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
MARTA, *et. al.*	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR SECOND MOTION FOR SUMMARY JUDGMENT

Detention of Plaintiff Raissi

Defendants concede that Raissi was "seized," Doc. 45-2, p. 1, but contend that they may forcibly detain any person with a firearm. 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). The Officers claim in their Brief that they suspected Raissi "***might have been*** committing the crime of carrying a pistol without a license[1]," [Doc. 45-1, p. 4] but they utterly fail to show anything more than speculation.

In this case, Defendant Nicholas saw Raissi carrying a pistol at a MARTA station, but admitted he had no knowledge of whether Raissi had a GFL ("Georgia

[1] A person commits the offense of carrying a pistol without a license when he has or carries about his person, outside of his home, motor vehicle, or place of business, any pistol or revolver without having on his person a valid license…. O.C.G.A. § 16-11-128.

Firearms License"). Doc. 35, p. 44. Defendants claim Nicholas' unsupported hunch that "he could be carrying it without a valid firearms license" is "clearly reasonable enough for a stop." Defendants provide no analysis, citation, nor explanation for this dubious claim.

Defendants cite as support for the Officers' suspicion that Raissi "might not have" a GFL the facts that (1) The Officers were aware of crime generally; (2) MARTA has a duty to protect passengers from unreasonable risk of harm; and (3) MARTA police are taught to look for suspicious activity, weapons, and objects which may seem innocent to the average person. Doc. 45-1, p. 3. Plaintiffs will address each of these facts in turn.

(1) Knowledge of Crime

The Officers had no knowledge of crimes on MARTA that would give the Officers reason to believe Raissi lacked a GFL. Defendant Nicholas testified that he was aware of automobile thefts and break-ins. Doc. 35, pp. 9-10. He did not testify that he was aware of any crimes involving firearms. Defendant Milton testified that he was aware of "numerous instances" of firearms used on MARTA for "shootings, theft of property and other crimes" [Doc. 45-3, p. 3], but he did not testify that he was specifically aware of any instances of people committing the crime of carrying a pistol without a license.

Neither Officer testified that he had any knowledge of the behavior or characteristics of people who commit the crime of carrying a pistol without a license. Neither Officer explained how his knowledge of crimes on MARTA aided him in suspecting that Raissi did not have a GFL. Defendants make no attempt to tie their knowledge back to the elements of the crime of carrying a pistol without a license. Defendants ask this court to rule that MARTA's unrelated crimes mean that MARTA officers have automatic reasonable suspicion to believe that anybody with a firearm is unlicensed.

Defendants reference Chief Dorsey's knowledge of crime statistics on MARTA and Raissi's own anecdotal perception of MARTA crime as support for the Officers' suspicion that Raissi did not have a GFL. Doc. 45-1, p. 3. Neither Dorsey's nor Raissi's knowledge can be imputed to the Officers. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the ***officers*** knew before they conducted their search"). [Emphasis supplied].

(2) MARTA's Duty to Its Passengers

In a spectacular bit of illogic, Defendants claim that MARTA's state tort liability to its passengers gave the Officers reasonable suspicion that Raissi did not have a GFL. In reality, Defendants are substituting the ***reason*** they want to be able

to violate their passengers' 4th Amendment rights for the ***unreasonableness*** of the Officers' suspicions. The Officers cannot really have concluded that their employer's tort liability gave rise to a suspicion that Raissi did not have a GFL.

(3) Officer Training

Finally, Defendants claim that officer training played a role in the Officers' suspicion (that neither testified they had) that Raissi lacked a GFL. Defendant Milton testified that he receives training on things for which to look. Doc. 45-3, p. 2. He did not, however, provide any explanation of what training he received that may have played a valid role in coming to the conclusion (that he did not testify he had come to) that Raissi lacked a GFL. Moreover, it was Defendant Nicholas, not Defendant Milton, who made the decision to stop Raissi.

Defendants wave the banners of "officer knowledge" and "officer training" without a single explanation of how those factors could have led a reasonable person in either Officer's position to conclude that Raissi did not have a GFL. The Officers knew that Raissi had a pistol, but they had no reason whatsoever to believe that he did not have a GFL. They stopped him merely to "check and see." Doc. 34, p. 30. "Reasonable suspicion . . . may not be derived from inchoate suspicions or unparticularized hunches." *United States v. Lyons*, 510 F.3d 1225, 1237 (10th Cir. 2007).

Abandoning all pretense of having reasonable suspicion that Raissi (or anyone else seen carrying a firearm) did not have a GFL, Defendants lament that if they are not allowed to stop everyone[2] seen carrying a firearm, they would have to "wait until an individual, sniper, or potential terrorist with a gun, actually starts shooting people at a MARTA station before they take action." Doc. 45-1, p. 4. The Supreme Court of Pennsylvania has addressed this argument:

> 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).

There is No Gun Exception to the Fourth Amendment

Despite Defendants' rejection of the argument, Courts around the country cite *Florida v. J.L.*, 529 U.S. 266 (2000) for the proposition that the Supreme Court has concluded that there is no "gun exception" to the 4th Amendment. *United*

[2] Can there be a more blatant admission that reasonable suspicion has nothing to do with Defendants' position? Defendants are asking this Court for a wholesale, automatic firearm exception to standard Fourth Amendment analysis.

States v. Reynolds, 526 F.Supp.2d 1330, 1339 (N.D. Ga. 2007) ("declining to adopt a firearm exception to stop-and-frisk Terry analysis"); *United States v. Harrell,* 268 F.3d 141, 151 (2nd Cir. 2001), Meskill *concurring,* ("In *J.L.*, the Supreme Court rejected the 'firearm exception"); *United States v. Ubiles,* 224 F.3d 213, 218 (3rd Cir. 2000) ("rejecting an 'automatic firearm exception' to the rule in Terry"); *United States v. Hauk,* 421 F.3d 1179 1187 (10th Cir. 2005) ("rejecting a firearms exception to the Fourth Amendment"); *United States v. Crandell,* 509 F.Supp.2d 435, 442 (D. N.J. 2007), *vacated on other grounds,* 554 F.3d 79, ("The Court declined to create a 'firearm exception' to the Terry analysis"); *United States v. Blackshaw,* 367 F.Supp.2d 1165, 1171 (N.D. Ohio 2005) ("The J.L. Court also declined to adopt the government's major argument that the standard Terry analysis should be modified to license a 'firearm exception.'"); *Brown v. City of Milwaukee,* 288 F.Supp.2d 962, 971 (E.D. Wis. 2003) ("declining to adopt a 'firearm exception' to the standard *Terry* analysis"); *State v. Cunningham,* 183 Vt. 401, 418 (S.Ct. Vt. 2008) ("declining to adopt a 'firearm exception' to the warrant requirement; noting that possession of a firearm, like possession of narcotics, does not pose an imminent danger"); *People v. Jordan,* 121 Cal. App. 4th 544, 555 (Ct. Ap. Cal. 2004) ("The court also declined to modify the reasonable suspicion standard established in *Terry* by creating a 'firearm exception'"); *People v. Mario*

T., 376 Ill.App. 468, 481 (Ct. App. Ill 2007) ("rejecting the 'firearm exception' to the standard Terry analysis").

Defendants' Pennsylvania cases have no application to this case

In an attempt to elude the clear holding of *United States v. Ubiles*, 224 F.3d 218 (3rd Cir. 2000), that possession of a firearm in a crowd does not alone provide reasonable suspicion of a crime, Defendants point to *United States v. Valentine*, 232 F.3d 350 (3rd Cir. 2000) and imply that it somehow overrules or conflicts with *Ubiles*. It does not. Nor does it stand for the proposition that the presence of a gun is sufficient, standing alone, to detain a person. In *Valentine*, the criminal defendant was seen with a gun in a high crime area "known for shootings" at 1 a.m., in a state (New Jersey) with a rule that "presumes that someone carrying a handgun does not have a permit to possess it until the person establishes otherwise. See N.J.S.A. S 2C:39-2(b)". *Id.* at 356. Georgia has no such law. In addition, Valentine and his two companions behaved suspiciously, "walk[ing] away as soon as they noticed the police car." *Id*. Valentine then, before he was seized, aggressively charged toward the officer, and "charging toward a police officer in a high-crime area also by itself provides reasonable suspicion." *Id*. at 359.

Defendants play fast and loose with the facts in the instant case to try to make them fit *Valentine*, claiming that "incidents with firearms occur regularly at

MARTA stations." Doc. 45-1, p. 7. Chief Dorsey claims only a few dozen firearms "incidents" (no further description is given) out of the more than 150 million rides MARTA provides each year. Doc. 48-1, p. 15. This hardly can be called "firearms incidents occurring regularly at MARTA stations," and neither Officer testified that he believed MARTA was a "high crime area." Moreover, Raissi was peacefully buying a fare token in broad daylight, not walking away upon noticing a police car at 1:00 a.m. Doc. 35, p. 17. He certainly did not behave aggressively toward the officers or charge at them.

Plaintiffs have already covered in a previous brief Defendants' unreported Third Circuit cases originating in Philadephia, which, similar to New Jersey, has a unique law presuming a person to be unlicensed until he shows otherwise.

Defendants' sole Georgia case is no longer good law

Defendants claim *Edwards v. State*, 165 Ga. App. 527, 528 (1983) holds that an officer may stop someone at gunpoint merely for seeing a "bulge" that he believes is a gun. Edwards had just committed an armed robbery when he was stopped, at a time in Georgia when carrying a concealed weapon was prohibited even for people with firearms licenses.[3] The officer in that case arguably was

[3] *See, e.g.*, Georgia AG Op. 73-66, "Criminal Code of Georgia § 26-2901 prohibits carrying any weapon in a concealed manner; it is the concealed nature of the

justified in stopping Edwards either for the armed robbery or for carrying a concealed weapon. *Edwards* does not compare favorably with the instant case, in which there was no report of a crime for which Raissi matched the description, and Georgia law has changed so that a GFL now allows a person to carry a firearm either openly or concealed.

The closest state court case on this topic is *State v. Jones*, 289 Ga. App. 176 (2008), holding that an officer's mere knowledge of a firearm's presence does ***not*** justify a detention of the citizen and a seizing of the firearm to "check."

Defendants summarize their argument with:

> 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 . . .

Doc. 45-1, p. 9. Defendants woefully miss the mark because, yet again, they do not say reasonable suspicion ***of what.*** Defendants are mistakenly convinced that anything they call "suspicious" equates to reasonable suspicion. They must have reasonable suspicion ***of a crime.***

The Duration and Manner of Raissi's Detention Were Unlawful

If the Court somehow determines that the initial stop of Raissi was lawful, the duration and manner of the stop were not. A frisk and disarmament requires

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carrying which constitutes the crime. This section is applicable even if one has a license to carry a pistol or revolver . . ."

that the officer believe the subject to be armed ***and dangerous.*** *Terry v. Ohio,* 392 U.S. 1, 27 (1968) ("there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe he is dealing with an armed and dangerous individual"). Defendants provide no indication that Raissi was dangerous, and dangerousness cannot be inferred solely from being armed. *See St. John v. McColley*, __ F.Supp.2d __ (D. N.M. September 2, 2009), available on WestLaw at 2009 WL 2949302 and on LEXIS at 2009 U.S.Dist. LEXIS 89543:

> Defendants ask the Court to ignore the conjunctive phrasing of the rule and find, in essence, that anyone who is armed is, by virtue of that fact, dangerous. In light of the extensive, controlling and compelling jurisprudence to the contrary, the Court declines to do so.

See also State v. Jones, 289 Ga. App. 176 (2008) ("the suspect is dangerous *and* the suspect may gain immediate control of weapons") (emphasis supplied by court). Defendants have not attempted to articulate any facts indicating Raissi was a danger. Thus, there was no justification for seizing Raissi's firearm. Furthermore, there was no justification for taking Rassi's social security number and continuing to detain him while calling him in for a criminal background check. Finally, the stop was unreasonable in that it ended with Defendant Nicholas taking Raissi to a non-public area before his property was returned to him. Even if the

detention of Raissi were permissible in the first place (which it was not), the detention should have ended upon Raissi's display of identification and GFL.

Defendants claim it was necessary to return Raissi's firearm to him in a private location for his own safety and for the safety of passengers. They fail to explain this statement. It was Defendant Nicholas who determined that it was appropriate to handle Rassi's firearm in the public area of the station, and to do so quickly and violently. There is no reason why Raissi could not have re-holstered his firearm in the spot where Defendant Nicholas seized it.

MARTA's Practice is Unlawful

Defendants claim they do not have a written policy regarding firearms on MARTA. They do have a written training bulletin on that subject which contains no actual direction to officers but merely summarizes MARTA's view of the law. This ruse is belied by the fact that the Officers and Chief Dorsey testified to the substance of the procedure not found in the training bulletin. MARTA has an admitted policy (or "procedure") of detaining anyone they see carrying a firearm for the purpose of checking if the person has a GFL. Doc. 41, pp. 6-8. They do not require any evidence that a crime has been committed. Just as the police may not stop a motorist merely to see if he has a license to drive, *Delaware v. Prouse*, 440 U.S. 648, 673 (1979), the police may not stop an armed pedestrian to see if he

has a license to be armed. MARTA's policy is unconstitutional, threatens the civil rights of Plaintiff GCO's members, and resulted in the illegal detention of Plaintiff Raissi.

Defendants attempt to deflect liability for their policy by saying that if a person refuses to show a GFL to an officer, the person is escorted off the property rather than arrested. Defendants thus acknowledge that it is not a crime to refuse to show a police officer a GFL upon demand. Their policy of ejecting people from public property for exercising a fundamental constitutional right is itself a Fourth Amendment violation.

Defendants violated the Open Records Act

Defendants claim that plaintiff must prove that the "violation was completely without merit as to law or fact," Doc. 45-1, p. 15, citing *GMS Air Conditioning, Inc. v. Dept. of Human Resources*, 201 Ga. App. 136, 138 (1991), decided under a former code version. 1988 Ga. L. 243, 250. ("If the court shall determine that the action constituting a violation of this article was completely without merit as to law or fact…."). This language changed in 1992 to the current:

> If…either party acted without substantial justification . . . in not complying with this chapter . . . , the court shall, unless it finds that special circumstances exist, assess in favor of the complaining party reasonable attorney's fees and other litigation costs….

1992 Ga. L. 1061, 1067. Thus, *GMS Air Conditioning* is no longer good law. The current test is:

> First, [plaintiff] must show that although [the defendant] produced the documents after the lawsuit was filed, the [defendant] violated the Open Records Act by not producing them before the suit was filed. Second, if a violation did in fact occur, [the plaintiff] must show that the [defendant] lacked substantial justification for the violation.

Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 834 (2006). In the instant case, Plaintiff has shown that Defendants did not produce the documents before the case was filed, but did produce them after the case was filed.

Under *Benefit Support, Inc.* and *Wallace v. Greene County*, 274 Ga. App. 776 (2005), mere failure to respond affirmatively to an open records request within three business days constitutes a violation. *Wallace*, 274 Ga. App. at 781:

> We conclude that 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 ORA has been violated…. [I]n the present case, the ORA was violated when [nobody] responded in any manner … within the required three-day period. As such, [plaintiff] satisfied the first prong for obtaining attorney fees under the ORA.

The instant facts are identical. Plaintiffs made Open Records Act requests to which Defendants did not respond within three business days. A violation has occurred *per se*, and this Court only has to determine if the violation was substantially justified and if special circumstances exist. "Lacked substantial

justification" in this context means "substantially frivolous, substantially groundless, or substantially vexatious." *Claxton Enter. v. Evans County Board of Commissioners*, 249 Ga. App. 870, 878 (2001).

In the instant case, Defendants failure to respond was "substantially groundless." Defendants' only ostensible explanation for not responding to Raissi's request is that they neglected it. They acknowledge receiving it, and even seeking legal advice on it, but then they did nothing. *See, e.g.*, Doc. 43-6, p. 3. Administrative negligence and bureaucratic incompetence cannot form a substantial ground for failing to respond. No special circumstances exist. Plaintiffs are entitled to attorney's fees and costs on this claim.

The Officers are not entitled to Qualified Immunity

The Officers claim to have qualified immunity in this case. Plaintiffs already have discussed at length in their opening Brief [Doc. 40-2, pp. 21-22] and their Brief Opposing Defendants' Motion [Doc. 48-1, pp. 17-22] why the Officers are not entitled to qualified immunity, and Plaintiffs incorporate those arguments here. While there is no need to restate the arguments in their entirety, Plaintiffs point out that *Delaware v. Prouse*, 440 U.S. 648, 673 (1979), holding that a driver may not be stopped just to see if he has a driver's license, controls the instant case. An armed pedestrian may not be stopped to see if he has a GFL. Because there is

no firearm exception to the Fourth Amendment, the right to be free from unreasonable searches, even when armed, is clearly established. The cases cited by Defendants in support of their immunity claim already have been shown to be inapplicable.

Qualified immunity was denied to officers in virtually identical circumstances in *St. John v. McColley* (cited earlier)[4]:

> Nothing in New Mexico law prohibited Mr. St. John from openly carrying a firearm in the Theater. Because both New Mexico law and the Fourth Amendment prohibition on unjustified seizure were clearly established, and a reasonable officer is presumed to know clearly established law, qualified immunity does not protect Defendants.

The *St. John* court relied on *Sorrel v. McGuigan,* 38 Fed. Appx. 970, 973 (4th Cir. 2002), when it said, "Qualified immunity protects law enforcement offices from bad guesses in gray areas. [T]he fact that the plaintiff's actions were clearly permissible under the statute meant that the officer was not in a gray area." *Id.*

Conclusion

Defendants are attempting to short circuit the *Terry* analysis by asking this Court to declare any peaceful, armed person subject to search and seizure regardless of individual reasonable suspicion of criminal wrongdoing. This Court

[4] __ F.Supp.2d __ (D. N.M. September 2, 2009), available on WestLaw at 2009 WL 2949302 and on LEXIS at 2009 U.S.Dist. LEXIS 89543

cannot accept such a blatant subversion of the Fourth Amendment. For the foregoing reasons, Plaintiffs' Motion must be granted.

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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.

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CERTIFICATE OF SERVICE

I certify that on October 16, 2009, I filed the foregoing using the ECF system, which automatically will email a coy to:

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