

No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs - Appellants,

vs.

MARY V. KING; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**APPELLANTS' MOTION TO EXTEND APPELLATE
DEADLINES, OR IN THE ALTERNATIVE TO MODIFY THE
COURT'S OPINION TO INCLUDE INSTRUCTIONS
TO THE TRIAL COURT**

Donald E. J. Kilmer, Jr.*
Law Offices of Donald Kilmer
1645 Willow Street, Suite 150
San Jose, California 95125
Vc: 408/264-8489 Fx: 408/264-8487
E-Mail: Don@DKLawOffice.com

Don B. Kates
Attorney at Law
22608 N.E. 269th Avenue
Battleground, Washington 98604
Vc: 360/666-2688 Fx: 360/666-3303
E-Mail: DonKates@earthlink.net

Counsel for Plaintiff - Appellants

Co-Counsel for Plaintiff - Appellants

**Counsel of Record*

FACTS IN SUPPORT OF MOTION

The majority's opinion¹ issued on June 1, 2012 states that this Court will "*hold the County to its interpretation of the ordinance, ...*" *Nordyke v. King*, Slip Opinion at 6168. The opinion notes that should "*the County add new requirements or enforce the ordinance unequally, or should additional facts come to light, Plaintiffs or others similarly situated may, of course, bring a new Second Amendment challenge to the relevant laws or practices.*" *Nordyke* at 6169.

The concurring opinion authored by Judge O'Scannlain and joined by Judges Tallman, Callahan and Ikuta, used somewhat stronger language in their first footnote. It suggests that a petition for rehearing may be warranted if the County strays from the concessions made at oral argument. *Nordyke* at 6169, fn. 1.

On Monday, June 4, 2012, I sent an email to both of the County's appellate attorneys setting forth my understanding of how gun shows would proceed under their Client's concessions. As of June 7, 2012, I have not received a reply, however it may just be that the County is

¹ Perhaps this is a niggling observation, but the district court did not dismiss a Second Amendment claim, it denied Plaintiffs' motion to amend their complaint to add a Second Amendment claim.

experiencing the delays inherent in bureaucracies.

With short deadlines for seeking remedies in the Court of Appeals (14-day deadline to petition for the rehearing suggested by the concurring opinion, see FRAP40), Appellants respectfully request a extension of all applicable deadlines and/or a modification of the June 1, 2012 Opinion to permit the trial court to make appropriate findings and orders if they become necessary.

LAW IN SUPPORT OF MOTION

This court will lose the jurisdiction to act once the mandate issues. FRAP 41. Furthermore the mandate must issue seven days after the time has expired for filing a petition for rehearing, which itself has only a 14-day deadline. FRAP 40. However this Court may extend the time for filing a petition for rehearing, and thereby extend the time for issuance of the mandate. FRAP 41(b). See also: *Bell v. Thompson*, 545 U.S. 794, 802, 125 S.Ct. 2825, 2830 (2005).

In the alternative, this Court could modify the June 1, 2012 disposition to an affirmance with directions that the trial court may entertain motions for sanctions and injunctive relief to insure that the

County abides by its concessions. See generally: *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

As a further alternative, this Court could modify the disposition to an affirmance with remand and instructions now that a new theory exists for plaintiffs to renew their request for injunctive/declaratory relief that was advanced for the first time (by appellees) during oral argument; especially given that this issue was not fully developed in the appellate record. See generally: *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 754 (9th Cir. 2003)(en banc).

Furthermore, as Chief Judge Kozinki remarked at oral argument, attorney's fees and costs (not to mention damages for plaintiffs' lost profits after 12 years of no guns shows and apparently unnecessary litigation) remain an unresolved issue. Also left unresolved is a determination of the prevailing party status, given that the case was resolved only after the County's concessions. Since FRAP 38 sanctions are unavailable to appellants, and FRCP 11 sanctions are only available for misconduct in the district court, Plaintiff/Appellants may be limited to filing a new lawsuit or seeking an award under 28 USCA §§ 1912, 1927 or the Court's inherent authority to control abusive

litigation conduct. See generally: *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123, 2133 (1991).

One resolution, is for this Court to remand with instructions to the District Court to determine any amount of sanctions/damages for any misconduct in the both the Court of Appeals and the District Court – subject, of course, to appellate review for abuse of discretion. See: *Pepperling v. Risley*, 739 F.2d 443, 444 (9th Cir. 1984).

CONCLUSION

The Court should grant Appellant's Motion to extend all appellate deadlines including the deadline for filing a cost memo until after prevailing party has been determined and extending the deadline for filing a petition for rehearing (as suggested by fn. 1 of the concurring opinion) for a minimum of 60 days. This would permit the parties time to make sure they are in full agreement of their understanding of this Court's June 1, 2012 disposition and the scope of the County's concessions. If the matter is resolved before the 60 days, the parties can be ordered to file a notice with this Court that no further time extensions are necessary. If more time is needed, either party can

apply for a further extension.

In the alternative, the Court should modify its disposition to either an affirmance with directions or an affirmance with remand and instructions that the trial court may entertain any/all of the follow:

1. Determination of prevailing party status,
2. A reconsideration of the award of costs in the trial court and an initial consideration of a cost award from the litigation in the Court of Appeals,
3. The power to entertain an action for injunctive relief and/or declaratory relief to give effect to this Court's June 1, 2012 disposition following the County's concessions,
4. The power to entertain motions for sanctions under any applicable rules of civil and appellate procedure (subject to appellate review) for misconduct by any of the parties or their counsel in both the trial court and the court of appeals.

Respectfully Submitted on June 7, 2012,

/s/

Donald Kilmer, Attorney for Appellants.

CERTIFICATE OF SERVICE

On June 7, 2012, I served the foregoing **APPELLANTS' MOTION TO EXTEND APPELLATE DEADLINES, OR IN THE ALTERNATIVE TO MODIFY THE COURT'S OPINION TO INCLUDE INSTRUCTIONS TO THE TRIAL COURT** by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. [By agreement, hard-copy service of County Counsel Richard Winnie has been previously waived by T. Peter Peirce, Attorney of Record for Appellees.]

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

Executed this June 7, 2012,

/s/ Donald Kilmer

Attorney of Record for Appellants