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 the 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

Reply to *Jackson v. City and County of San Francisco,* No. 12-17803 Response to Mr. Young's Motion to Reply or Bind

ALAN BECK Esq.
4780 Governor Drive
San Diego, California, 92122

Introduction

Mr. Young replies to Appellants in *Jackson v. City and County of San Francisco*, No. 12-17803 ("Jackson"). The legal issues are related and the positions taken are as different as the two parties who bring the claims. Mr. Young has found himself adversarial to legal acumen of the highest pedigree. Jackson Plaintiffs' elegant sophistry argues these two appeals are not related. This is in furtherance of a litigation strategy conceived by sophisticated minds to overturn a fairly tepid restriction on hollow point ammunition. By doing so they ignore the deplorable effects a judgment on the merits will have on the civil rights of all of the Ninth Circuit. The two appeals are very much related and present two very different paths for this Circuit.

Mr. Young and Jackson Plaintiffs' Positions Are Incongruent

Jackson Plaintiffs state their position is congruent with Mr. Young's by resort to a pedantic argument which misconstrues the reasons given by Mr. Young as to why these appeals are related. They argue "whether ammunition generally, [is] a necessary component of a functional firearm, is protected by the Second Amendment is not in dispute, nor is the *Jackson* Appellants' position on this issue incongruent with the *Young* Appellant's." *See* Response of Jackson Plaintiffs at 10. By this logic, cases are never related unless they challenged identical statues.

This is not the issue that relates the appeals. The issue that relates the two appeals is how to define a class of ammunition. Jackson Appellants' argues hollow point ammunition is a class of ammunition in common use. Analogizing improperly from *Heller* they argue a categorical ban on hollow point ammunition would fail any level of scrutiny. This would leave a ban on any rarely used (not necessarily deadly) ammunition not in common use protection. That is a misapplication of *Heller* as shown in the motion to align or expedite and supplemental brief. Mr. Young's argument simplified is ammunition should be categorized by the type of arm they are used with. Complete bans on all ammunition used by protected arms need to survive strict scrutiny.

By misapplying the common use test, esoteric ammunition could be banned without any government interest shown. Mr. Young argues that the burden is always on the government to show a reason why it can come and take. Jackson Plaintiffs' argument asks for greater protection for ammunition commonly manufactured but gives no protection for newly developed or rarely used ammunition. Their position allows government interference with innovation and the free market by governmental forces. It also is attack personal liberty in defiance of Heller which stands for individual choice as to the means people defend their lives.

The Supplemental Brief Should Be Presumed Valid By The Motion Panel

This Court waived all defects as to the motion for affirmative relief. Mr. Young was informed via ECF correspondence immediately after he filed for affirmative relief that no action was needed. The motion to strike should be presumed denied. Mr. Young plead a presumption of waiver should be found in his response to County of Hilo's Motion to Strike. Young City Defendants filed a reply and did not rebut the established presumption of waiver. *See* Young Response to Defendant's Motion to Strike at 15.

"In a civil matter a rebuttable presumption can be created if a rational relation exists between an act and the presumption." *See Mobile, Jackson & Kan. City R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910). A rational relation exists between the Defendants not promptly responding to the March 21st Notice which states it contains a new argument and all Defendants in Young waived their right to bring this motion.

Young City Defendants promptly filed a reply to Mr. Young's Response which made no effort to rebut this presumption. *See* Young City Defendants' Reply to Plaintiff Young's Response to Defendants' Motion to Strike. Moreover, Young State Defendants' did not bring the Motion to Strike. Even if relief is granted as to City Defendants, the various 28(j) Notices at issue would remain in

effect as to the State Defendants. In this eventuality, Mr. Young would request that this appeal be remanded to the lower court with instructions for Mr. Young to name an appropriate State actor in a revised complaint. Accordingly the matters raised would still be heard before this Court. The issue which relates Mr. Young's appeal and *Jackson* are raised in the various Notice of Supplemental Authority Mr. Young has filed. *See* Notice of Supplemental Authority February 25th Accordingly, regardless of whether Mr. Young's supplemental brief is approved by this Court these matters will remain part of the appeal. They have been deemed permissible by Young Defendants' conduct and will be expanded on in Mr. Young's reply brief as part of Mr. Young's inevitable rebuttal of Young Defendants' Answering Brief.

Moreover, regardless of this Court's opinion of the merits of this argument and the disposition of the supplemental brief which merely codifies the relief sought along with a model to aid this Court, it has already decided to leave the disposition of these matters up to the merits panel. Accordingly, it should presume the supplemental brief will remain for purposes of rendering a verdict in this motion. If need be, it could stipulate this order is predicated on the merits panel acceptance of the Notices of Supplemental Authority at issue.

Jackson Plaintiffs Misapply the Law of Standing

Jackson Plaintiff misstate the doctrine of standing as applied to a 12(b)(6) appeal. It claims "it is unclear which claims, if any, the Young Appellant would have standing to pursue because the complaint does not allege an intention to engage in much of the conduct prohibited by Hawaii's weapons chapter." *See* Jackson Response at 3. On a 12(b)(6) appeal standing is presumed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). ("at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") The lower court made an insightful analysis as to the ammunition transport law among others. *See* ER 18-21.

As to his challenged to banned items, his presumed desire to purchase them give him standing. *See Craig v. Boren*, 429 U.S. 190 (1976), both beer sellers and underage persons (who would otherwise consummate beer transactions) had standing to challenge a drinking-age law that restricted the sale of 3.2% beer. See id. at 197; see also *Bryant v. Yellen*, 447 U.S. 352, 366-67 (1980) (plaintiffs would purchase land but for acreage limitation); *Arlington Heights v. Metro. House. Dev. Corp.*, 429 U.S. 252, 262-63 (1977) (plaintiff had contract to purchase property that was contingent on repeal of zoning law). Mr. Young would also suggest that the complaint of a pro se plaintiff is sufficient to fulfill the evidentiary stage ("To

survive a motion for summary judgment for lack of standing, a party must set forth by affidavit or other evidence specific facts to support its claim"). *See* Lujan, 504 U.S. at 561.

Jackson Plaintiff Misstate The Grounds For Summary Disposition

It is unclear whether Jackson Plaintiffs' merely state the obvious or misstate the law governing summary disposition. Nearly all 12(b)(6) appeals are remanded with instructions from the higher Court. On occasion it may issue a directed verdict, however that is rare. Jackson Plaintiffs may have intended to state that Mr. Young's appeal will be subject to summary disposition per Circuit Rule 3.6 due to the assured dispositive ruling *in Richards v. Prieto*, No. 11-16255 (9th Cir. argued Dec.6, 2012) and likely dispositive ruling *Baker v. Kealoha*, No. 11-00528 (9th Cir. argued Dec. 6, 2012) as to whether the Second Amendment confers a right outside the home. Jackson Plaintiffs' mistakenly include *Peruta v. County of San Diego*, No. 10-56971 (9th Cir. argued Dec. 6, 2012) as it is unclear at this time whether this Court will issue a ruling or remand the matter to the district court due to Peruta Plaintiffs' failure to comply with 28 USC § 2403.

In re Thomas 508 F.3d 1225, 1226 -1227 (9th Cir. 2007), the Ninth Circuit explained the standard governing summary affirmances and stated in relevant part as follows:

> Because our decisions pursuant to a pre-filing review order are rarely published, we have not yet clarified the standard for determining whether an appeal or petition has sufficient merit to proceed. We take the opportunity to do so now. In addressing this issue, we are guided by prior decisions setting standards for disposing of cases on a summary basis. In United States v. Hooton, we permitted summary affirmance of a final judgment*1227 in a nonemergency situation only where "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." 693 F.2d 857, 858 (9th Cir.1982) (citations omitted). *Id*.

The question of whether an issue is substantial in the appellate context was addressed by this Court in *Wolf v. Boyd*, 287 F.2d 520, 522 (1961). The Ninth Circuit, based on Supreme Court precedent, explained the relevant standard as follows:

> The issue upon this appeal is not whether appellant is correct in her construction of her constitutional rights, but whether her contentions raise a substantial constitutional question. In the words of the Supreme Court, a question is to be regarded as insubstantial if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' *Hannis Distilling Company v. Mayor and City Council of Baltimore*, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482. *Wolf v. Boyd*, 287 F. 2d 520 - Court of Appeals, 9th Cir. (1961)

Mr. Young is unclear how his appeal is controlled by precedent. It raises many issues of first impression for this Court. In fact his appeal is the first to present the entire weapons chapter of a state before any Circuit Court. As Jackson is a preliminary appeal both appeals will likely be

remanded. However, Jackson is the only one that could be remanded without a ruling on the dispositive issues by this Court. Jackson fulfills the standard for summary disposition.

Preliminary Injunctions per *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008) are an equitable relief requiring a showing of irreparable harm. As Jackson Plaintiff's wait over three years to file a preliminary injunction it is unclear what irreparable harm is being enjoined. *See Smart v. Board of Trustees of the University of Illinois*, 34 F.3d 432, 436 (7th Cir.1994) (appeal from denial of preliminary injunction is frivolous where plaintiff failed to establish irreparable harm; court issues rule to show cause why sanctions should not be imposed on plaintiff). The merits panel may sua sponte issue a summary dismissal to this appeal despite briefing having begun. Mr. Young is well aware of this. However, the importance of this issue requires that he take this risk and align his appeal with Jackson despite its glaring defects.

Jackson Plaintiff Misapplies the Masciandro Court's Holding

The matter before the Fourth Circuit in *US v. Masciandaro*, 638 F. 3d 458 (4th Cir. 2011) was the constitutionality of a criminal conviction involving possession of a handgun in a national park. An accurate synopsis of the opinion shows the Court engaged in what was effectively constitutional avoidance.

> Without entertaining the novel notion that an overbreath challenge could be recognized "outside the limited context of the First Amendment," Salerno, 481 U.S. at 745, 107 S.Ct. 2095, we conclude that a person, such as Masciandaro, to whom a statute was constitutionally applied, "will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). This conclusion "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." Id. at 610-11, 93 S.Ct. 2908; see also Gonzales v. Carhart, 550 U.S. 124, 167-68, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) ("It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. . . . For this reason, `[a]s-applied challenges are the basic building blocks of constitutional adjudication'" (quoting Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000))); Skoien, 614 F.3d at 645 ("[a] person to whom a statute properly applies [cannot] obtain relief based on arguments that a differently situated person might present"). Accordingly, we reject his facial challenge. *Id* at 474.

As this Court assuredly knows, constitutional avoidance is a long standing doctrine self-imposed by our Courts. When applied by a court it will refuse to rule on a constitutional issue if the case can be resolved on other grounds. In *Masciandro* the Court simply had no need to look into whether the statute could conceivably be construed in an unconstitutional manner. As applied to the plaintiff, the statute was constitutional. There was no need to look beyond that matter.

Here, this Court cannot avoid the constitutional questions raised by Mr. Young. The *only* matter before this Court is the constitutionality of Chapter 134 of

the Hawaii Revised Statutes .Mr. Young's appeal is a constitutional challenge brought under numerous statutes including 42 USC § 1983 and 28 USC § 1331. The lower Court issued a decision as to the merits of Mr. Young's challenge. The constitutionality of these statutes is the only matter on appeal. Accordingly, this Court is bound by its mandate under Article III of the United States Constitution to issue a ruling on the H.R.S. Chapter 134.

Conclusion

Mr. Young begs this Court's forgiveness for what he admits is an inappropriate conclusion Jackson Plaintiffs' are correct in stating the relief asked for in motion was to simply be heard by the same merits panel. Counsel for Mr. Young asks this Court to allow him to amend the relief. He asks this Court to issue an order to be heard for oral arguments on the same day. The Constitution requires more than what was asked for despite Counsel's trepidation in regards to this matter. Mr. Young asks this Court this in its equitable nature as Mr. Young concedes it is improper to ask for this. It simply is not right to take money from people and pursue a litigation strategy that actually harms the rights that money is supposed to be used to protect. Begging this Court's pardon once again, Counsel and George Young did not serve their country to watch, of all people, the N.R.A. destroy the Constitution. Please grant this motion.

Respectfully submitted this 28th day of April, 2013,

s/ Alan Beck
Alan Beck (HI Bar No. 9145)

CERTIFICATE OF SERVICE

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 28th day of April, 2013

s/ Alan Beck
Alan Beck (HI Bar No. 9145)