writing to be enforced. *Howard v. Sumter Free Press,* 272 Ga. 521, 522 (2000). Given that an oral request is sufficient, it is difficult to understand how a written request, sent via email and admittedly received, is insufficient.

Dorsey admits that he did not respond to the email (or the original oral request referenced in the email). Deposition of Joseph Dorsey, p. 18. Dorsey relies on the artificial distinction he draws between a "policy" (which he denies having) and a "procedure" (which he admits to having). Deposition of Joseph Dorsey, p. 6. Nor did Dorsey respond to either of two more emails sent as a

follow-up to the original request (*Id.*, pp. 17-18), thus constituting a total of four separate violations.

Defendants assert that no policy existed, so no response was required. This is not an accurate statement of the law. A response is required within three business days. O.C.G.A. § 50-18-70(f).

Conclusion

For the foregoing reasons, Defendants' Motion must be denied.

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/s/ John R. Monroe

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

/s/ John R. Monroe
John R. Monroe

CERTIFICATE OF SERVICE

I certify that on October 5, 2009, I filed the foregoing using the ECF system, which automatically will email a coy to:

Ms. Paula M. Nash
pmnash@itsmarta.com

/s/ John R. Monroe
John R. Monroe