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

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

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

I. Raissi's Detention

"A police officer views facts through the lens of his police experience and expertise. The background facts provide a context for historical facts, and when seen together yield inferences that deserve deference." United States v. Valentine, 232 F,3d 350, 355 (3rd Cir.2000), quoting Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663 (1996). Defendants have previously provided the police experience of the officers, the historical background facts of crimes on MARTA property, and the extraordinary duty owed to MARTA patrons. These things combined with the totality of the facts, which include officers observing a weapon, and Raissi having the

weapon stuck in the middle of his back with his shirt pulled over it, was reason enough for the officers to stop and investigate for a license.

Plaintiffs' contention is that there is no reasonable suspicion of criminal activity. However, the officers stated numerous times that they suspected Raissi of carrying a firearm without a license.

> Q. Did you have any reason to believe he was about to commit a crime?
>
> A. Upon the radio call that came – that I responded to, the reason was suspicion, yes sir.

Milton depo. p. 28. Milton went further to say that the call from Officer Nicholas indicated that the subject had a gun. Id. He also stated that there was a possibility that Raissi was committing the crime of carrying a pistol without a license. Id. at 30. Likewise, Nicholas stated that he had reasonable suspicion that Raissi was armed with a weapon that could endanger the public, and officers, and it was unknown if he had a valid permit. Nicholas depo. p.44. He also would have charged Raissi with carrying a concealed weapon without a license, if Raissi had not shown proof of license. Id. at p.31.

Plaintiffs further argue that the existence of a gun is not justification for a police officer to stop and investigate further, citing the no "gun exception" of

Florida v. J.L., 529 U.S. 266 (2000). As Defendants have previously stated in an earlier brief, the Supreme Court in J.L. found that there is no general exception to the "indicia of reliability" requirement for anonymous tips alleging possession of firearms. Id. at 274. Defendants have previously distinguished the cases cited by Plaintiff. In essence, those cases do not involve a situation where the officer *observes* the gun, but instead, situations where the possession of a gun was reported by an anonymous informant. The only exception being the two New Mexico cases, U.S. v. King, 990 F.2d 1552 (10th Cir. 1993) and St. John v. McColley, __F.Supp.2d__ (D.New Mex. September 8, 2009), 2009 WL 2949302. These cases find that based on New Mexico law the mere existence of a firearm without more cannot justify seizing the person. New Mexico law allows persons to openly carry a firearm in public, and there is no requirement for a license. Id. at 4; See N.M.S.A. §30-7-1 et seq. In these cases, there was no possibility that the person was committing a crime.

Plaintiffs further attempt to distinguish the Pennsylvania cases cited by Defendants by alleging that the Pennsylvania statue is vastly different from Georgia. As it relates to Philadelphia, Pennsylvania law states:

> 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; or
>
> (2) Such person is exempt from licensing under section 6106 of this title.

18 Pa. C.S.A. §6108. Similarly Georgia law states,

> "This code section shall not permit, outside of his or her home, motor vehicle, or place of business, the concealed carrying of a pistol, revolver, or concealable firearm by any person unless that person has on his or her person a valid license ..." O.C.G.A. §16-11-126.

Also,

> "A person commits the offense of carrying a pistol without a license when he has or carries on or 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(a).

Defendant Nicholas stated that if Raissi did not have the permit, he would have been cited for both crimes. Nicholas depo. pp. 30-31. Both Georgia and Pennsylvania law make it a crime to carry a firearm unless the person is licensed. However, Georgia, unlike Pennsylvania and many other states, takes it a step further and requires the license to be on the person.

Defendants had a legal right to stop Raissi. "Possession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicious that

the individual maybe dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed." United States v. Cooper, 293 Fed.Appx 117, 2008 WL 4276904 (3rd Cir.), quoting Commonwealth v. Robinson, 410 Pa.Super. 614, (1991). An officer's observance of an individual's possession of a gun in a public place is sufficient to create reasonable suspicion. Cooper, 293 Fed.Appx at 119, 2008 WL 4276904 at 2; United States v. Bond, 173 Fed. Appx. 144, 146, 2006 WL 751509 (3rd Cir.); Commonwealth v. Romero, 449 Pa.Super. 194 (1996).

Plaintiffs' pointing out that the Pennsylvania law only applies to Philadelphia is a distinction without meaning. The important point is that carrying a gun is only a crime if there is no license, like Georgia. Similarly, Plaintiffs' distinction regarding whether a lack of a license is an element of the crime is irrelevant. Even if through word construction, it were found that lack of license is an element of O.C.G.A. §16-11-128, as in Bond, it is not an element of O.C.G.A. §16-11-126, and Defendant Nicholas suspected Raissi for violating both crimes. Nicholas depo. pp. 30-31.

1. MARTA Crime Records

Defendants' presented 2008 and 2009 crime statistics related to incidents with guns on MARTA property. Dorsey Aff. ¶¶ 4-6. Plaintiffs' allege that these statistics are not put into perspective. However, Plaintiffs' attempt at putting the statistics into perspective is illogical. Plaintiffs compare the crime statistics for MARTA to the crime statistics for the State of Georgia. MARTA's jurisdiction covers a portion of two counties in Georgia (Dekalb and Fulton). Plaintiffs' compares MARTA crime statistics to the crime statistics for 159 counties. Of course there are more gun related crimes in the entire State of Georgia, than on MARTA. Plaintiffs seem to imply that there should be some higher number of shootings or gun related crimes before MARTA becomes concerned for the public. Defendants disagree. One shooting, or gun related crime on MARTA is tragic for both MARTA and the patron involved.

More importantly, the purpose of the statistics is not just to show the volume of crime on MARTA, but also to show that there is notice to the MARTA Police Department and its officers that there are individuals carrying guns on to MARTA property without permits. It is further common knowledge, as noted by the statistics that the gun related

incidents are being committed primarily by individuals without permits. (Dorsey Aff. ¶¶3, 4,&7; Milton Aff. ¶6,7,&8.[1]

2. Extraordinary Care

Contrary to Plaintiffs' assertions, Defendants do not contend that Georgia law excuses MARTA from the Fourth Amendment. MARTA's position is that due to the statutory duty of extraordinary care, MARTA is obligated to act as a community caretaker as it relates to the patrons of MARTA. The statute also places on MARTA a heighten safety requirement, which in essence, lowers the expectation of privacy to its patrons.

As common carriers, MARTA owes a duty of extraordinary care to its patrons O.C.G.A.§46-9-132. Unlike most governmental police agencies, MARTA Police owe a higher duty of care to the public that they serve. In essence, the same higher responsibilities that allow schools and airports to have relaxed seizure requirements apply to MARTA. Public school administrators have a heighten burden of providing a safe haven for students. U.S. v. Aguilera, 287 F.Supp. 2d 1204 (E.D. Cal. 2003). See also New Jersey v. T.L.O., 469 U.S. 375, 339, 105 S.Ct. 733 (1985).

[1] Knowledge of one officer is imputed to another when officers are working closely together. U.S. v. Kapperman, 764 F.2d 786, 791 fn5 (11th Cir. 1985); U.S. v. Edwards, 885 F.2d 377,383 (7th Cir. 1989); Collins v. Nagle, 892F.2d 489, 495 (6th cir. 1989).

Schools require heighten security due to the responsibility to children. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655, 115 S.Ct. 2386 (1995). Likewise, MARTA requires heighten security to provide the extraordinary diligence and responsibility that MARTA is obligated to provide for its patrons, which includes children and disabled citizens.

Airports have a similar heighten security requirements due to the need for safe air travel. U.S. v. Fofana, 620 F.Supp.2d 857 (S.D. Ohio 2009) In airports there is a concern of people taking weapons onto plane where the passengers are a captive audience, public transportation has the same concern. The Department of Homeland Security (DHS) and the Transit Security Administration (TSA) have designated Atlanta (MARTA) as one of eight jurisdictions with a TIER I, highest risk transit agency for terrorist attacks.[2] MARTA Police have the tasks of taking steps to lessen security risks and protecting the traveling public. Due to this heighten security requirement, the expectation of privacy under the Fourth Amendment is lower for its patrons. It is important to note that Defendants do not contend that a crowd of adults invokes a public safety concern, instead it is the fact that the public will be

[2] See June 2009 *Report to Chairman, Committee on Homeland Security, House of Representative –Transit Security Grant Program.*
Found at www.gao.gov./pdfs/GAO-09-491.

captive while exposed to possible danger, similar to an airplane.

In the end, MARTA is not trying to stop people from lawfully carrying guns aboard MARTA, but it has a duty for the protection of its employees and patrons, to ensure that the people seen carrying guns, are indeed lawfully carrying the guns. Using a balancing test, the interest of the government in ensuring safety for citizens aboard a closed train where they are a captive audience, far outweighs the minimal intrusion to a person of having to show a gun license, which the law requires that they have on their person. The intrusion is even lessened by the fact that it only occurs if someone takes out the gun, or is carrying the gun openly.

II. Defendants Had A Right to Seize the Firearm

Plaintiffs allege that Defendants did not have a right to seize the firearm because they did not establish that Raissi was armed *and dangerous*. The fact that he had a firearm in close proximity made him dangerous. There is no question that Officer Nicholas feared for his safety. For his safety, he chose not to encounter Raissi in the parking lot. When he encountered Raissi, Nicholas "removed the threat away" by taking the gun. Nicholas depo pp.15-18.

Nicholas stated numerous times that he was concerned that Raissi could endanger him. Id. pp.43-44.

Interestingly, in Anderson v. State, 221 Ga. App. 176 (1996), the court stated that "the legislature intended to compel persons who carried such weapons to so wear them about their persons that others who came in contact with them might see that they were armed and dangerous..." Id. Anderson involves an arrest on MARTA property for having a concealed weapon (O.C.G.A. 16-11-126) and carrying a weapon without a license (O.C.G.A. 16-11-128), the same two laws that Nicholas was concerned that Raissi had violated. Nicholas depo. p. 31. The relevance of this case is that it implies that seeing a weapon puts one on notice that the person carrying is both armed and dangerous.

III. Qualified Immunity

A plaintiff seeking to overcome the defense of qualified immunity 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. Siegert v. Gilley, 500 U.S. 226, 232, (1991). Plaintiffs contend that the law was clearly established because in Delware v. Prouse, 440 U.S. 648 (1979), the Supreme Court 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. Although qualified immunity case law does not require that the cases be fundamentally similar, it does require that the cases be similar enough to give the officer fair warning that their alleged conduct was unconstitutional. This 1979 case is not sufficient to give Officers Milton and Nicholas fair notice of the law regarding whether knowledge of a person carrying a gun is reasonable suspicion to stop the person to investigate for licenses. There have been numerous cases since 1979, both pre and post J.L., that have found that the suspicion of a firearm warranted stopping the person. See Cooper, 293 Fed. Appx. 117,; Bond, 173 Fed. Appx. at 146. This is even true where it is legal to have a firearm with a license. Id.

Plaintiffs have cited no cases from this Circuit on the issue. In fact, there appears to be no cases in this Circuit that would indicate that under the circumstances of this case, even if Defendants violated Raissi's constitutional right, which they did not, that the right was clearly established at the time of the alleged violation. No reasonable police officers in the same position as Defendants would have known that their actions violated his constitutional rights. Raissi's claims against

the Defendants in their individual capacities are due to be dismissed.

IV. MARTA's Policy Does Not Violate The Fourth Amendment

To establish a MARTA policy, Plaintiffs must identify an officially promulgated policy or an unofficial custom or practice of MARTA, shown through the repeated acts of a final policymaker for MARTA. Grech v. Clayton County, 335 F.3d 1326, 1329 (11th Cir. 2003). If there is no officially adopted policies of permitting constitutional violations, Plaintiffs must establish a widespread practice that, although not authorized by written law or express policy, is so permanent and well-settled to constitute a custom or usage with the force of law. Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1481 (11thCir. 1991). Plaintiffs must also show the final policymaker's "acquiescence in a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity." Jett v. Dallas Indep. School Dist., 491 U.S. 701, 737 (1989). Plaintiffs have failed to do this.

It is very clear from the testimony of the officers, that although MARTA does not have a written policy or written procedure that governs what officers are to do when they see a person with a gun, they do have a practice. Milton depo. p.19; Dorsey depo. pp. 6-7,12-15. The practice

can best be explained through the training material that was used to train the officers. Dorsey depo. pp. 12-13. There is nothing in the training that violates the Fourth Amendment. In fact, Plaintiffs have not even alleged that there is anything in the training material that violates the Fourth Amendment. Plaintiffs' consistently assert that through the testimony of Dorsey and officers Milton and Nicholas, Plaintiffs have shown that Defendants have a practice of detaining anyone seen carrying a gun. Although Defendants dispute that such a procedure, as explained by the officers, is a violation of anyone's constitutional rights, even if it were, there is no evidence of acquiescence by the final policy maker for MARTA.

1. Practice Not Unconstitutional.

Assistant Chief Dorsey stated in his deposition that

> "if an officer actually observes someone with a firearm in the system, the officer is going to approach the individual and ask to see their credentials as far as their firearms license. And they're also going to ask for their Georgia ID, valid ID, to compare the two to make sure they actually coincide with each other, then at that point the person will be released."

Dorsey depo. pp. 6-7. This is a consensual encounter. An officer approaching a person and asking questions does not make it a seizure. Officers are allowed to ask questions of anyone, including gun owners without having any evidence

creating suspicion. Valentine, 232 F.3d at 356; see also Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386 (1991). Even asking for identification, does not make it a seizure. People v. Franklin, 192 Cal. App.3d 935,942 (1987). Even in the scenarios where Asst. Chief Dorsey indicates that officers would order a person to stop and produce identification, if the person refuses they may still leave off of MARTA property. Dorsey depo. pp.10-11. The person is not restricted from leaving, and they have not submitted to authority. If police make a show of authority and the suspect does not submit, there is no seizure. Valentine, 232 F.3d at 358; California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991). Attempted seizures of a person are beyond the scope of the Fourth Amendment. County of Sacramento v. Lewis, 523 U.S. 833, 845 n.7, 118 S.Ct. 1708 1716 n.7 (1998). The practice describe by Dorsey does not amount to a Fourth Amendment violation by MARTA.

2. No Final Decision Maker

Finally, even if this Court were to find that there exist a practice of seizing persons seen with guns in violation of the Fourth Amendment, there is no evidence of a final decision maker's acquiescence of such a long standing practice. Liability under § 1983 attaches only if (1) the decision-maker (2) possessed final authority to

establish governmental policy (3) with respect to the action taken. Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986). Only the MARTA Board of Directors and the Georgia Legislature have the authority to make law and establish by-laws, rules and regulations for MARTA. See Ga. L. 1976, pp.3407-3408. Plaintiffs fail to provide any evidence that either Defendants Dunham or Dorsey is, in any way, a final decision-maker for MARTA. Asst. Chief Dorsey stated that he reports to the Chief of Police. Dorsey depo. p. 6. His actions are subject to review and ultimate approval of Chief Dunham Id. p.14. Even if it could be argued that Chief Dunham is a final policy-maker for the Police Department, there is no evidence of her approving anything except the training bulletin. Id. There is no evidence of Chief Dunham knowing of any other practice other than what is in the training bulletin. As mention earlier, the training bulletin is constitutional. Plaintiffs failed to establish that either Dorsey or Dunham is a final decision-maker whose actions can serve as the basis of § 1983 liability for MARTA.

CONCLUSION

For the above stated reasons in Defendants' Second Motion for Summary Judgment should be granted.

This 23rd day of October, 2009.

Respectfully Submitted,

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CERTIFICATE OF FONT TYPE, SIZE AND SERVICE

I hereby certify that on October 23, 2009, I served Plaintiffs' counsel by e-filing "DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' 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:

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This 23rd day of Oct., 2009

/s/ Paula Morgan Nash
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