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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT THOMSON,

Plaintiff,

vs.

TORRANCE POLICE DEPARTMENT and THE LOS ANGELES COUNTY SHERIFFS DEPARTMENT,

Defendants.

Case No. CV11-06154 SJO (JCx)
Date Action Filed: July 26, 2011

Assigned to:
U.S. District Judge S. James Otero

DEFENDANT TORRANCE POLICE DEPARTMENT'S REPLY TO PLAINTIFF'S OPPOSITION TO TORRANCE POLICE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

Motion Hearing Date: Feb. 27, 2012
Time: 10:00 a.m.
Courtroom: 1- 2nd Floor
Location: Spring Street

Plaintiff argues TPD is not entitled to judgment because he has a fundamental right to bear arms outside the home, and claims that TPD's good cause policy should be evaluated under First Amendment "prior restraint" cases. Plaintiff not only fails to cite a single authority that would support either of those arguments, but he fails to distinguish the plethora of authority cited by the TPD holding (i) there is no fundamental right to carry a concealed handgun in public, and (ii) there is no reason to analogize rights under the Second Amendment to those under the First.[1]

1. There Is No Fundamental Right To Carry A Handgun In Public.

Plaintiff insists the Heller case established a fundamental right to bear arms outside the home. Not so. The Court's holding was quite narrow: "[W]e hold that the District's ban on handgun possession **in the home** violates the Second Amendment, as does its prohibition against rendering any lawful firearm **in the home** operable for the purpose of immediate self-defense." (554 U.S. at 635 (emphasis added).) While declining to expound fully on the scope of the Second Amendment, the Court "warns readers not to treat Heller as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns **at home** for self-defense." (United States v. Skoien (7th Cir. 2010) 614 F.3d 638, 640.) Indeed, the Heller Court explained that the Second Amendment right is "not unlimited," is not a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," and that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." (554 U.S. at 626.)

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[1] Plaintiff confuses the issue by asserting he has never argued that he has a fundamental right to a CCW license. Instead, he claims the Second Amendment protects his "fundamental right to 'carry' and there is only one way to 'carry' in California – concealed." (Oppo., 2:15-16, 23-26; 6:15-18.) Plaintiff's claim is simply incorrect, as there are several alternative methods of self-defense in addition to a CCW license. (See, e.g., Cal. Pen. Code §§ 26035, 26050, 26045(a), 16840(b) [formerly §§ 12031(h), (j)(1), (k), and (g)] [allowing the carrying of a loaded weapon at one's place of business, or the open-carry of a firearm while making an arrest or if in immediate danger].)

Plaintiff asserts Heller created a broader Second Amendment right based on the Court's textual analysis of the phrase "keep and bear arms," where the Court stated that the phrase should be read as including carrying for the purpose of being ready for defensive action in case of conflict with another person. (Heller, 554 U.S. at 584.) That argument was expressly rejected in Kachalsky v. Cacace (S.D. N.Y. 2011) 2011 U.S. Dist. *LEXIS* 99837, where the court held that Heller's textual interpretation was provided solely to support its main holding that the Second Amendment gives rise to an individual right, and should not be expanded because such a reading overlooks the opinion's pervasive limiting language. (Id. at *70-*71; accord People v. Dawson (2010) 403 Ill.App.3d 499, 934 N.E.2d 598, 605, 343 Ill. Dec. 274 ["The specific limitations in *Heller* and *McDonald* applying only to a ban on handgun possession **in a home** cannot be overcome by defendant's pointing to the *Heller* majority's discussion of the natural meaning of 'bear arms' including wearing or carrying upon the person or in clothing."].)

In short, Plaintiff's claim that he has a fundamental right to carry a concealed weapon in public for self-defense has been overwhelmingly rejected by the courts.

2. Firearms May Be Used For Immediate Self-Defense Purposes.

As stated, Plaintiff does not even attempt to distinguish most of the authorities cited by the TPD which explain why Heller did not create a fundamental right to carry a weapon in public, and why the TPD's good cause policy should be upheld. Plaintiff attempts to distinguish only Peruta v. County of San Diego (S.D.Cal. 2010) 758 F.Supp.2d 1106 and Richards v. County of Yolo (E.D.Cal. 2011) 2011 U.S. Dist. *LEXIS* 51906. Plaintiff argues these cases are inapposite because: (i) they "were decided based on the ability of the plaintiff to open carry, a right that no longer exists due to the passage of AB 144;" and (ii) "neither case is citable as both cases have been stayed pending an *en banc* review in the current Nordyke matter. Nordyke v. King, No. 07-15763, 2011 WL 5928130 (9th Cir. Nov. 28, 2011) (granting rehearing en banc)." (Oppo., 5:20-26.) Plaintiff is wrong on both counts.

First, neither Peruta nor Richards has been stayed, and both are citable. The Ninth Circuit's order cited by Plaintiff states only that the three-judge panel opinion **in Nordyke** shall not be cited as precedent by or to any court of the Ninth Circuit. (2011 WL 5928130 at *3.) The TPD has not cited or relied on Nordyke.

More importantly, contrary to Plaintiff's assertion, neither Peruta nor Richards relied solely on the plaintiffs' ability to open carry. Indeed, in both cases the court cited to several exceptions to the need for a CCW license, including the one which permits loaded open carry by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property. (Peruta, 758 F.Supp.2d at 1113; Richards, 2011 U.S. Dist. *LEXIS* 51906, at *12.) The enactment of AB 144 did nothing to undercut that exception.

Thus, even if AB 144 is considered, which it should not be because it was not effective until *after* the TPD's decision, it avails Plaintiff nothing, as it changes very little regarding the alternative means of self-defense that existed when the TPD made its decision. Specifically, new California Penal Code section 26350, merely prohibits the **unqualified** open-carry of unloaded handguns. It does **not** prohibit carrying a loaded weapon at one's place of business, or the open-carry of a firearm while making an arrest or if in immediate danger. Nor does section 26350 apply to the carrying of an unloaded handgun if it is carried in the locked trunk of a vehicle or elsewhere in a locked container. (Cal. Pen. Code §§ 26389, 26045(a).) Thus, even now the open carrying of handguns, loaded or unloaded, is still permitted for immediate self-defense purposes, along with dozens of other legitimate exceptions.

3. The TPD Policy Promotes Important Public Interests.

Unlike possession in the home, carrying concealed firearms in public presents a "recognized threat to public order," and "poses an imminent threat to public safety." (Yarbrough, 169 Cal.App.4th at 313-314; see McDonald v. City of Chicago (2010) 130 S.Ct. 3020, 3105, 177 L.Ed.2d 894 (Stevens, J., dissenting) ["firearms

kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside. . . ."].) The TPD has important interests in public safety and in reducing the number of concealed weapons in public in order to reduce the risks to those who use the streets and go to public accommodations, as set forth in the Zimring Declaration.[2] The TPD's policy relates reasonably to those interests because requiring documentation enables the TPD to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not.

As recently held by Judge Kronstadt in Birdt v. Beck, 2:10-CV-08377-JAK-JEM, upholding the LASD's CCW policy, California's concealed weapons regime is substantially related to important government objectives.[3] Limiting the number of concealed firearms in public places strengthens law enforcement and prevents the need for public places – such as restaurants, malls, theaters, and parks – to be equipped with metal detectors, fencing, guards, and other forms of security, in order to protect patrons from unchecked concealed firearms.

Judge Kronstadt also held that the numerous exceptions to the ban on carrying loaded weapons – including when a person believes he is in immediate danger or when making a lawful arrest (Cal. Pen. Code §§ 26045(a), 26050 [formerly § 12031(j)(1), (k)]) – ensure California's concealed weapons law is tailored to the safety issues raised by gun violence and does not infringe unnecessarily on the right to use guns in self-defense. Thus, state concealed weapon laws are substantially related to an important government objective, and survive intermediate scrutiny.

Plaintiff's arguments that many violent crimes are committed by people who illegally possess guns, and that there is a dispute over the effectiveness of concealed

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[2] A copy of Zimring's Declaration is attached to the Thind Declaration as Exhibit B, submitted with the TPD's Opposition to Plaintiff's Summary Judgment Motion.

[3] A copy of the Court's Order is attached as Exhibit A to the Thind Declaration, submitted with the TPD's Opposition to Plaintiff's Motion for Summary Judgment. It may be cited as precedent. (Schwarzer, Tashima, & Wagstaffe, Cal. Practice Guide: Federal Procedure Before Trial (The Rutter Group 2011) 1:15, p. 1-4.)

weapons laws, simply reflect differing opinions within the law enforcement community regarding the impact of those laws. Under intermediate scrutiny, the TPD's policy need not be a perfect empirical fit to the problem of gun violence; it must merely be "substantially related." (See United States v. Marzzarella (3d Cir. 2010) 614 F.3d 85, 98.) The TPD's policy satisfies that standard because it focuses on the particular threat posed by concealed weapons. The variations in the experts' declarations are simply a reflection of the responsibility that lies with the Legislature to weigh the effectiveness of concealed weapons laws as a tool to combat violence. To prevail on its motion, the TPD need not prove that California's approach to concealed weapons is more empirically sound, that Plaintiff's expert is incorrect, or that California's approach is otherwise the "correct" one. Rather, the TPD need only show a sufficient "fit." The Legislature's decision in balancing the competing views will be upheld where, as here, it is substantially related to the important objectives described. (Thind Decl., Ex. A [Kronstadt Order], p. 8.)

4. The TPD's Exercise Of Discretion Is Not Unconstitutional.

Plaintiff argues the TPD cannot condition his right to carry concealed on the grant of a license that officials have discretion to withhold. That argument relies on "prior restraint" cases based on the First Amendment's right to free speech, which are inapposite to a Second Amendment claim.

Plaintiff's opposition, in effect, asks the Court to interpret "good cause" for a CCW permit to mean "no cause," and to read out language from the state legislative scheme. No authority supports such a request. Accordingly, the TPD's motion for summary judgment should be granted for all of the reasons set forth in its motion.

Dated: February 10, 2012

RUTAN & TUCKER, LLP

By: _____
Robert S. Bower
Attorneys for Defendant
TORRANCE POLICE DEPARTMENT