

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

SARA CARTER, ET.AL.,)	
)	
Plaintiffs,)	CIVIL ACTION FILE NO.
)	
v.)	1:20-CV-01517-SCJ
)	
)	
BRIAN KEMP, ET.AL.,)	
)	
Defendants.)	

PLAINTIFF’S POST-TRO HEARING BRIEF

On April 15, 2020, the Court held a hearing on Plaintiffs’ Motion for a Temporary Restraining Order or in the alternative for a Preliminary Injunction. At the conclusion of the hearing, the Court invited the Parties to file post-hearing briefs. Plaintiffs will briefly address some of the arguments raised by Defendants.

Enforcement of O.C.G.A. § 16-11-126.

Defendant Kemp argued that O.C.G.A. § 16-11-126 is not heavily enforced, telling the Court that the Georgia State Patrol (“GSP”) only issued 13 *citations* in a two-year period. Kemp did not state how many *arrests* the GSP made during the

same period for that offense, and he provided no data for charges brought by county sheriffs or local police departments.

Kemp's data shows with certainty that O.C.G.A. § 16-11-126 *is* enforced. And that is just by officers that primarily enforce traffic laws and therefore deal with people who are in motor vehicles (and therefore do not need a GWL to carry). It is the sheriffs and local law enforcement that deal with people on the street and who are more likely to encounter people who are required to have a license to carry.

Kemp next argues that O.C.G.A. § 16-11-126 is not likely to be enforced because a law enforcement officer is prohibited by Georgia law from detaining a person *solely* to determine if the person has a GWL. O.C.G.A. § 16-11-137(b) ("A person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license.") It also is illegal for an officer to stop a motorist just to see if the motorist has a driver's license. *Delaware v. Prouse*, 440 U.S. 648 (1979). Nevertheless, no one could seriously argue that driving without a driver's license is not enforced.

There are plenty of scenarios where someone could be caught for carrying a weapon without a license. The Court observed that a person stopped for a traffic violation might get out of the car with a weapon on her side. Because she already

was being detained (for the traffic stop), nothing would stop the law enforcement officer from taking advantage of the detention to investigate whether the driver had a GWL. Likewise, if a person were involved in a shooting, say for being attacked in public and using her firearm for self-defense, the police are obviously going to check to see if she had a GWL.

Moreover, Plaintiffs are trying to be law-abiding citizens. Kemp is making a thinly veiled suggestion that Plaintiffs just violate the law because they probably will not be caught. Plaintiffs refuse to take that suggestion. If Kemp does not believe the law is worthy of enforcement, he should suspend enforcement of it as Plaintiffs have suggested.

Governor's Emergency Powers

Kemp then argues that he does not have the power to suspend enforcement of O.C.G.A. § 16-11-126 during the current emergency. He argues that weapons having nothing to do with a health emergency. Kemp overlooks, however, that O.C.G.A. § 38-3-51(d)(1) authorizes the governor during an emergency to “Suspend any regulatory statute ... if strict compliance with any statute ... would in any way prevent, hinder, or delay necessary action in coping with the emergency....” (the “Suspension Power”)

Kemp used the Suspension Power to suspend enforcement of the criminal violation of wearing a mask in public (O.C.G.A. § 16-11-38). Plaintiff's Exh. 1 (Exec. Order # 04.13.20.02). Plaintiffs do not argue that wearing masks could not be a "necessary action in coping with the emergency," but they do argue that carrying a weapon in public could be a necessary action in coping with the emergency. Kemp conceded at the hearing that he does not believe that O.C.G.A. § 16-11-126 should be enforced during the emergency. He, too, apparently believes Georgians ought to be able to carry weapons.

The Application of the Second Amendment Outside the Home

Next, Kemp argues that the Second Amendment does not apply outside the home, or at least there is no authority that it does. In response to that argument, Plaintiffs directed the Court to *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), in which the Court did in fact find the Second Amendment applies outside the home:

And one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home.... [A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman ... is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building

(complete with doorman) has a claim to sleep with a loaded gun under her mattress.

Id. When confronted with *Moore*, Kemp's rejoinder was that 7th Circuit opinions are not binding on this Court. Kemp is free to make that argument if and when he defends himself with qualified immunity for a damages claim. But right now, for the purposes of a preliminary injunction, Kemp's argument, that there is no authority that the Second Amendment applies outside the home, is foreclosed.

Toomer Says Marriage Licenses are Essential and GWLs are Non-Essential

Toomer offers no rationale for her position that marriage licenses are essential and GWLs are non-essential. Faced with that impossibility, she instead argued that marriage licenses are easier to issue because they do not require fingerprinting and a background check. Perhaps so, but the ease of performing a task does not define whether it is essential.

Toomer is hard-pressed to explain how it is that a marriage is essential during this emergency, and the carrying a weapon in the face of civil unrest is not. If anything, the opposite is true. The right to keep and bear arms is a fundamental constitutional right that is enumerated in the Constitution. The right to marry is unenumerated. Carrying a weapon is necessary to protect one's self in case of

confrontation. Marriage may be an important institution in our social fabric, but it is not crucial in the short-term defense of life.

The Probate Judges Council Advises Following State Law

Attached to Toomer's Affidavit was a Memorandum from the Council of Probate Court Judges of Georgia (the "Memorandum"). The Memorandum states, *inter alia*, "The Declaration [of Judicial Emergency] **DOES NOT** change the law.... If the Code says you **SHALL** do something, you still must do it." [Emphasis in original]. O.C.G.A. § 16-11-129 says that probate judges "shall" issue GWLs, yet Toomer still refuses to do so.

Alternative Fingerprinting is Available

Plaintiffs suggested during the hearing that Toomer could make use of an alternative fingerprinting system if she chose to. She carefully chose her words, not denying the existence of alternatives, but instead saying that such alternatives were not in the record. While it is incredible that Toomer is not aware of the information, Plaintiffs are now putting that information in the record.

For years now, the Georgia Bureau of Investigation ("GBI") has used the Georgia Applicant Processing Service ("GAPS") for fingerprinting and background check services. Information about GAPS may be found at the GBI's web site.

<https://gbi.georgia.gov/georgia-applicant-processing-service>. GAPS is administered by a company called Gemalto Cogent, which also is the company that manufactures the “Livescan” machines used for capturing fingerprints digitally. Gemalto Cogent maintains sites around the state for capturing fingerprints for applications. A list of the sites, including nine in Fulton County, is available on Gemalto Cogent’s web site at https://www.aps.gemalto.com/ga/GA_regions_html/reg_3.htm. Gemalto Cogent has a short description of how the service works on its web site:

Electronic submission of fingerprint images will involve the use of a Gemalto Cogent Livescan machine. The Livescan captures fingerprint images and demographic data and submits this information to GBI. GBI conducts a search of its criminal history records using the fingerprint images. In some cases, these images are also forwarded to the FBI where a Federal Criminal History Record search is also conducted. Notifications of the search results are then forwarded from the GBI/FBI to Gemalto Cogent where these results are then electronically disseminated to the Georgia company or agency that requested the search to be completed.

<https://www.aps.gemalto.com/ga/index.htm>. Gemalto Cogent has information on its web site telling agencies such as Toomer’s how to register with them.

<https://www.aps.gemalto.com/ga/index.htm>. Contrary to Toomer’s assertion at the hearing, procurement is not necessary because GAPS is done at no cost to the agency. The cost of the system is born by the applicants, such as Plaintiffs.

GAPS is operational during the current emergency. Of the nine GAPS locations in Fulton County, Plaintiffs called one at random (UPS Store # 4448) to see if it is processing fingerprints during the emergency. That GAPS location stated that it is open, it has expanded hours during the emergency, and that it is capturing fingerprints on a “touchless” basis to maintain social distancing (by giving oral instructions to the applicant from across the room on how to operate the machine).

It is, therefore, disingenuous for Toomer to blame an inability to get fingerprinting and background checks done as an excuse not to accept and process GWL applications.

Conclusion

For the reasons stated above, Plaintiffs move for a TRO or preliminary injunction against enforcement of O.C.G.A. § 16-11-126 against law-abiding citizens (i.e., those not prohibited from possessing firearms) during the pendency of the current state of emergency.

/s/ John R. Monroe

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RULE 7.1 CERTIFICATE

I certify that this brief was prepared with one of the font and point selections approved in Rule 5.1(B).

 /s/ John R. Monroe
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