Docket No. 11-10387

The United States
Court of Appeals
For
The Eleventh Circuit

GeorgiaCarry.Org, Inc., *et.al.*, Appellants
v.
State of Georgia, *et.al.*, Appellees

Appeal from the United States District Court
For
The Middle District of Georgia
The Hon. C. Ashley Royal, District Judge

Brief of Appellants

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Certificate of Interested Persons

Appellants certify that the following persons are known to Appellants to have an interest in the outcome of this case:

The Baptist Tabernacle of Thomaston, Inc.

Deal, the Hon. Nathan

Georgia, State of

GeorgiaCarry.Org, Inc.

Lonas, Laura L., Esq.

Monroe, John R., Esq.

Royal, the Hon. C. Ashley

Stone, Edward A., Esq.

Trice, J. Edward, Jr., Esq.

Upson, County of

Wilkins, the Rev. Jonathan L.

Statement on Oral Argument

Appellants in this case request oral argument. The appeal involves the exercise of important fundamental Constitutional rights of the Appellants, namely, their ability to be free to exercise their religion, pursuant to the First Amendment, and their ability to be free to carry firearms in case of confrontation, pursuant to the Second Amendment. The appeal is not frivolous and the dispositive issue has not been authoritatively determined. Indeed, to the best of Appellants' knowledge, this is a case of first impression both in this Circuit and in every Circuit in the United States.

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Statement on Jurisdiction

The District Court had removal jurisdiction of this case, according to Defendants-Appellees, because the case involved federal questions under 28 U.S.C. § 1331, as the Plaintiffs-Appellants sought redress for civil rights violations pursuant to 42 U.S.C. § 1983.

The District Court action was dismissed on January 24, 2011. The Clerk of the District Court entered a judgment against Plaintiffs-Appellants on January 25, 2011. Appellants filed a notice of appeal on January 26, 2011, so this appeal is timely. F.R.A.P. § 4(a)(1)(A).

Statement of the Issues

1. The District Court erred in ruling that Defendants-Appellees' ban on carrying firearms in places of worship does not interfere with Plaintiffs-Appellants' free exercise of religion.

2. The District Court erred in ruling that Defendants-Appellees' ban on carrying firearms in places of worship does not interfere with Plaintiffs-Appellants' right to carry firearms in case of confrontation.

3. The District Court erred in ruling that Defendant-Appellant State of Georgia has immunity in this case.

Statement of the Case

Nature of the Case

This is a civil rights case. Plaintiffs-Appellants Georgia Carry.Org, Inc., The Baptists Tabernacle of Thomaston, Inc., Edward Stone, and Jonathan Wilkins (collectively "GCO") seek declaratory and injunctive relief against the State of Georgia, Gov. Nathan Deal[1], Upson County (Georgia), and Kyle Hood (collectively, "Georgia"). Georgia has a statute banning carrying firearms in "places of worship," (the "Ban") and GCO attacks the enforcement of the Ban on First and Second Amendment grounds, as well as under state law principles. GCO asserts that the Ban burdens its free exercise of religion, by imposing a prohibition on people who are at a "place of worship," when such prohibition does not generally apply elsewhere in the state. GCO also asserts that the Ban burdens its rights to carry firearms "in case of confrontation," in violation of the Second Amendment. Both the First and Second Amendment guarantee fundamental constitutional rights. GCO also asserts that as taxpayers, they have an interest in preventing public funds from being used to enforce the illegal Ban.

Proceedings Below

GCO commenced this case by filing a complaint in the Superior Court of Upson County, Georgia against the State of Georgia and Upson County on July 12, 2010. Both defendants removed the case to the District Court. GCO thereafter filed an Amended Complaint, adding Kyle Hood and Sonny Perdue as defendants (Hood was and is the

[1] Gov. Sonny Perdue originally was named as a defendant in his official capacity as governor of the State of Georgia. Since the filing of the Complaint below, Gov. Perdue's term ended and Gov. Deal has become governor of Georgia. Gov. Deal therefore is substituted as a Defendant-Appellee.

county manager of Upson County and Perdue, as noted in FN 1, was the governor of the State of Georgia). Georgia filed a Motion to Dismiss and GCO filed a Motion for Summary Judgment. In a single Order, the District Court granted Georgia's motion and denied GCO's motion as moot. The District Court granted Georgia's motion pursuant to Fed.R.Civ.Pr. 12(b)(6). The District Court also found that the State of Georgia has sovereign immunity in his case (even though GCO seeks only declaratory and injunctive relief).

Statement of the Facts[2]

GeorgiaCarry.Org, Inc. is a Georgia non-profit corporation whose mission is to foster the rights of its members to keep and bear arms. R5, ¶ 2. The Baptist Tabernacle of Thomaston, Inc. (the "Tabernacle") is a Georgia non-profit corporation that is a church whose members meet regularly in a "place of worship." *Id.,* ¶ 3. Edward Stone is the former president and a current board member of GCO who is a citizen of Georgia and of the United States. *Id.,* ¶¶ 4, 6. Jonathan Wilkins is the CEO and pastor of the Tabernacle. *Id.,* ¶¶ 5, 24. Stone and Wilkins both are members of GeorgiaCarry.Org, Inc. and both possess valid Georgia weapons carry licenses. *Id.,* ¶¶ 6, 17, and 23.

Stone and Wilkins both attend religious services regularly and desire to carry firearms with them when they do so, but they are in fear of arrest and prosecution. *Id.,* ¶¶ 18, 27, 28. Their fear is based on O.C.G.A. § 16-11-127(b), which prohibits the carry of firearms in "places of worship." The Tabernacle also would like to have certain of its

[2] The District Court granted Georgia's Motion to Dismiss on the grounds that GCO failed to state a claim. R32, pp. 10, 25. In granting a motion to dismiss on these grounds (Fed.R.Civ.P. 12(b)(6)), the court must accept the facts in the complaint as true. The facts stated here are therefore found in the Amended Complaint.

members able to carry firearms during worship services, but also in fear of their arrest and prosecution. *Id.,* ¶¶ 29.

Stone and Wilkins are taxpayers and do not wish for public funds to be expended to enforce the Ban. *Id.,* ¶ 19, 20, 30, 31.

Statement on the Standard of Review

An appellate court reviews *de novo* the granting of a motion to dismiss under Fed.R.Civ.Pr. 12(b)(6). *Speaker v. United States HHS CDC,* 623 F.3d 1371, 1379 (11th Cir. 2010). The Court also must review the District Courts' interpretations of state law *de novo. Mega Life & Health Co. v. Pieniozek,* 516 F.3d 985, 989 (11th Cir. 2008).

Summary of the Argument

The District Court erred by dismissing GCO's Amended Complaint because the District Court failed to distinguish between statutes that target religion, such as the Ban at issue in this case, and statutes that are neutral and generally applicable. The District Court also erred by determining that the categorical Ban on carrying firearms in places of worship is subject only to intermediate scrutiny, but even if that is the correct standard, the District Court erred by finding that Georgia has an important interest in keeping firearms out of places of worship. Finally, the District Court erred by finding that the State of Georgia has sovereign immunity under state law from suits seeking only declaratory and injunctive relief.

Argument and Citations of Authority

1. The Ban Targets Religion

A person who holds a Georgia weapons carry license ("GWL") is "authorized to carry a weapon … in every location in this state not listed in [O.C.G.A. § 16-11-127(b)]." O.C.G.A. § 16-11-127(c). Examples of places where Stone and Wilkins may carry firearms include banks, restaurants (including restaurants that serve alcohol), retail stores, office buildings, parks, entertainment facilities, theaters, recreation events, city streets and sidewalks, public transportation, and political rallies. It is, therefore, a fair conclusion to say that Stone and Wilkins generally may carry firearms throughout the state.

One exception to this generalization is the Ban at issue in this case. O.C.G.A. § 16-11-127(b) states, in pertinent part:

A person shall be guilty of carrying a weapon or long gun in an unauthorized location and punished as for a misdemeanor when he or she carries a weapon or long gun while … (4) in a place of worship.[3]

[3] In addition to places of worship, the other "off-limits" locations are government buildings, courthouses, jails and prisons, state mental health facilities, bars, nuclear power plants, polling places, and schools. O.C.G.A. § 16-11-127(b) and (c).

For purposes of the Ban, "weapons' are handguns and knives. O.C.G.A. § 16-11-125.1.

The District Court incorrectly resolved GCO's First Amendment Free Exercise Claim on the question of whether the Ban "impermissibly burdened [GCO's] sincerely held religious beliefs." R 32, p. 5. The problem with using this standard is that it does not apply in cases such as the instant one, where the Ban targets religion.

"Government action is not neutral and generally applicable if it burdens…religiously motivated conduct but exempts substantially comparable conduct that is not religiously motivated." *McTernan v. City of York,* 564 F.3d 636, 647 (3rd Cir. 2009). A law is not generally applicable "if it proscribes particular conduct only or primarily religiously motivated." *Tenafly Eruv Association v. Borough of Tenafly,* 309 F.3d 144, 165 (3d Cir. 2002). While there may be some secular reasons why a person would go to a place of worship, Georgia cannot reasonably dispute that going to a place of worship is primarily religiously motivated, and therefore the challenged Georgia law is not neutral. Despite the fact that GCO raised this argument below, the District Court failed to address it at all in its Order.

"When a law that burdens religion is not neutral or not of general application, strict scrutiny applies and the government action violates the

Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." *McTernan,* 564 F.3d at 647. Georgia cannot possibly articulate a compelling government interest in burdening religion in this way. The policy of leaving worshippers defenseless against aggression or persecution is unconscionable. There can be no governmental interest in either burdening or favoring religion. Even if such an interest existed, disarming all who enter a place of worship, indiscriminately, is not a tailored measure at all, and certainly is not a narrowly tailored one.

The cases cited by the District Court to support the "impermissibly burdens sincerely held religious beliefs" test all related to laws that are neutral and generally applicable. The District Court relied on cases related to denial of unemployment for refusing work offers (because the jobs required work on Sundays or production of armaments). The denial of unemployment benefits for refusing to accept a work offer clearly is a secular, neutral, and generally applicable activity. Only in cases where the neutral denial of benefits "impermissibly burdened sincerely held religious beliefs" do courts interfere with the state action and reverse the denial of benefits. The instant case, however, does not involve the neutral denial of benefits.

The District Court did cite in passing a single case involving a non-neutral regulation. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). It is not clear, however, that the District Court applied any principles from *Lukumi.* In *Lukumi,* the Supreme Court said, "[I]f the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* As discussed above, visiting a place of worship is primarily motivated by religious beliefs. Thus, the Ban, by burdening a visit to a place of worship by prohibiting otherwise lawful behavior, is not neutral.

The *Lukumi* Court also noted that a "minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without secular meaning." *Id.* The Court concluded that the ordinance at issue, which banned animal "sacrifice," ***could have*** referred to other than religious practice in the use of the word "sacrifice." In the instant case, however, no parsing of words is necessary. The Ban applies to "places of worship." There is no question that worship has only a religious meaning and not a secular one. The Ban therefore "lacks facial neutrality" because it refers to a religious practice

without secular meaning. Instead of applying the "sincerely held religious beliefs" test, therefore, the District Court should have observed that the Ban is not neutral towards religion. The Ban is subject to strict scrutiny and must be stricken down.

Another aspect of the Free Exercise clause discussed in *Lukumi* is that "inequality [towards religion] results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. The principle that government … cannot … impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 542-543. In the instant case, the Ban applies to places of worship and additional bans apply to very few other places. The District Court failed to attach significance to the fact that whatever interests Georgia seeks to protect are more worthy of protection in places of worship than in the rest of the State.

2. The Ban Cannot Withstand Strict Scrutiny and Must Be Struck Down

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of the those interests…. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.

Id. at 546.

The Ban in the instant case cannot survive strict scrutiny. Although the District Court did not discuss any standard of review at all under the Free Exercise clause, it is clear that a law targeting religion, such as the Ban, is subject to strict scrutiny and only can be upheld in "rare cases." There is no reason to believe that the instant case is one such rarity.

3. The Ban Violates the Second Amendment

In addition to infringing on GCO's First Amendment rights, the Ban also infringes on the Second Amendment. The Second Amendment provides, "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The Supreme Court has ruled that the Second Amendment guarantees an individual right to keep and bear arms. *District of Columbia v. Heller,* 128 S.Ct. 2783, 2791 (2008). The *Heller* Court also ruled that "keep" means "carry" [*Id.* at 2793], and that the core principle in the Amendment is to protect the right to carry arms "in case of confrontation" [*Id.*]. Finally, the Court ruled in both *Heller* and *McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010) that the right is fundamental. *McDonald* also ruled that the Second Amendment applies to the states. 130 S.Ct. at 3050, 3088.

The District Court correctly concluded that the Second Amendment right applies not just in the home. R32, p. 12. The *Heller* Court ruled that the Second Amendment protects the right to carry arms in case of confrontation, and it is difficult to imagine that the Court concluded that such confrontation can only happen in the home.

3A. Places of Worship Are Not "Sensitive Places"

Moreover, the *Heller* Court noted that its opinion would not affect the ability of governments to restrict carrying firearms in certain "sensitive places," notably schools and government buildings. 128 S.Ct. at 2817. By bringing up the power to restrict carry in two specific places outside the home, the Court implied that there is no power to restrict carrying firearms in other places outside the home that are not "sensitive."

The District Court declined to rule that places of worship are "sensitive." R32, p. 18. Instead, the District Court correctly assumed that the Ban burdens a right protected by the Second Amendment. *Id.* at 19. The District Court then determined that it should analyze the Ban by applying an intermediate scrutiny test against it. The District Court determined that the Ban "may be upheld so long as it is substantially related to an important governmental objective" and that "the fit between the government's

objective and regulation need not be necessarily perfect but reasonable." *Id.* at 20.

3B. The Ban Does Not Survive Even Intermediate Scrutiny

The District Court considered three governmental objectives suggested by Georgia, but ultimately the Court accepted only two of them: 1) an interest in deterring and punishing crime directed at "sensitive places" such as places of worship, government buildings, courthouses and polling places and 2) an interest in protecting the free exercise of religion.

The District Court found, without any meaningful discussion, that a place of worship is a "sensitive place" and that the Ban bears a substantial relationship to that goal. This is an odd conclusion given that the Court did not find places of worship to be "sensitive" for the purposes of determining if the Ban is outside the scope of the Second Amendment. The Court also found that "the protection of religious freedom against private bias or coercion is also an important governmental goal." *Id.,* p. 22.

Taking each objective in turn, it is interesting to note at the outset that the District Court did not accept Georgia's third suggested objective of deterring crime generally. The District Court expressed skepticism at Georgia's argument that by "limiting the locations to which one may lawfully bring a weapon a weapon, the [Ban] deters gun violence by

providing for punishment for those who do bring weapons to those locations." *Id.* The Court said it was not clear that this reasoning would pass intermediate scrutiny. *Id.*

The District Court failed to explain how deterring crime generally is not substantially related to restricting arms, but that deterring crime in "sensitive places" is substantially related to restricting them arms. It is illogical to conclude that restricting guns in some places is substantially related to deterring crime but that deterring crime in other places does not bear that relationship. It also begs the question, in what places does the government lack an important interest in deterring crime such that it has no power to ban guns?

The logical extrapolation of the District Court's reasoning is that 1) the government has an interest in deterring crime everywhere and therefore 2) the government may ban guns anywhere. By way of extreme example, one might easily postulate that the government has an important interest in deterring crimes in homes. It would follow, therefore, that the government may ban guns in homes. We know from *Heller,* however, that such a ban is unconstitutional. The District Court's conclusion that deterring crime is substantially related to banning guns just does not comport with *Heller.*

Consider next Georgia's stated goal of "protecting" the free exercise of religion. The District Court came to the startling conclusion that banning guns in places of worship "protect[s] attendees from the fear or threat of intimidation or armed attack." *Id.* The District Court gave no explanation of how banning someone from having the very devices the Supreme Court called the "quintessential" tool of Americans for addressing a "confrontation" protects those people from the fear or threat of intimidation or armed attack. More logically, it achieves just the opposite result.

Surely no one would assert that banning fire extinguishers would remove the fear of fire. Presumably one keeps a fire extinguisher in case of fire just as one carries a firearm in case of confrontation. Just as not having a fire extinguisher leaves one vulnerable to fire, not having a firearm leaves one vulnerable to attack. It makes no sense to assert the contrary.

Moreover, one could extrapolate this supposed governmental interest to the extreme. Presumably the government has some interest in protecting people from fear of intimidation or attack in their own homes. If disarming them provides that protection, then one would assume the government may lawfully ban firearms in the home to provide that level of protection. Again, however, we know that *Heller* tells us otherwise. The inescapable

conclusion is that the interests suggested by Georgia and accepted by the District Court are not advanced by the Ban.

3C. Strict Scrutiny Applies in the Instant Second Amendment Claim

It also should be noted that the District Court's use of intermediate scrutiny is not appropriate. The District Court expressed two reasons for applying intermediate scrutiny instead of strict scrutiny. The first reason relies on the ***dissent*** in *Heller,* which noted that the existence of exceptions to the Second Amendment for "sensitive places" implies that a lower level of scrutiny than strict scrutiny applies. First, it need not be argued long that *Heller* itself declined to articulate a standard of review for Second Amendment cases. The ***dissent*** can hardly be an appropriate source for legal analysis of the majority opinion. Second, the existence of "sensitive places" shows that some places are outside the scope of the Second Amendment. The District Court even noted this by rejecting the "sensitive places" argument and instead assuming "that Georgia's law burdens conduct ***within the scope of the Second Amendment."*** *Id.* at p. 18 [emphasis supplied]. A doctrine that determines what falls ***outside*** the scope of the Second Amendment cannot be used to determine what standard of review applies to statutes that fall ***within*** the scope.

A case upon which the District Court heavily relied, *United States v. Marzzarella,* 614 F.3d 85 (3rd Cir. 2010), implies that strict scrutiny would be appropriate in some Second Amendment cases. *Marzzarella* applies a First Amendment analysis to Second Amendment cases, noting that content-based speech regulations are subject to strict scrutiny while content-neutral time, place and manner restrictions are subject to intermediate scrutiny. In the instant case, the Ban is not neutral, but instead applies only in places of worship while leaving most places in Georgia open for carrying. Because the Ban is not neutral and imposes a total prohitibtion on exercising the right in places of worship, strict scrutiny must apply.

4. The State of Georgia Does Not Have Sovereign Immunity

Even though it was not necessary for the determination of the case (given the rest of the District Court's analysis), the District Court nevertheless ruled that the State of Georgia has sovereign immunity in this case The District Court based this holding on state law and not on a principle of federal law. The District Court cited the Georgia Constitution for the basis of the State of Georgia's immunity.

The District Court noted that GCO pointed out *In the Interst of A.V.B,* 267 Ga. 728 (1997), in which the Supreme Court of Georgia said, "The doctrine of sovereign immunity shields the state from suits seeking to

recover damages. Sovereign immunity does not protect the state when it acts illegally and a party seeks only injunctive relief." Because GCO seeks only declaratory and injunctive relief, therefore, the State is not shielded by sovereign immunity. The District Court avoided *A.V.B.,* however, by citing *IBM v. Georgia Department of Administrative Services,* 265 Ga. 215, 217 FN 3 (1995). In *IBM,* the Supreme Court of Georgia said "sovereign immunity has *never* applied to bar this type of action seeking injunctive relief." [Emphasis in original].

The District Court relied, however, on FN 3 of *IBM,* which says "Because sovereign immunity does not bar IBM's complaint, it is unnecessary to decide whether sovereign immunity would bar a suit based on the alleged violation of a constitutional right." In other words, *IBM* implies that a constitutional violation might be an alternative means of ***avoiding*** sovereign immunity (rather than an alternative means of ***applying*** it). The District Court interpreted this footnote to mean that a constitutional claim might be subject to sovereign immunity even if it were only seeking declaratory or injunctive relief. R32, p. 27.

This interpretation is illogical and inconsistent with the holdings of both *A.V.B.* and *IBM.* Because the State of Georgia is the party asserting the immunity, the burden is on the State of Georgia to show that the immunity

applies in this case. The State has failed to do so. On the other hand, state case law is clear that sovereign immunity "never" has applied to suits seeking injunctive relief (and not damages). Finally, it should be noted that GCO brought state law claims against the State of Georgia, in addition to the constitutional claims. Even if sovereign immunity somehow protects the State of Georgia from GCO's federal claims, as the District Court ruled, it is clear from state case law that sovereign immunity does not apply to GCO's state law claims against the State.

Conclusion

GCO has shown that the Ban infringes on its First and Second Amendment rights and that the State of Georgia does not enjoy sovereign immunity in this case. For these reasons, the judgment of the District Court must be reversed and the case remanded for further proceedings.

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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 4,383 words as determined by the word processing system used to create this Brief of Appellants.

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Certificate of Service

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I also certify that I filed the foregoing Brief of Appellants by mailing it via Priority Mail to the Clerk on March 14, 2011.

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