No. 12-56508 [DC# 2:11-cv-08026]

IN THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

SIGITAS RAULINAITIS and
RIMA RAULINAITIS,

Plaintiffs-Appellants, v.

LOS ANGELES SHERIFFS
DEPARTMENT, et. al.,

Defendants-Appellees.

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

No corporate Apellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED

Can an elected official exercise broad discretion and rely solely on Public Safety concerns, unsupported by any evidence, to deny applicants their Fundamental Rights under the Second Amendment, by failing to review any

evidence and determining that only a core Right exists under the Second Amendment that is limited to the home?

STATEMENT REGARDING ORAL ARGUMENT AND REPLY BRIEF

Appellants waive oral argument and their Reply Brief due to the simple and straightforward nature of the matter and the urgency for resolution by this Court.

STATEMENT OF JURISDICTION

This is a 42 U.S.C. § 1983 action. The District Court had jurisdiction pursuant to 28 U.S.C. § 1343. The District Court granted summary judgment for Defendant-Appellee (hereinafter "Appellee"), and entered judgment in their favor under Federal Rule of Civil Procedure 56 on August 13, 2012.

Appellants filed a notice of Appeal on August 15th, 2012, in accordance with Federal Rules of Appellate Procedure 3 and 4 and Ninth Circuit Rules 3-1, 3-2 and 3-4. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This matter was set for Trial on September 4, 2012, but the District Court granted defendants' Motion for Summary Judgment on August 13, 2012. This precluded Plaintiff from seeking redress, despite an absence of any evidence by

Defendant and substantial evidence presented in opposition to the motion, but not addressed in the Courts' ruling granting the Summary Judgment. This case is unique in that Appellants did not file a motion for summary judgment, nor did the District Court review or consider any evidence offered in support of or in opposition to the Defendants' Motion for Summary judgment, and instead relied solely upon Judicial Notice of another District Court Judge, adopting that Courts' finding that Public Safety fears alone are sufficient to justify denial of Plaintiffs' fundamental Rights.

STATEMENT OF FACTS

The underlying matter proceeded without oral argument, but with significant factual disputes not addressed in the Courts' ruling. Much of the basic facts of this case are not in dispute: the only way to bear a firearm in Los Angeles for purposes of self-defense is with a Permit to carry a concealed weapon (hereinafter "CCW"), a reasonable regulation not it dispute; that plaintiffs applied for and were denied permits because they failed to demonstrate a credible threat of violence which would justify the need to possess a concealed weapon; and that Defendant has no factual basis for this policy other than a belief that guns are dangerous and gang members commit crimes.

More significantly, the disputed facts, ignored by the District Court, were significant material facts that formed the basis of the violations at issue, but not

supported by evidence. At fact 14 Defendants claimed:

> It is the LASD's position that increasing the numbers of concealed weapons in the community increases the threat of gun violence to the community at large, to those who use the streets and go to public accommodations, and to law enforcement officers patrolling the streets.
> ER at 71.

Defendants proffered facts at 11-14 were not even mentioned in the ruling, but are the basis for the unsupported policy, i.e. because guns are involved in crimes, they are a risk to public safety, though even in Fact 12, the LASD admits that gang members commit most homicides, and neither Defendant nor their expert offered any correlation to CCW holders.

In marked contrast, and again ignored by the District Court, was significant evidence presented by Plaintiffs Expert Lawrence Mudgett, who testified:

> It is my opinion, based upon my education, training, and experience and being intimately familiar with firearms research, regulation, publications and studies, that there is no correlation between the issuance of CCW permits and unlawful violence. In fact as a retired law enforcement officer, it has been my experience that criminals do not seek out training or licensing for the purpose of carrying concealed weapons, and CCW permit holders are not in any way likely to increase crime or violence, and among the gun owning population are safer and less likely to be involved in an accident with a gun, than gun owners in general because of their increased training and awareness. What facts I am aware of indicate that armed and trained citizens reduce crime by their very existence, as criminals do not know which citizens are in fact armed. ER at 220-221

Appellants' disputed the facts proffered in support of the motion, and in what could not be a greater dispute of material fact, Mr. Mudgett testified:

> The declaration of Franklin Zimring is not consistent with my knowledge, training or experience. Mr. Zimring expresses theories which are not related to CCW permits and are not consistent with any peer reviewed statistics.
> ER at 221
>
> The last ten years have seen an astronomical rise in the sale of guns and ammunition while at the same time seeing a consistent and yearly drop in violent crime as is commonly known, based upon my knowledge, experience and training and as reflected in the attached FBI crime and NCIS statistics.
> ER at 222
>
> As a former Law Enforcement officer, and expert who has reviewed the discovery responses by LASD, there is absolutely no truth to the assertion that CCW holders present any risk to law enforcement, and in fact the opposite is true. Citizens with training tend to be more aware of the concerns faced by law enforcement, and less likely to become involved in any sort of law enforcement encounter.
> ER at 223

Finally, the District Court Ruling did not even address the defendants own admission that they had no evidence to support their flawed theory:

> Q. Okay. Can you point to any study or correlation between increased issuance of CCW permit and gun violence?
> A No.
> ER at page 60.

The District Court's wholesale adoption of another District Court's ruling and failure to review or discuss the evidence presented in opposition to the motion demonstrates a complete abrogation of the Court's duties to Appellants to review and consider the evidence, especially where Appellees were the moving parties, had the burden of proof, offered no affirmative evidence, and Appellants offered

significant evidence directly contradicting Appellee's assertions. Defendant failed to provide any evidence to support their assertions that restrictive CCW policies reduce crime or increase public safety.

Further, Appellees never indicated that their policies have changed or even been reviewed following the flood of recent and ground breaking cases recognizing the long held Rights of Citizens to keep and bear arms for the purpose of self-defense. The District Court failed to make inquiry into this, and thereby has denied the Appellants a fair hearing on the assertions made by LASD and how they further a compelling governmental interest in a manner that is least restrictive of Appellants' Second Amendment Rights.

STANDARD OF REVIEW ON SUMMARY JUDGMENT

An order granting summary judgment on the constitutionality of a statute or ordinance is reviewed de novo. Nunez by Nunez v. City of San Diego (9th Cir. 1997) 114 F.3d 935, at 940. The standard governing this Court's review is the same as that employed by trial courts under Federal Rule of Civil Procedure 56(c), with the Court determining, **after independently viewing the evidence**

and all inferences therefrom in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact, and whether the District Court correctly applied the law. *See* Twentieth Century-Fox Film Corp. v. MCA, Inc. (9th Cir. 1983) 715 F.2d 1327, 1328-29 ; *see also*, Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1035 (independent review of questions of law and fact in First Amendment case).

On a motion for summary judgment, as at trial, the substantive law determines burden of proof issues and evidentiary standards. It dictates what the moving party must show to prevail on its motion and what the non-moving party must show, if anything, to resist the motion. *See* Nissan Fire & Marine Ins. Co. v. Fritz (9th Cir. 2000) 210 F.3d 1099, 1102-03. Here the Courts' own Ruling fails to even identify the evidence presented in opposition or to address the disputed facts presented.

SUMMARY OF ARGUMENT

The District Court found that Appellees' policy of denying Second Amend Rights to any resident was constitutional and justified by Public Safety concerns if they failed to show:

> "convincing evidence of a clear and present danger to life or of great bodily harm to the applicant, his spouse or dependent child, which cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm." ER at pages 1-2.

This finding stands in marked contrast to both well-established precedence and specific Ninth Circuit Authority holding:

> "The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In Heller, the Supreme Court struck down the District of Columbia's ban on handgun possession, concluding that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592, 635."
>
> U.S. v. Henry (9th Circuit, filed August 9, 2012), No. 11-30181, at 9040

The District Court erred in several significant findings including:

1. Concluding that the Second Amendment was limited to the home unless Appellants can show some verifiable threat to Appellants life or limb.
2. Finding that Public Safety fears alone, without any nexus between the fears enumerated, and the restrictive CCW policy used by LASD, justified a violation of Appellants Civil Rights.
3. Approving broad discretion by an elected official to abrogate a Fundamental Right.
4. Failing to consider the significant evidence offered in opposition to the motion.
5. Failing to recognize that Self-Defense is a Fundamental Right protected by the Second Amendment.

ARGUMENT

The trial court draws an unsupported conclusion that the Fundamental Rights protected by the Second Amendment somehow differ depending upon whether a person is in their home. This is not consistent with constitutional jurisprudence, or specific Ninth Circuit and Supreme Court rulings explicitly stating that the Second Amendment encompasses the Fundamental Right to Bear

Arms in case of confrontation, and does not state that Right is somehow limited to the home, which would be antithetical to the entire premise of the Second Amendment.

Remarkably, and without legal citation, the District Court found essentially that the Second Amendment did not protect the Appellants outside of "hearth and home" stating:

> Based on the Ninth Circuit's reasoning in post-*Heller* Second Amendment cases and persuasive authority from other circuits, the Court concludes that a policy that does not curtail the core protection of the Second Amendment, the right to keep and bear arms for self-defense in the home, is subject to intermediate scrutiny. The right at issue in this case, the right to carry a concealed weapon outside of one's home, does not implicate the right to keep and bear arms for self-defense in the home.
> ER at 6.

I. THE SECOND AMENDMENT PROTECTS THE RIGHT TO BEAR ARMS BY LAW ABIDING CITIZENS OUTSIDE THE HOME FOR THE PURPOSE OF SELF-DEFENSE

1.

In Heller the Supreme Court held that the Constitution guarantees the individual right to possess and carry weapons in case of confrontation. District of Columbia v. Heller (2008) 554 U.S. 570 at 592. "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in Heller, we held that individual self-defense is "the central component" of the Second Amendment right". McDonald v. City of Chicago (2010) 130 S. Ct. 3020, at 3037.

II. PUBLIC SAFETY ALONE DOES NOT WARRANT INFRINGMENT OF A FUNDAMENTAL RIGHT

Ignoring the evidence, and based entirely upon Public Safety Concerns, the District Court held "accordingly, the Court concludes that the LASD's CCW Permit regime restricts the use of loaded firearms in public, substantially furthering the important governmental interest of promoting public safety, and satisfying intermediate constitutional scrutiny." ER at 7. The Court does not explain how Public Safety is protected or the nexus between the right and the regulation.

In Dickens v. Ryan (9th Circuit, August 3, 2012) No. 08-99017, filed, Justice Reinhardt, in his dissent, noted that:

> Carrying a gun, which is a Second Amendment right, also cannot legally lead to a finding that the individual is likely to murder someone; if it could, half or even more of the people in some of our states would qualify as likely murderers.
>
> Id. at 8654

This quote is not offered as authoritative, but simply to demonstrate the absurdity of the LASD position that they can eliminate a Civil Right because a gang member might commit a crime without a scintilla of evidence. Appellees have never submitted any evidence that any CCW holder has ever committed any crime or that issuing CCW's would lead to an increase in crime, and to the contrary, Appellants submit evidence that the opposite is true.

Accordingly, the Ninth Circuit has rejected alleged public health and safety

concerns as a substitute for objective standards and due process. Desert Outdoor Advertising v. City of Moreno Valley (1996) 103 F.3d 814, at 819.

III. UNBRIDLED DISCRETION BY AN ELECTED OFFICIAL CANNOT BE COUNTENANCED BY THIS COURT

2.

"Unbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor's discretion." Chesapeake B &M, Inc. v. Harford County 58 F.3d 1005, 1009 (4th Cir. 1995 (en banc); cf. Green v. City of Raleigh (4th Cir. 2008) 523 F.3d 293, 306 ("'virtually unbridled and absolute power' to deny permission to demonstrate publically, or otherwise arbitrarily impose de facto burdens on public speech" is unconstitutional) (citation omitted).

A "reasonable" regulation is one that does not eliminate the exercise of a right, but instead is narrowly tailored, is based on a significant government interest, and leaves ample alternatives. As with the right to keep and bear arms, the right to freedom of speech has sometimes been analyzed in terms of "reasonable" regulation. For example, many public events for the exercise of First Amendment rights may be subject to "reasonable" time, place, and manner regulations. The "government may impose reasonable restrictions," which means that the restrictions must be "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism (1989) 491 18 U.S. 781, 791.

The District Court mentions sections of the penal code that allow the bearing of a loaded firearm when a citizen is performing a valid arrest, and when an individual is in instant fear for one's physical safety. The Court fails to analyze how it is that a situation wherein one's safety is threatened can take place. Crimes of violence take place in seconds. Not minutes. The Court fails to analyze how it is that one could legally carry a firearm without a CCW and effectively deploy said firearm for self-defense, though offers that as a viable alternative. The only legal way to do this is unloaded in a locked container. The idea that one can effectively protect oneself from a situation that arises suddenly by unlocking a container and loading a firearm before being able to use it in self-defense is not only implausible, but it is not supported by evidence, logic or reason. If this method of self-defense was effective, then cities and counties would require that their officers and deputies carry their weapons in this manner.

IV. THE DISTICT COURT FAILED TO CONSIDER THE SIGNIFICANT EVIDENCE OFFERED IN OPPOSITION TO THE MOTION

Appellees carry the burden of establishing the nexus between their need and their infringement upon a Fundamental Right. Under Cantwell v. Connecticut (1940) 310 U.S. 296, and progeny, States and localities may not condition a

license necessary to engage in constitutionally protected conduct on the grant of a license officials have discretion to withhold. Further, a host of prior restraint cases establish that "the peaceful enjoyment of freedoms which the Constitution guarantees" may not be made "contingent upon the uncontrolled will of an official." Staub v. Baxley (1958) 355 U.S. 313, 322.

Public Safety is invoked to justify most laws, but where a fundamental right is concerned, a mere incantation of a Public Safety rationale does not save arbitrary licensing schemes. In the First Amendment arena, where the concept has been developed extensively, courts have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. Kunz v. New York (1951) 340 U.S. 290, 294; Shuttlesworth v. City of Birmingham (1969) 394 U.S. 147, at 153. Public Safety concerns may justify permissible regulations of protected activities, but the Constitution does not permit fundamental civil rights to be abridged by public safety fears. ***See, e.g.*****, Near v. Minnesota (1931) 283 U.S. 697, 721-22.**

CONCLUSION

The District Court has adopted a standard herein not recognized in the law to date, first declaring that the Fundamental Core Rights recognized by the

Second Amendment are limited to the home, and that, Appellees are entitled to unfettered discretion to infringe upon these fundamental rights based solely upon Public Safety fears.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, this case is directly related to Birdt v. Baca, 9th Circuit Case# 12-55115 and Thompson v. Torrance Police Department and LASD, 12-56236.

Date: August 16, 2012

s/ Jonathan Birdt
Jonathan W. Birdt (SBN# 183908)
Plaintiffs -Appellants