DOCKET No.: 14-13739

The United States
Court of Appeals
For
The Eleventh Circuit

GeorgiaCarry.Org, Inc., et. al., Appellants
v.
U.S. Army Corps of Engineers, Appellees

Appeal from the United States District Court
For
The Northern District of Georgia

The Hon. Harold L. Murphy, District Judge

Brief of Amicus Curie, Florida Carry, Inc.

Eric Friday
Fletcher & Phillips
541 E. Monroe St.
Jacksonville, FL 32202
904-353-7733

Lesley McKinney
McKinney, Wilkes & Mee
13400 S. Sutton Park Dr. #1204
Jacksonville, Florida 32224
904-620-9545

Attorneys for Amicus Curie, Florida Carry , Inc.

Rule 26.1 Corporate Disclosure

Amicus Curie, Florida Carry, Inc. Certifies that it has no parent or subsidiary entity and is not publicly traded.

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INTEREST OF AMICUS CURIE

Florida Carry is a non-profit, non-partisan, grassroots organization dedicated to advancing the fundamental civil right of all Floridians to keep and bear arms for self defense as guaranteed by the Second Amendment to the United States Constitution and the Florida Constitution's Declaration of Rights. All parties have consented to the filing of this brief, by Florida Carry, Inc., pursuant to Rule 29, Fed. R. App. P.

Florida Carry stands to represent our members, the approximately 8 million gun owners, and countless knife and defensive weapon carriers of Florida. We are not beholden to any national organization's agenda that may compromise that mission. Florida Carry is the state's largest independent second amendment advocacy organization.

The Defendants/Appellee in this case, specifically Col. John. J. Chytka and the Mobile District of defendant, U.S. Army Corp of Engineers exercise control over all Corps projects and recreational land in Florida, from the Apalachicola basin west. Furthermore, the other Corps of Engineers offices within the Eleventh Circuit operate numerous recreational lands throughout the rest of Florida, often in conjunction wtih state agencies that are precluded by Florida law from promulgating or enforcing rules, policies, or regulations which regulate firearms in

any way. For example, the Lake Okeechobee project involves "22 recreation areas managed by other agencies." http://www.saj.usace.army.mil/Missions/CivilWorks/Recreation.aspx : visited 11 Nov. 2014.

Members of Florida Carry utilize Corps of Engineers managed locks and waterways as well as Corps managed lands for business and recreational purposes.

STATEMENT OF AMICUS CURIE

No counsel for either party had any part in the preparation of this brief. Neither party contributed any money or in kind assistance in the preparation of this brief. No person other than the amicus curie, its members, and counsel contributed any money or in kind assistance in the preparation of this brief.

ARGUMENT

The decision below has three primary faults. The first is the Court's conclusion that intermediate scrutiny is the proper standard of review. The second, is the assumption that all Corps of Engineers (hereinafter "CoE") property constitutes a sensitive place under the *Heller* Court's list of presumptively valid regulations. The third assumption is that allowing the lawful carry of firearms increases the danger to other users and CoE staff.

I. An analysis of Second Amendment jurisprudence and appropriate level of scrutiny should be based on the Ninth Circuit's ruling in *Peruta.*

The *Peruta* decision from the Ninth Circuit, made the first attempt at a comprehensive review of the post-*Heller* landscape. The *Peruta* Court noted that some Second Amendment decisions are more equal than others. *Peruta v. County of San Diego,* 742 F.3d 1144, 1155 (9th Cir. 2014). The *Peruta* court started with two fundamental premises that it drew from the Supreme Court's decision in *Heller*. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). The first premise, is that the "bearing of arms is, and has always been, an individual right. The second, is that the "right is, and has always been, oriented to the end of self-defense." The Ninth circuit concluded that based on *Heller*, any contrary interpretation whether in 1791 or last week was in error. *Peruta* at 1155. No decision in any circuit has since contradicted these basic premises.

Relying on these two fundamental premises from the *Heller* Court, the *Peruta* Court reviewed the landscape of Second Amendment jurisprudence and concluded that there were three functional categories of cases post *Heller*, those finding an individual right for purposes of self-defense, those finding an individual right for some other purpose, and those ignoring the Supreme Court's finding of an individual right. *Id.* at 1156. The Court reasoned that any case that

did not hold true to what it considered the fundamental holdings of *Heller* were of little value to its resolution of the case. *Id.* Similarly, the Seventh Circuit rejected an attempt to have it repudiate the Supreme Court's historical analysis of the Second Amendment. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012)(rejecting any argument that the Supreme Court's *Heller* analysis confined the exercise of the Second Amendment to the home).

This Court should follow the analysis of the other circuits which have held true to the basic premise and holding of *Heller*, and reject from consideration any decision that has sought to arrive at its decision through either ignoring the *Heller* analysis, or repudiating its reasoning. The Court should also follow the *Heller* and *Peruta* Courts in finding that a complete ban on bearing any arms, including the most commonly used arm for self-defense, cannot survive any level of scrutiny. The ban at issue here goes even farther than the ban in *Heller* by prohibiting not just handguns, but all guns, for the very reason the Second Amendment was enshrined, self-defense.

II. Corps of Engineer projects are distinguishable from Army bases, and mere operation by the Corps does not automatically constitute a "sensitive place."

The argument of the CoE below and in the Idaho case, *Morris v. U.S. Army Corps of Engineers*, 2014 U.S. Dist. LEXIS 147541 (D. Idaho 2014), primarily relies on two claims. First, that all CoE property constitutes a sensitive place, and second that the CoE is acting in its capacity as a landowner rather than as a governmental authority. See,

The CoE arrives at the first claim on the basis that as a part of the U.S. Army, its civil works projects are no different than a military base and that the projects are critical to the national defense. While it is true that the CoE is a part of the Department of the Army, its relationship to the military virtually ends there. One need only examine the leadership page of the Mobile District to see that of the five key figures in its leadership, only the top two are actually Army officers. The next three persons in leadership are civilians. http://www.sam.usace.army.mil/About/Leadership.aspx, visited 11 Nov. 2014.

Unlike Army bases which have manned gated entrances and regular security, not to mention armed military police, not all CoE sites are even manned 24-7. Many sites such as boat ramps may have no person on regular scheduled duty.

CoE also attempts to claim that its allowance of visitors for recreation purposes is purely discretionary. The Court below found this argument pursuasive

reasoning that if the right of entry to the public was discretionary by the CoE, then the CoE could place restrictions such as a waiver of one's Second Amendment rights as a condition of entry.[1] However the Court was operating from a faulty premise.

The authorizing statute which provides for the construction and operation of public parks and recreation areas at CoE property directly contradicts the claims of the CoE and the Court below.

> The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, . . .

16 USCS § 460d. While the Secretary of the Army could arguably conclude that allowing persons to be in a certain area, such as within a specified distance of a dam is contrary to the public interest, nothing in this statute allows him to decide to exclude persons merely because they exercise a constitutional right in a non-disruptive manner. Additionally, 36 C.F. R. 312.2 prohibits discrimination against

[1]It remains to be seen if the Court below would carry this analysis through to find that a person's First or Fourth Amendment rights cease by choosing to recreate on public land open for that purpose.

persons based on suspect classifications. Prohibiting a person for the exercise of a fundamental, enumerated, pre-existing right, should be no less suspect.

The CoE's claim that its regulations are necessary for the security of its water management projects is directly contrary to federal law. While no federal law gives the CoE specific authority to regulate the possession of firearms on all of its property, federal law specifically prohibits the Department of the Interior from having such regulations at its similar facilities operated by it Bureau of Reclamation. At DOI's Reclamation projects the ban on firearms is limited to the facilities themselves, such as dams and buildings or designated special use areas. Possession of firearms is allowed on attached recreation areas. *Firearms at Army Corps Water Resource Projects: Legislation and Issues*, Congressional Research Service, Nicole T. Carter, 2012.[2]

III. The lack of security at CoE projects is an important reason why lawful firearm possession is necessary. The prohibition on firearms does nothing to enhance the security of CoE projects.

[2]"The Congressional Research Service (CRS) works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, regardless of party affiliation. As a legislative branch agency within the Library of Congress, CRS has been a valued and respected resource on Capitol Hill for more than a century.

CRS is well-known for analysis that is authoritative, confidential, objective and nonpartisan. Its highest priority is to ensure that Congress has 24/7 access to the nation's best thinking." http://www.loc.gov/crsinfo/ visited 11 Nov. 2014.

The argument of the CoE is that because there is no armed security at their sites, the only sensible response is to prohibit firearms by regulation and signs. Presumably, it is the opinion of the CoE that a person such as the Aurora Theater Shooter will suddenly, upon seeing signs prohibiting firearms, conclude he cannot conduct his mayhem on CoE property and will have to look elsewhere for victims, despite the admitted concentration of people who use this most densely used of all federal recreation areas.[3]

While CoE claims its property is sensitive, it provided no evidence below of what security measures it utilizes to prevent the possession of firearms and other weapons on its property. In fact, by its own admission, there is no security provided to protect the public from harm, yet the CoE refuses to let people exercise their basic fundamental right to defend themselves.

Judge Posner found that the empirical evidence before the *Moore* Court failed to "establish a pragmatic defense" of Illinois ban on all carry of firearms outside the home. *Moore v. Madigan*, 702 F.3d 933, 939 (2012). The CoE has not presented any compelling study that the Moore Court did not have, but seems to resort to the standard parade of horribles that is offered anytime the right to carry

[3]Killers seek gun-free zones for attacks, John Lott. http://crimepreventionresearchcenter.org/2014/06/cprc-in-the-philadelphia-inquirer-killers-seek-gun-free-zones-for-attacks/ : visited 11 Nov. 2014

is expanded, but which never comes true. The failure of the CoE to take any active security measures belies both the claim that a prohibition on firearms is necessary since the CoE is not taking any steps to actively prevent possession of weapons, nor have they taken steps to protect the public.

IV. CoE restrictions on firearms impair the constitutional right to travel and the right to use navigable waterways.

All []Citizens have a right under the Florida Constitution[4] to chat on a public street, stroll aimlessly, and saunter down a sidewalk." *Catron v. City of St. Petersburg*, 658 F.3d 1260 (11th Cir. 2011). There is no less of a right to travel the waterways of the state and nation, as instrumentalities of interstate commerce. See, *United States v. Guest*, 383 U.S. 745 (1965). The CoE regulation at issue effectively prohibits the use of waterways and locks by persons traveling in interstate commerce unless they give up their Second Amendment right to bear arms.

V. CoE restrictions conflict with State law and require state entities to violate state law in order to partner with CoE.

As stated *supra*, many CoE projects are operated in conjunction with state or local entities. Under Florida law these state agencies and local entities are

[4]And under the First Amendment to the Constitution of the United States

prohibited from promulgating or enforcing any rule, regulation, or policy regarding firearms that is not specifically authorized by the Florida Legislature. *Florida Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966 (Fla. 1st DCA 2013). The rational for upholding the regulation offered by the CoE is directly contrary to findings of the Florida Legislature that firearms are useful in self-defense. Sec. 790.25, Fla. Stat. While the supremacy clause unquestionably make the CoE regulation superior to state law, such a policy could also impair joint state and federal cooperation.

The Florida Constitution has long recognized a right to bear arms, and the Legislature has specifically recognized this right by statute. Sec. 790.25, Fla. Stat. Surprisingly, given the CoE's argument, no evidence exists that the state of Florida has experienced the problems the CoE would surely encounter were its regulation struck down. This is in spite of the fact that Florida has over 1.3 million active concealed weapons firearms licenses, and does not even require such a license for those engaged in hunting, fishing, camping, target shooting, or traveling to or from. Furthermore, most states allow liberal open and concealed carry of firearms Presumably, if the CoE parade of horrible claims were true, it would be able to point to at least one study or one state that had found the liberal bearing of arms by citizens with lawful authority to do so to be problematic and

therefore restricted or curtailed in the last 27 years. Rather, almost every state in the country during that time has liberalized the carry of firearms and has likewise seen a reduction in violent crime.

Conclusion

The CoE regulation at issue is not a reasonable regulation consistent with *Heller*. Rather, it is a complete ban on the exercise of a fundamental enumerated right. As the *Heller* court stated, the enshrinement of a right necessarily takes certain policy choices off the table. The CoE policy choice here is firmly within that category. Those Court's that have ruled consistent with *Heller* have uniformly held that bans are bans, not regulations, and cannot survive any level of scrutiny.

Florida Carry asks this Court to continue this line of reasoning and hold that absolute bans must be narrowly tailored to the specific circumstances to protect true sensitive places, not unfettered bureaucratic capriciousness.

The Court should grant the requested injunction and immediately restore the right to bear arms to the citizens of the Eleventh Circuit who wish to use the land set aside by Congress for recreational use without sacrificing their rights or their safety.

CERTIFICATE OF COMPLIANCE

I certify that this Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Brief of Amicus Curie contains 2427 words as determined by the word processing system used to create this brief.

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Brief of Amicus Curie via U.S. Mail this 12th day of November 2014 upon:

Abby C. Wright
U.S. DOJ
950 Pennsylvania Ave., NW, Room 7252
Washington DC 20530

John R. Monroe
9640 Coleman Rd.
Roswell, GA 30075

I also certify that I filed the foregoing Brief of Amicus Curie by ECF as well as by mailing the required number of copies by U.S. Mail to the Clerk on November 12, 2014.

/s/ Eric J. Friday
Eric J. Friday
541 E. Monroe St.
Jacksonville, FL 32202
Fla. Bar. No.: 797901
904-353-7733

Lesley McKinney
13400 S. Sutton Park Dr. #1204

Jacksonville, Florida 32224
Fla. Bar No.: 67976
904-620-9545

Attorneys for Amicus Curie,
Florida Carry, Inc.