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GUN RIGHTS TESTED IN PARKS AND PUBLIC SPACES

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A number of states have already adopted "open carry" gun laws. These laws are subject to significant jurisdictional variations. See: http://smartgunlaws.org/open-carrying-policy-summary/#state Public parks and recreation agencies have become increasingly concerned about the appropriate agency and employee response to situations involving citizens openly carrying guns in parks and recreation facilities. As with every other significant law related issue and policy, including applicable federal and state gun laws, local counsel should be consulted.

As illustrated by the federal court opinions described herein, the preferable response to situations causing immediate concern about an individual's possession of a firearm might be to summon local law enforcement officials. In responding to firearms reports and complaints, peace officers with arrest authority (including some park rangers) can stop and question an armed individual to determine whether applicable federal and state gun laws have been violated. Moreover, law enforcement officers acting reasonably and in good faith will generally have qualified immunity from any federal civil rights liability for alleged violations of an individual's constitutional rights.

QUALIFIED IMMUNITY

In the case of *Baker v. Officer Randall Schwarb*, 40 F. Supp. 3d 881; 2014 U.S. Dist. LEXIS 114685 (E.D. Mich. 8/19/2014), the City of Sterling Heights Police Department received a flood of 911 calls from concerned citizens reporting "what looked like two young, heavily armed men walking on a city street" past a public park. Responding police officers found one young man "dressed all in black and sporting sunglasses, and both carrying impressive looking rifles and handguns in full view.' The officers approached and, after an initial discussion, peacefully disarmed the men. They were then briefly detained, their I.D.s were retrieved and verified, and they were questioned.

After the officers safely restrained the men, the men stated that they were "exercising their constitutional rights." One of the men asked the police officer (defendant Schwarb), "are we committing a crime?" Schwarb responded, "that's what we're trying to figure out" because "you're freaking out half the city here." During this time, the police officers verified the men were over the age of 18, did not have any criminal convictions or outstanding personal protection orders against them, and were properly licensed to carry their weapons. After establishing that the firearms were lawfully possessed, the officers returned Plaintiffs' weapons and released them. The entire encounter lasted about twenty minutes.

The two men subsequently brought a federal civil rights suit against the police officers alleging violation of their Fourth Amendment rights. In response, the defendant police officers contended they are entitled to qualified immunity and thus may not be held liable for damages under Title 42, Section 1983 of federal civil rights law. Qualified immunity shields government officials from civil liability when actions performed in their official capacity "[do] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Qualified immunity attaches unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

PROBABLE CAUSE

As cited by the federal court, the Fourth Amendment to the United States Constitution establishes the "right of the people to be secure in their persons against unreasonable searches and seizures." As described by the court, "[t]he Fourth Amendment protection against unreasonable searches and seizures generally requires a law enforcement officer to have probable cause to believe that a crime has been or is being committed before conducting a search." Further, the court noted the "existence of probable cause must be assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

In the opinion of the federal district court, "officers in the position of Defendants reasonably could have believed that Plaintiffs were in violation of the city's disturbing the public peace ordinance. As defined in the ordinance: "Disturbing the public peace consists of causing a public disturbance," *i.e.*, "any act or series of actions causing an interruption of the public peace and quiet, including the direct endangerment of the safety of persons or property." Under the circumstances, the court found the men were indeed intent on creating a public disturbance.

> By Plaintiffs' own terms, they were "walking while open carrying their firearms in local communities to desensitize the public to open carry, and to educate police officers with [sic] whom they may encounter on the legality of open carry." It is reasonably clear that Plaintiffs knew that, in the face of their intended behavior, the public was likely to be highly sensitive (else why seek to "de-sensitize" people?). The single reasonable conclusion is that Plaintiffs were knowingly acting in a provocative manner, hoping to foment an interaction and cause a disturbance. As events show, they succeeded nicely.

Accordingly, the federal district court concluded, "[t]he Defendant officers' conduct was, at the very least, reasonable—they were investigating a fear-provoking scenario, and their actions were prudent given the unusual nature of the circumstances."

INVESTIGATORY STOP

As cited by the federal district court, in the case of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the Supreme Court had held that a police officer can stop and question an individual for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. Further, because the Fourth Amendment to the United States Constitution bars "unreasonable searches and seizures," the court acknowledged an officer "must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts," give rise to a "reasonable suspicion" that criminal activity is taking place. In addition, "[t]he officer must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.'" Moreover, the court views "the evidence in support of reasonable suspicion using a common sense approach, as understood by those in the field of law enforcement."

Applying these principles to the facts of the case, the federal district court found the police officers had reasonable suspicion that the plaintiffs were engaging in, or intended, criminal activity.

> Defendants responded to at least six (and possibly more) 911 calls from concerned citizens. Upon arriving at the scene, Defendants encountered two heavily armed individuals outside of a hospital… Not only did the officers have reasonable suspicion to believe that Plaintiffs were engaging in criminal activity, but they also had reasonable suspicion to believe that Plaintiffs *may have been about to commit a crime.* (*Emphasis of court*)

Based on "the totality of the circumstances" in this case, the federal district court, therefore, concluded "Defendants' decision to stop and temporarily detain Plaintiffs was objectively reasonable." As result, the federal district court held "Defendants did not violate any of Plaintiffs' clearly established rights under the Fourth Amendment and are therefore entitled to qualified immunity on this claim."

PARK SAFETY

In the case of *United States v. Masciandaro*, 638 F.3d 458; 2011 U.S. App. LEXIS 5964 (4th Cir. 3/24/2011), the federal appeals court considered whether a regulation prohibiting the possession of a loaded handgun in a motor vehicle within a national park area violated the Second Amendment. Daingerfield Island is an area near Alexandria, Virginia which is managed by the National Park Service for recreational purposes, including a restaurant, marina, biking trail, wooded areas, and other public facilities. On June 5, 2008, at about 10:00 a.m., Sean Masciandro was parked illegally while sleeping in his vehicle at Daingerfield Island. A park police officer approached Masciandro's vehicle and asked him for his driver's license.

Having noticed a machete-type knife protruding from under the front seat, the police officer asked Masciandro whether there were any weapons in the vehicle. Masciandro indicated that he had a handgun and a subsequent search uncovered a loaded 9mm Kahr semiautomatic pistol. Masciandro had an expired Virginia concealed weapon carry permit. Masciandaro was arrested and charged with "carrying or possessing a loaded weapon in a motor vehicle" within national park areas, in violation of 36 C.F.R. § 2.4(b).

This particular federal regulation was subsequently revised to "harmonize the regulation of firearms in national parks with that by the States." Specifically, the revised regulation would allow individuals to possess loaded, operable firearms within national parks whenever it was legal to do so under the laws of the state in which the park was located, so long as the individual was not otherwise prohibited from doing so by federal law. See: "Political Reversal on National Park Gun Ban," October 2009 Law Review, *Parks & Recreation*
http://cehdclass.gmu.edu/jkozlows/lawarts/10OCT09.pdf

At trial, Masciandaro explained that he carried the handgun for self-defense, as he frequently slept in his car while traveling on business, and that while traveling, he often kept cash, a laptop

computer, and other valuables on hand. Masciandaro was fined $150 for violating the handgun regulation. The federal district court rejected Masciandaro's claim that the fine violated his constitutional Second Amendment rights. Masciandaro appealed.

Citing the "watershed" decision of the United States Supreme Court in *Dist. of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), Masciandaro claimed the Second Amendment guaranteed him "the right to possess and carry weapons in case of confrontation and thus protected him from prosecution under § 2.4(b) for exercising that right in a national park area." In so doing, Masciandaro argued "his handgun is the 'quintessential self-defense weapon' and that he was exactly the type of "law-abiding citizen" who is the primary intended beneficiary of the Second Amendment's protections." In response, the government contended the holding of *Heller* was limited to possession of a handgun in the "home," and, therefore, inapplicable to the circumstances to this case.

As noted by the federal appeals court, the Supreme Court in *Heller* had held a law that "totally banned handgun possession in the home and prohibited rendering any lawful firearm in the house operable for the purpose of immediate self-defense violated the Second Amendment." While *Heller* may have established a "clearly-defined fundamental right to possess firearms for self-defense within the home," the federal appeals court acknowledged "a considerable degree of uncertainty remains as to the scope of that right beyond the home." The issue was, therefore, whether *Heller* necessarily invalidated a regulation which prohibited "the possession of a loaded firearm in a motor vehicle on National Park Service land."

While *Heller* "did not define the outer limits of the Second Amendment right to keep and bear arms," the Supreme Court had noted that "the right was not unlimited, just as the First Amendment's right of free speech was not." On the contrary, the Supreme Court found the Second Amendment right to bear arms was not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

Moreover, the Supreme Court in *Heller* had noted "a majority of the 19th-century courts that considered prohibitions on carrying concealed weapons held them to be lawful under the Second Amendment." Similarly, in *Heller*, the Supreme Court indicated it would uphold "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." Accordingly, the federal appeals court would determine whether a regulation of firearms in national parks was justified as a "sensitive place" prohibition. The federal appeals court noted further that a governmental prohibition on firearms was a "presumptively lawful regulatory measure."

Two years after deciding *Heller*, in the case of *McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), the Supreme Court had held "the Second Amendment was applicable to the States by incorporation into the Fourteenth Amendment." In so doing, the Supreme Court had stated "self-defense is the central component of the individual right to keep and bear arms" and that this right is "fundamental." Once again, however, the Supreme Court reiterated, "Second Amendment rights are far from absolute" and "many basic handgun regulations" are "presumptively lawful."

At the time of his arrest, Masciandaro claimed he was a "law-abiding citizen who was simply seeking to exercise his 'fundamental' right to self-defense." In response, the federal government claimed the challenged firearms regulation was constitutional because it was "narrowly tailored to advance a compelling government interest in public safety" in a public park.

In balancing an individual's Second Amendment rights against a governmental interest in public safety, the federal appeals court would "take into account the nature of a person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation."

> A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.

While *Heller* recognized a "fundamental, core right of self-defense in the home by a law-abiding citizen," once "outside the home," the federal appeals court acknowledged that "firearm rights have always been more limited because public safety interests often outweigh individual interests in self-defense." Similarly, in this particular context, the federal appeals court found the challenged regulation would pass constitutional muster "if the government can demonstrate that § 2.4(b) is reasonably adapted to a substantial governmental interest."

As noted by the federal appeals court, the federal government claimed the challenged firearms regulation was a law regulating firearms in "sensitive places," as identified in *Heller* and therefore was "presumptively constitutional":

> Arguing that Daingerfield Island is a sensitive place, the government states that a large number of people, including children, congregate in National Parks for recreational, educational and expressive activities. Park land is not akin to a gun owner's home and is far more analogous to other public spaces, such as schools, municipal parks, governmental buildings, and appurtenant parking lots, where courts have found firearms restrictions to be presumptively reasonable.

In response, Masciandaro contended, "the parking lot at Daingerfield Island was not a 'sensitive place' like a school or governmental building, as referenced to in *Heller*." See: "Right to Bear Arms Limited in 'Sensitive' Public Facilities," April 2011 Law Review, *Parks & Recreation* http://cehdclass.gmu.edu/jkozlows/lawarts/04APR11.pdf

In this particular instance, the federal appeals court found "the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks, including Daingerfield Island... a national park area where large numbers of people, including children, congregate for recreation." Moreover, the federal appeals court found "§ 2.4(b)'s narrow prohibition is reasonably adapted to that substantial governmental interest… to secure public safety."

As noted by the federal appeals court, § 2.4(b) simply prohibited national park patrons "from

possessing *loaded* firearms, and only then within their motor vehicles." (*Emphasis of court*) In so doing, the court found § 2.4(b) passed constitutional muster because it "leaves largely intact the right to possess and carry weapons in case of confrontation."

> While it is true that the need to load a firearm impinges on the need for armed self-defense… [constitutionality in this context] does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question.

Accordingly, in promulgating the challenged regulation, the federal appeals court found the federal government could have reasonably concluded that the need for armed self-defense was less acute in a national park, like Daingerfield Island, than in the context of one's home.

As a result, the federal appeals court concluded 36 C.F.R. § 2.4(b) was constitutional under the circumstances of this particular case. The federal appeals court, therefore, affirmed the judgment of the federal district court which had rejected Masciandaro's Second Amendment challenge to this particular regulation of firearms in national parks.

REASONABLE SUSPICION

In the case of *Embody v. Ward*, 695 F.3d 577; 2012 U.S. App. LEXIS 18399; 2012 FED App. 0293P (6th Cir. 8/30/2012), a park ranger detained an armed visitor to a state park. The park visitor, Leonard Embody, claimed his detention by park rangers and local police violated his constitutional rights. Tennessee law allowed individuals with gun permits to carry handguns in public places "owned or operated by the state" such as "public park[s]" and "natural area[s]." Tenn. Code § 39-17-1311(b)(1)(H). The statute defined a "handgun" as "any firearm with a barrel length of less than twelve inches" that is "designed, made or adapted" to be fired with one hand.

Embody was aware of the applicable state law when he went to Radnor Lake State Natural Area, a state park near Nashville, Tennessee, on a Sunday afternoon. At the time, Embody was dressed in camouflage and armed with a Draco AK-47 pistol slung across his chest. The pistol had an eleven-and-a-half-inch barrel with a fully loaded, thirty-round clip attached to it.

Anticipating his appearance at the park would attract attention, Embody carried an audio-recording device with him. Embody's appearance did indeed attract the attention of other park visitors. One passer-by spontaneously held up his hands when he encountered Embody. Two park visitors reported to a park ranger that they were "very concerned" about Embody and the AK-47. And an elderly couple reported to a ranger that a man was in the park with an "assault rifle."

These reports regarding Embody's appearance at the park prompted two encounters with park rangers. In the first, Ranger Joshua Walsh approached Embody, asked for his permit and questioned him about the gun. Embody produced a valid permit, but Walsh could not tell whether the firearm qualified as a legal one under state law. "Technically it's a handgun," he told Embody, "but I don't know why you need it out here," and "I'm pretty sure an AK-47 is not a

handgun." Uncertain how to proceed, Walsh allowed Embody to continue through the park—for the time being.

Walsh phoned a supervisor, Ranger Steve Ward, for further direction. Ward in turn called Chief Ranger Shane Petty, who did not believe the AK-47 was a handgun given the description of it. Petty and Ward determined that Ward should undertake a "felony take down" of Embody, disarm him and check the weapon. They called the Metropolitan Nashville Police Department for assistance.

Ward found Embody in a parking lot and ordered him to the ground at gunpoint. Without arresting Embody, Ward removed the gun, patted him for other weapons and detained him. When the Nashville police officers arrived, Ward explained his concern that Embody's weapon was illegal, and the officers conducted a weapons check to determine the gun's status. Once the officers confirmed that the firearm fit the definition of a handgun under state law, Ward returned the gun to Embody and released him. The incident lasted about two-and-a-half hours.

Embody sued Ward for damages under 42 U.S.C. § 1983. Section 1983 is the applicable federal civil rights law to seek legal redress when a government official effects a deprivation of one's constitutional rights. In his complaint, Embody alleged that Ward had violated his Fourth Amendment rights by subjecting him to an unreasonable seizure and his Second Amendment rights by disarming and detaining him for carrying a weapon condoned by state law. The federal district court granted Ward's motion for summary judgment, effectively dismissing the lawsuit. Embody appealed.

As noted by the federal appeals court, the "question raised by this § 1983 action is whether Ward violated Embody's rights under the Fourth (and Fourteenth) Amendment, which protects individuals against 'unreasonable searches and seizures'."

As cited by the federal appeals court, the following well-known rules of criminal procedure would govern the constitutionality of an encounter in which an individual is temporarily detained by law enforcement:

> Before conducting a temporary investigatory stop, a law enforcement officer must have a "reasonable" suspicion of criminal activity based on "specific and articulable facts" known to the officer at the time of the stop. The length of the stop and the extent of intrusion must be "reasonably related in scope to the circumstances which justified the interference."

Applying these rules to the facts of the case, the federal appeals court concluded "an officer could reasonably suspect something was amiss."

> Embody's AK-47, carried openly and fully loaded through a state park, gave Ward ample reason for suspicion that Embody possessed an illegal firearm. The barrel was a half-inch shy of the legal limit, and, when coupled with the thirty-round ammunition clip, it reasonably could look more like a rifle than a handgun. All of this explains the reactions of visitors to the park, who became frightened at

> the sight of a man in camouflage carrying an AK-47 across his chest, including one couple who reported a man with an "assault rifle." Making matters worse (or at least more suspicious), Embody had painted the barrel tip of the gun orange, typically an indication that the gun is a toy. An officer could fairly suspect that Embody had used the paint to disguise an illegal weapon.

Further, in the opinion of the appeals court, "[t]he scope of Ward's investigation also was reasonably related to the circumstances that justified the stop."

> Ordering Embody to the ground at gunpoint was not an excessive intrusion given the existence of a loaded weapon, the risk to officer (or public) safety if Embody had been up to no good and the danger to law enforcement whenever it disarms an individual suspected of crime.
>
> Although the rangers detained Embody for two-and-a-half hours, he points to no lack of diligence by Ward in trying to confirm (or allay) his suspicions. The officers took the time needed to determine whether the AK-47 was a handgun, whether Embody had a permit for it, whether he had illegally modified it and whether he posed any other safety threats.

According to the federal appeals court, the issue was not whether Embody had committed a crime when carrying an AK-47 pistol in a Tennessee state park. Rather, the constitutional question before the court was "whether the officers had reasonable suspicion of a crime, not whether a crime occurred." Otherwise, the federal appeals court noted that "all failed investigatory stops would lead to successful § 1983 actions." Under the circumstances of this case, the appeals court found reasonable suspicion of a crime did indeed exist.

> Having worked hard to appear suspicious in an armed-and-loaded visit to the park, Embody cannot cry foul after park rangers, to say nothing of passers-by, took the bait. The officers stopped him only as long as it took to investigate the legitimacy of the weapon and, at his insistence, bring the supervisor to the park.

Accordingly, in the absence of an unreasonable search and seizure of his person, the federal appeals court found no Fourth Amendment violation had occurred.

Since Tennessee "state law authorized him to carry this gun in the park," Embody had also argued that "temporarily disarming him" violated the Second Amendment. The court rejected this argument. According to the appeals court, "[n]o court has held that the Second Amendment encompasses a right to bear arms within state parks." On the contrary, in the landmark case of *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the holding of the Supreme Court of the United States was limited to recognizing a Second Amendment right of the individual "to bear arms in the home."

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