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

Reply Brief of Appellants

John R. Monroe
John Monroe Law, P.C.
9640 Coleman Road
Roswell, Georgia 30075
(678) 362-7650
Attorney for Appellants

Table of Contents

Table of Citations

Cases

Summary of the Argument

The Corps' Second Amendment analysis strays from the precedent of this Court and other Circuits. The Corps fails in its burden to establish that the people of 1791 did not understand the Second Amendment right to include carrying firearms on government-owned recreational property. Applying any standard of scrutiny leads to the conclusion that the Ban is unconstitutional.

Argument and Citations of Authority

I. *The Corps' Analysis of Second Amendment Jurisprudence is Flawed*

The Corps begins its analysis by suggesting the two-pronged approach used by several circuits to examine Second Amendment cases. First, the Court considers whether the challenged provision burdens the rights protected by the Second Amendment. If it does not, then the inquiry ends there. If it does, then the Court must apply an appropriate level of scrutiny to determine if the challenged provision passes constitutional muster. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260, FN 34 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 856 (2013), *citing Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

A. The Corps Cannot Meet Its Burden

For the first prong, the Court must consider the meaning of the right at the time it was adopted. *Ezell*, 651 F.3d at 701, *citing District of Columbia v. Heller*, 554 U.S. 570, 634-635 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.") The burden is on the government to establish that the challenged provision was not protected by the constitutional provision at the

time it was established. *Ezell*, 651 F.3d at 702-703 ("Accordingly, if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant histo5rical moment – 1791 or 1868 – then the analysis can stop there…. If the government cannot establish this – if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected – then there must be a second inquiry….") [emphasis in original].

In its brief, the Corps declares that restrictions on firearms possession in "sensitive places" do not burden conduct protected by the Second Amendment. Corps Brief, p. 10. Pretermitting whether all Corps property all over the country, regardless of its use or nature, is "sensitive," the Corps' declaration abandons the inquiry adopted by this Court from the 7th and other Circuits. The Corps seems to assume that "presumptively lawful" restrictions on carrying firearms in sensitive places are outside the scope of the Second Amendment. This assumption is flawed for two reasons.

First, when the Supreme Court declared that "sensitive place" restrictions were "presumptively" (and not conclusively) lawful, it implicitly left open the possibility that the presumption could be overcome. That is, the presumption is merely a description of the likely outcome ***after*** applying

the appropriate analysis. *Tyler v. Hillsdale County Sheriff's Department*, 2014 U.S.App.LEXIS 23929, 2014 FED App. 0296P, p. 34 (6th Cir., December 18, 2014) ("*Heller's* 'presumptively lawful' language does not suggest that a presumption of constitutionality attaches to the *Heller* exceptions. An equally valid, if not better, reading of the language is that the Court presumed that it would find the *Heller* exceptions constitutional *after applying* some analytic framework.") [Emphasis in original].

Second, presuming constitutionality, as the Corps suggests, is an abrupt abandonment of the methodology the Corps urges this Court to follow. That is, the Corps makes no attempt to carry its burden showing that in 1791, the people did not intend for the Second Amendment right to apply to the now12 million acres of land and water controlled by the then nascent Army Corps of Engineers.[1] The Corps does not cite to a single source of any kind that indicates the people of 1791 saw any such limitation on the Second Amendment.

As noted by *Ezell*, if the government fails to meet its burden, or if the historical information available is just too ambiguous, then the reviewing court must go to the second prong of the inquiry and apply some form of

[1] http://www.usace.army.mil/Missions/CivilWorks/Recreation.aspx

scrutiny. Because the Corps is unable to carry its burden, the next step is to determine the appropriate level of scrutiny to apply to the Corps' ban.

B. Strict Scrutiny Should Apply, But the Ban Fails Under Any Scrutiny

The Corps urges this Court to conclude that "at most, intermediate scrutiny applies…." Brief, p. 17. Actually, what the Corps would like to be the ceiling is really just the floor. Of the three traditional levels of scrutiny in constitutional challenges (rational basis, intermediate scrutiny, and strict scrutiny), *Heller* forecloses application of rational basis. 554 U.S. at 628, FN 27. What the Corps should have said is "at least, intermediate scrutiny applies."

The Corps would have this Court believe that other circuits almost universally apply intermediate scrutiny to Second Amendment cases, but the situation is not that succinct. The 6th Circuit recently undertook a thorough review of scrutiny of Second Amendment cases by Circuits throughout the county. *Tyler*, pp. 10-12, concluding, "There are strong reasons for preferring strict scrutiny over intermediate scrutiny." For a lengthy discussion of why strict scrutiny ought to apply, see p. 12 of *Tyler*.

Regardless of the level of scrutiny applied, however, the Ban fails constitutional muster. The Ban has been declared unconstitutional by the District Court for the District of Idaho and the Corps has been permanently

enjoined from enforcing the Ban in that state. *Morris v. U.S. Army Corps of Engineers,* 2014 U.S. Dist. LEXIS 147541, Case No. 3:13-CV-336-BLW, Opinion on Cross Motions for Summary Judgment, (D. Id., October 13, 2014).

As noted by the Court in *Tyler,* the level of scrutiny applied may be more academic than meaningful. Whether the governmental interest at stake is "important" (intermediate scrutiny) or "compelling" (strict scrutiny) is immaterial. Assuming the Corps' interest is protecting the safety of its employees and visitors, that interest fits either test.

That leaves us with a determination of whether the Ban is a "close fit" (intermediate scrutiny) or is "narrowly tailored" (strict scrutiny) to the government interest. Narrowly tailored measures leave little room for over- or under-inclusion. Close fits leave a little more room, but still do not tolerate significant deviations.

The Ban is both over- and under-inclusive. The Ban is over-inclusive because it covers all people on all Corps property regardless of any attendant circumstances. It applies to the adjacent landowner with a permit to have a boat dock on Corps land, who is prohibited from possessing a loaded firearm on his own boat dock. It applies to the camper in a remote area where bears and other wildlife, as well as would-be criminals may be lurking. It applies

to the houseboat owner who spends several days on his boat on Lake Allatoona, with no protection against burglars or robbers. It applies regardless how far one is from anything even remotely resembling a "sensitive" facility.

The Ban is under-inclusive because it exempts loaded firearms used for hunting or sport shooting (in approved areas). That is, the "sensitivity" the Corps ascribes to ***all*** its lands vaporizes when there is hunting or sport shooting to be done. The same person with the same firearm containing the same ammunition is a danger to employees and visitors when driving his car on Corps property, but the danger disappears when he steps out of his car with his gun.

The Ban is indecipherable when someone both recreates and hunts or sport shoots. The camper who plans to hunt or shoot obviously possesses both firearms and ammunition. He is violating the Ban when not hunting or sport shooting and he is not violating it otherwise.

Whether the Ban has to be a "close fit" or "narrowly tailored," it misses the mark either way.

II. The Corps' Other Arguments Are Unavailing

The Corps argues that it is acting in its proprietary capacity and not using its police powers in enforcing the Ban. The Ban itself undercuts any

such argument. A private property owner is of course free to exclude people from her property for any reason, including that the people are carrying firearms. A visitor that violates such a rule may be ejected by the property owner, under pain of prosecution for trespassing for refusing to leave.

The Corps enjoys some rights as a private property owner (though not the full panoply of rights – the Corps cannot, for example, exclude on the basis of race the way a private landowner can). It is plain, however, that the Corps is not acting as a property owner. The Ban is more than a mere rule, to be enforced by the Corps the way a property owner enforces any other rule. Not content to rely on property rights, the Corps added to its Ban something only the sovereign can do – attach criminal penalties.

A person who violates the Ban is not merely subject to ejection from Corps property. The violator is subject to a fine of up to $5,000 or imprisonment for up to 6 months, or both, and may be cited and required to appear before a federal magistrate to answer to the charge. 36 CFR § 327.25. Private property owners have no such enforcement powers. Clearly, the Corps is flexing its governmental muscles and not its property owner rights.

The Corps attempts to make something of the fact that the Ban only applies on Corps property, and a would-be firearm carrier is free to carry

somewhere else. Whatever small attraction this argument may have had was dispelled by *Heller* and *McDonald v. City of Chicago,* 561 U.S. 742 (2010). Gone is the possibility of arguing, "Illinois after all is a big state, surely a ban on possessing guns only in the City of Chicago leaves plenty of room to carry a gun elsewhere."

The Corps also attempts to justify its Ban based on court ratification of a Postal Service ban on guns in the restricted portions of Postal property. The Corps cites to *United States v. Dorosan,* 350 F.Appx 874 (5th Cir. 2009), a case in which a postal employee was convicted for having a gun in his car in the portion of the parking lot used for "loading mail and staging … mail trucks." While the *Dorosan* opinion is light on analysis, it is clear that the fact that the parking lot in question was not open to the public played a significant role. Compare *Dorosan* to *Bonidy v. U.S. Postal Service,* No. 10-CV-02408 (D. Colo., July 9, 2013) Memorandum Opinion and Order, in which the Court ruled the Postal Service could not enforce its ban in the public parking lot. (Both parties have appealed to the 10th Circuit – oral arguments were heard October 1, 2014).

GCO's position in this case is consistent with the outcomes in both *Dorosan* and *Bonidy.* Where the property is restricted from public access and used for governmental functions, such as the sorting of the mail,

firearms possession (and even personal presence) presumably can be restricted. This is so because, though the Second Amendment is implicated, the governmental interest of protecting governmental functions from disruption and protecting governmental employees is tailored sufficiently by applying only where the public is not allowed in the first place. Thus, the dam control room or power plant on Corps property may be restricted from firearms.

But, where the property is not restricted from public access and is not used for a government function, possession presumably cannot be restricted. The Second Amendment certainly is still implicated, but the government has no special interest in banning guns on all government property and such a ban cannot meet any level of scrutiny. Thus, the Corps cannot ban guns on all its property.

The Corps told the District Court it potentially would have to close its facilities for some period of time to adjust to a ruling that the Ban cannot be enforced. Notably, however, the Corps has not told the Courts that it had to close any facilities in Idaho as a result of the permanent injunction there. That argument is merely hype.

The Corps further expands its parade of horribles by describing how it has no armed security on its property and the presence of firearms would

cause untold security issues. There are several problems with this argument. First, the lack of armed security indicates that Corps property is not as "sensitive" as the Corps would have the Court believe. Second, the Corps conveniently forgets that it allows armed hunting on its property. That is, during hunting seasons and on portions of Corps land designated for hunting, people are free to roam on Corps property with loaded firearms. The problems the Corps claims would necessarily flow from the presence of such firearms just do not materialize. Lastly, the Corps only bans ***loaded*** firearms. The panic, tensions, interpersonal issues, and all the other matters raised by the Corps can be present based on ***unloaded*** firearms that already are there. The Corps fails to explain why panic would not ensue from a loaded firearm that does not ensue from an unloaded firearm.

Conclusion

The District Court erred in failing to grant a preliminary injunction. For the reasons articulated above, this Court should reverse the District Court with instructions to issue a preliminary injunction.

JOHN R. MONROE
ATTORNEY AT LAW

/s/ John R. Monroe
John R. Monroe
Georgia State Bar No. 516193

9640 Coleman Road

Roswell, GA 30075
Telephone: (678) 362-7650
Facsimile: (770) 552-9318

ATTORNEY FOR APPELLANT**S**

Certificate of Compliance

I certify that this Reply Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Reply Brief of Appellants contains 2,663 words as determined by the word processing system used to create this Reply Brief of Appellants.

/s/ John R. Monroe
John R. Monroe
Attorney for Appellants
9640 Coleman Road
Roswell, GA 30075
State Bar No. 516193
678-362-7650

Certificate of Service

I certify that I served a copy of the foregoing Reply Brief of Appellants via U.S. Mail on December 22, 2014 upon:

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

I also certify that I filed the foregoing Reply Brief of Appellants by mailing it via U.S. Mail to the Clerk on December 22, 2014.

/s/ John R. Monroe
John R. Monroe
Attorney for Appellants
9640 Coleman Road
Roswell, GA 30075
State Bar No. 516193
678-362-7650