No. 12-17808

In The United States Court of Appeals For The Ninth Circuit

George K. Young, Jr.

Plaintiff-Appellant,

v.

State of Hawaii, et al.

Defendants-Appellees.

Appeal from a Judgment of United States District Court
For the District of Hawaii
Civ. No. 12-00336 HG BMK
The Honorable Judge Helen Gillmor
United States District Court Judge

Appellant's Supplemental Brief

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Introduction

Mr. Young sought a permanent injunction of H.R.S. § 134 and "[i]mmediate issuance of a Concealed Carry Weapons Permit or an Unconcealed Weapons Permit for a period of not less than three years" in the lower court. *See* ER 5. Mr. Young's claim to concealed carry was foreclosed by this Court's en banc opinion in *Peruta v. County of San Diego*, -- F.3d --, 2016 WL 3194315 (9th Cir. June 9, 2016). This Court held that "… the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public." *Id*. at *2. For the reasons explained by the dissent, we believe that holding was error. We therefore respectfully preserve that the point for further review. However, whatever the scope of the Second Amendment with respect to concealed carry, *Peruta* does not address and thus does not foreclose Mr. Young's claim that the Second Amendment extends to open carry outside the home. For reasons set forth below, this Court should hold that Hawaii's complete ban on open carry outside the home violates the Second Amendment.

In *Peruta* this Court held that while concealed carry of a firearm was not covered by the Second Amendment, it did "not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry. That question was left open by the Supreme Court in *Heller*, and we have no need answer it here." *Id*. at 19. That reserved question is presented here. Mr. Young

wishes to carry "for personal self-defense, … a hand held firearm in useable condition, loaded with live ammunition, and carried on oneself, either concealed or unconcealed" for self-defense. *See* Complaint at 9. Defendants completely ban the carry of firearms, open or concealed. This Court should find that total ban unconstitutional.

I. Defendants Completely Ban the Open Carry of Firearms

As applied by defendants, the Hawaii Revised Statutes completely ban the open carrying of firearms for self-defense. Specifically, H.R.S. § 134-9 only allows for issuance of open carry handgun permits when one "is engaged in the protection of life and property."[1] It is undisputed that this means only private security, armored truck drivers and others employed to protect property are issued open carry permits. Under no circumstances are open handgun carry permits issued to private citizens. Hawaii also maintains a complete ban on the carry of long arms for self-defense. Therefore, Hawaii completely bans the open carry of firearms outside the home.

[1] This same Hawaii statute is also at issue in *Baker v. Kealoha*, No. 12-16258, 564 Fed. Appx. 903 (9th Cir. 2014), petition for rehearing and rehearing en banc filed Apr. 17, 2014.

II. The Second Amendment Right Extends Outside the Home

Heller explicitly holds that the Second Amendment right extends to the open carry of firearms subject to reasonable government time, place, and manner restrictions. In *District of Columbia v. Heller*, Justice Scalia wrote,

> We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179, 59 S.Ct. 816. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." *Dist. of Columbia v. Heller,* 554 U.S. 570, 627, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008).

The dangerous and unusual doctrine applies to the *manner* in which the right is exercised. In this context, the Common Law's definition of "dangerous" was any item that could be used to take human life through physical force. ("[S]howing weapons calculated to take life, such as pistols or dirks, putting [the victim] in fear of his life … is … the use of dangerous weapons" *United States v. Hare*, 26 F. Cas. 148, 163 - 64 (C.C.D. Md.1818)). "Any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt" *See Baron Snigge v. Shirton* 79 E.R. 173 (1607). In this context, "unusual" meant to use a protected arm in a manner which creates an affray. Timothy Cunningham's 1789 law dictionary defines an affray as "to affright, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror."

The longstanding prohibition on the carrying of "dangerous and unusual weapons" refers to types of conduct with weapons. A necessary element of this common law crime of affray, to which the "dangerous and unusual" prohibition refers, had always required that the arms be used or carried in such manner as to terrorize the population, rather than in the manner suitable for ordinary self-defense.

Heller's first source on the topic, Blackstone, offered that "[t]he offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, *by terrifying the good people of the land*." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769) (emphasis added). Blackstone referenced the 1328 Statute of Northampton, which, by the time of the American Revolution, English courts had long limited to prohibit the carrying of arms only with evil intent, "in order to preserve the common law principle of allowing 'Gentlemen to ride armed for their Security.'" David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, DET. L. C. REV. 789, 795 (1982) (citing *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686)). "[N]o wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people," by causing "suspicion of an intention to commit an[ ] act of violence or disturbance of the peace." TREATISE ON THE PLEAS OF THE CROWN, ch. 63, § 9 (Leach ed., 6th ed. 1788); *see* Joyce Lee

Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104-05 (1994).

Heller's additional citations regarding the "dangerous and unusual" doctrine are in accord. "[T]here may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, *in such a manner, as will naturally diffuse a terrour among the people*." James Wilson, WORKS OF THE HONOURABLE JAMES WILSON (Bird Wilson ed., 1804) (footnote omitted) (emphasis added). "It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, *in such manner as will naturally cause terror to the people*." John A. Dunlap, THE NEW-YORK JUSTICE 8 (1815) (emphasis added).

> Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land … But here it should be remembered, that in this country the constitution guar[]anties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.

Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); *see also Heller*, at 588 n.10 (quoting same). It is the *manner* of how the right is exercised, not the type of weapon that is carried, that constitutes the crime. Said another way, just because a firearm or other weapon is in common usage at the time does not make the *manner* in which the right is exercised excused or excusable simply due to the type of firearm or weapon carried.

"[T]here may be an affray … where persons arm themselves with dangerous and unusual weapons, in such manner as will naturally cause a terror to the people." William Oldnall Russell, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271 (1826). But:

> it has been holden, that no wearing of arms is within [meaning of Statute of Northampton] unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons … in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.

Id. at 272.

The other treatises *Heller* cites in support of the "dangerous and unusual" doctrine are in accord, as are the cases *Heller* cites. *See O'Neill v. State*, 16 Ala. 65, 67 (1849) (affray "probable" "if persons arm themselves with deadly or unusual weapons for the purpose of an affray, *and in such manner as to strike terror to the people*") (emphasis added); *State v. Langford*, 10 N.C. (3 Hawks) 381, 383-384 (1824) (affray "when a man arms himself with dangerous and unusual weapons, *in such a manner as will naturally cause a terror to the people*") (emphasis added); *English v. State*, 35 Tex. 473, 476 (1871) (affray "by terrifying the good people of the land"). In fact, one does not even need to be armed with a firearm to commit the crime of affray under the dangerous and unusual doctrine. *See State v. Lanier*, 71 N.C. 288, 290 (1874) (riding horse through courthouse, unarmed, is "very bad

behavior" but "may be criminal or innocent" depending on whether people alarmed). The traditional right to arms "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller* at 626. The carrying of dangerous and unusual weapons doctrine refers to a time, place, and manner restriction on the carrying of protected arms.

The common use language is supported by the tradition of carrying dangerous and unusual weapons. At Common Law one had a right to carry protected arms. Mr. Young argues that protected arms are those that survive the *Miller* test. Those arms are considered in "common use". The government cannot strip the right to carry protected arms without demonstrating that carrying within an area is unusual. *Heller* expressly holds that there is a right to carry outside the home subject to reasonable time, place, and manner restrictions.

III. Defendants' Ban on the Open Carry of Firearms is Unconstitutional

When a law burdens conduct falling within the scope of the Second Amendment's guarantee this Court conducts a two-step inquiry. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014). "The two-step inquiry we have adopted '(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.'" *Id*. at 960 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

Hawaii's complete ban on handgun carry cannot fulfill any level of heightened scrutiny per this Court's precedent. Even under intermediate scrutiny this Court looks to see whether regulations "leave open alternative channels for self-defense". *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014). Here, Hawaii provides no alternative channel for self-defense and maintains a complete ban on the carry of handguns. This ban cannot fulfill any level of scrutiny. This same reasoning should be applied to Hawaii's complete ban on long arm carry.

Even if it does not, here, both State and County Defendants have waived any argument as to why they should be allowed to ban long arm carry. *See, e.g.,United States v. Chester*, 628 F.3d at 680 ("unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law"). Mr. Young specifically raised this argument in his Opening Brief. Despite this, both State and County Defendants opted to not defend its long arm ban. Hawaii's ban on long arm carry must be enjoined.

It is important to note what is being asked here. Mr. Young is asking this Court to enjoin Hawaii's *complete* ban on long arm carry. This does not require this Court to create a right to armed rifle carry in residential areas or other areas were large numbers of people either live or congregate. Rather in line with the tradition of prohibiting dangerous and unusual weapons, this Court could find that there is an important government interest in restricting long arm carry to unincorporated land.

Much of which already allows hunting. Within residential areas, this Court could restrict Mr. Young to handgun, electric gun and knife carry. To deny Mr. Young this relief would create a circuit split.

IV. This Court Should Not Create a Circuit Split

In the past, this Court warned against creating circuit splits and is "hesitant to create such a split, and we do so only after the most painstaking inquiry…" *Zimmerman v. Oregon Dept. of J.*, 170 F.3d 1169, 1184 (9th Cir. 1999). Ruling against Mr. Young would create an explicit split in the Circuits and leave this Court in finding that the Second Amendment right does not extend outside the home. Three other Circuit Courts have upheld so-called "good cause" requirements. See *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), cert. denied, 133 S. Ct. 1806 (U.S. 2013); *Drake v. Filko*, 724 F.3d 426, 427-28 (3d Cir. 2013), cert. denied, 134 S.Ct. 2134 (U.S. 2014)*; Woollard v. Gallagher*,712 F.3d 865, 882 (4th Cir. 2013), cert. denied, 134 S. Ct. 422 (U.S. 2013). Yet, all three of those Sister Circuits either assumed or found that there is a right to keep and bear arms outside the home. Their holdings were derived from an application of intermediate scrutiny in determining the constitutionality of the respective statutes at issue.

Their decisions are in accord with *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) which is the only Circuit decision to deal with a complete ban on the carry of firearms. There, the Court struck Illinois's complete ban on the carrying of handguns

and explicitly found that the Second Amendment right extends outside the home. If this Court were to find that Mr. Young's claim to firearm carry meritless, then it would be creating an explicit Circuit split with the 4th, 7th and 2nd Circuits. This Court would stand alone without reason and contrary to *Heller's* precedent. This Court should not create a Circuit split.

Conclusion

For the reasons raised in this appeal, Mr. Young requests that H.R.S. § 134 be enjoined.

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CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This supplemental brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this supplemental brief contains 2,400 words, as calculated by Microsoft Word 2016, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This supplemental brief complies with the typeface Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

CERTIFICATE OF SERVICE

On this, the 23rd day of June, 2016, I served the foregoing pleading by electronically filing it with the Court's CM/ECF system which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 23rd day of June, 2016

s/ Alan Beck