

NO. 11-5963

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**LEONARD S. EMBODY,
Plaintiff-Appellant**

v.

**STEVE WARD,
Defendant-Appellee**

**On Appeal from the Judgment of the United States District Court
for the Middle District of Tennessee**

BRIEF OF DEFENDANT-APPELLEE STEVE WARD

**ROBERT E. COOPER, JR.
Attorney General and Reporter**

**WILLIAM E. YOUNG
Solicitor General**

**MARY M. BERS, BPR #013159
Senior Counsel
DAWN M. JORDAN, BPR #020383
Senior Counsel
Office of the Tennessee Attorney General
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-1845**

NO. 11-5963

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Leonard S. Embody, Plaintiff-Appellant

v.

Steve Ward, Defendant-Appellee

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Steve Ward makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publically owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: NO.
2. Is there a publically owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: NO.

CERTIFICATE OF SERVICE

I certify that on November 28, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record

s/ Mary M. Bers

TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS.....	i
TABLE OF CONTENTS.....	ii-iii
TABLE OF AUTHORITIES	iv-vi
STATEMENT ON ORAL ARGUMENT	1
SUBJECT MATTER AND APPELLATE JURISDICTION	1
ISSUES PRESENTED ON APPEAL.....	2
STANDARD OF REVIEW	3
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	6
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. THE DISTRICT COURT CORRECTLY RULED THAT DEFENDANT TENNESSEE STATE PARK RANGER STEVE WARD ACTED IN AN OBJECTIVELY REASONABLE MANNER UNDER THE FOURTH AMENDMENT BY TEMPORARILY DISARMING LEONARD EMBODY IN A STATE PARK.	14
A. The doctrine of qualified immunity protects Steve Ward as to Embody’s Fourth Amendment claim. Qualified Immunity protects a law enforcement officer from personal liability in the performance of discretionary functions.	14

B. The District Court correctly held that Steve Ward had not violated Embody’s Fourth Amendment rights.....	15
1. An investigatory stop is permissible under the Fourth Amendment when a law enforcement officer has reasonable suspicion of criminal activity.....	15
2. The District Court did not err in holding that Steve Ward had a reasonable suspicion of criminal activity when he temporarily detained Embody.	17
II. THE DISTRICT COURT CORRECTLY RULED THAT DEFENDANT WARD DID NOT VIOLATE EMBODY’S SECOND AMENDMENT RIGHTS BY TEMPORARILY DISARMING HIM.	22
CONCLUSION	26
CERTIFICATE OF COMPLIANCE	27
CERTIFICATE OF SERVICE	28
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS BY APPELLEE/DEFENDANT STEVE WARD	29
CERTIFICATE OF DESIGNATION.....	31

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adams v. Williams</i> , 407 U.S. 143 (1972).....	22
<i>Boyce Motor Lines, Inc. v. United States</i> , 342 U.S. 337 (1952).....	26
<i>Center for Bio-Ethical Reform, Inc. v. City of Springboro</i> , 477 F.3d 807 (6th Cir. 2007)	22
<i>Debusscher v. Sam’s East, Inc.</i> , 505 F.3d 475 (6th Cir. 2007)	3
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	22, 23
<i>Dorsey v. Barber</i> , 517 F.3d 389 (6th Cir. 2008)	16
<i>Feathers v. Aey</i> , 319 F.3d 843 (6th Cir. 2003)	17
<i>Gallegos v. City of Los Angeles</i> , 308 F.3d 987 (9th Cir. 2002)	20
<i>Hamblen v. United States</i> , 591 F.3d 471 (6 th Cir. 2009), <i>cert. denied</i> , 552 U.S. 992 (2010)	22
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	14
<i>Hills v. Kentucky</i> , 457 F.3d 583 (6 th Cir. 2006)	14
<i>Jones v. Byrnes</i> , 585 F.3d 971 (6th Cir. 2009)	15
<i>McDonald v. City of Chicago</i> , ___ U.S. ___, 130 S.Ct. 3020 (2010).....	22, 23

<i>Michigan v. Summers</i> , 452 U.S. 692 (1981).....	20
<i>Nordyke v. King</i> , 563 F.3d 439 (9th Cir. 2009)	23
<i>Pearson v. Callahan</i> , 129 S.Ct. 808 (2009).....	14
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001).....	14, 15, 21
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	16, 20
<i>United States v. Arvizu</i> , 534 U.S. 266 (2002).....	16
<i>United States v. Dorosan</i> , 2009 WL 3294733 (5th Cir. 2009)	23
<i>United States v. Hardnett</i> , 804 F.2d 353 (6th Cir. 1986)	17, 19, 20, 21
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985).....	20
UNITED STATES CONSTITUTION	
U.S. Const., amend. 2.....	passim
U.S. Const., amend 4.....	passim
STATUTES	
15 U.S.C. § 5001 (b)(1).....	6
28 U.S.C. § 1291	1
42 U.S.C. § 1983	1, 3
2009 Tenn. Pub. Acts ch. 428	11
Tenn. Code Ann. § 11-3-101	22

Tenn. Code Ann. § 39-11-106(16).....12, 18, 25
Tenn. Code Ann. § 39-11-1307 11
Tenn. Code Ann. § 39-17-1311(b)(1)(H)11, 24
Tenn. Code Ann. § 39-17-1311(d).....11
Tenn. Code Ann. § 39-17-135124, 26
Tenn. Code Ann. § 39-17-1351(t).....passim

OTHER AUTHORITIES

Fed. R. Civ. P. 56(c).....3
Fed. R. App. P. 32(a)(7)(C)27

STATEMENT ON ORAL ARGUMENT

Defendant Steve Ward does not request oral argument. However, the plaintiff has requested oral argument. Should the Court deem oral argument appropriate in this case, the defendant Ward will appear at, and participate in oral argument.

SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal by plaintiff Leonard S. Embody from the final judgment of the United States District Court for the Middle District of Tennessee on July 20, 2011. (R. 45, Entry of Judgment). The district court exercised subject matter jurisdiction under 42 U.S.C. § 1983. This Court has jurisdiction on appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED ON APPEAL

I. Whether the district court correctly ruled that the defendant Tennessee Park Ranger Steve Ward, acted in an objectively reasonable manner under the Fourth Amendment by temporarily disarming the plaintiff Leonard Embody in a state park when Embody displayed an “AK-47” altered to resemble a toy while he was dressed in camouflage, and after park visitors had expressed alarm and concern for their safety.

II. Whether the district court correctly ruled that the defendant Ward did not violate Embody’s Second Amendment rights by temporarily disarming him, when state law governing handguns authorizes a law enforcement officer to disarm a permit holder if the officer reasonably believes it is necessary for the protection of the permit holder, the officer, or other individuals.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of summary judgment. *Debusscher v. Sam's East, Inc.*, 505 F.3d 475, 478 (6th Cir. 2007). Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* See Fed. R. Civ. P. 56(c).

STATEMENT OF THE CASE

On February 8, 2010, the plaintiff Leonard Embody, filed a Complaint under 42 U.S.C. § 1983 against the defendant Steve Ward, a park ranger with the Tennessee Department of Environment and Conservation, in the United States District Court for the Middle District of Tennessee in Nashville, alleging violations of the Fourth Amendment to the United States Constitution. (R. 1, Complaint).¹ District Court Judge William J. Haynes, Jr., presided over the case. Ward filed an Answer on February 26, 2010, denying the allegations. (R. 4, Answer). The parties entered a period of discovery.

On November 2, 2010, Embody moved to amend the Complaint to add allegations under the Second Amendment. (R. 13, Motion to Amend). On November 9, 2010, the district court granted his motion, and Embody filed an

¹ References to the record will be designated as "R." followed by a description.

Amended Complaint. (R. 14, Order Granting Motion to Amend; R. 15, Amended Complaint).

Ward filed a Motion for Summary Judgment with attached exhibits, a Statement of Material Facts, and Memorandum of Law on November 30, 2010. (R. 16, Motion for Summary Judgment and exhibits 16-1 to 16-10); R. 17, Statement of Material Facts by Steve Ward; R. 18, Memorandum of Law). On November 30, 2010, Ward also filed a motion for leave to manually file an audio CD in support of his Motion for Summary Judgment. (R. 18, Motion for Leave to Manually File). The court granted this motion on December 3, 2010, and the audio CD was manually filed with the court on the same day. (R. 20, Order Granting Motion for Leave to Manually File; R. 21, Notice by Ward of Manual Filing of Audio CD and attached audio CD).²

On December 15, 2010, Embody filed a Response to the Motion for Summary Judgment (R. 22). This included: Plaintiff's Responses to Ward's Statement of Materials Facts in Support of Summary Judgment (R. 22-3), a Memorandum of Law (R. 22-2), and Plaintiff's Statement of Material Facts. (R. 22-1). On December 16, 2010, Ward filed a Motion for Leave to File a Reply in Support of Motion for Summary Judgment. (R. 23, Motion for Leave to File

² Simultaneously with the filing of this brief, four copies of the audio CD are being sent by private overnight carrier to the Court and to opposing counsel.

Reply). The court granted this motion on December 20, 2010. (R. 24, Order Granting Motion for Leave to File Reply).

Ward then filed a Reply in Support of Motion for Summary Judgment on December 28, 2010. (R. 25, Reply in Support of Ward's Motion for Summary Judgment). The same day, December 28, 2010, Ward filed Responses to Plaintiff's Statement of Material Facts. (R. 26, Responses). Also on December 28, 2010, Ward filed a Notice of Amendment to his Responses to the Plaintiff's Statement of Material Facts, correcting an error to his responses in R. 26. (R. 27, Notice of Amendment).³

On February 15, 2011, the district court issued an order continuing the trial date in this case pending the court's ruling on Ward's Motion for Summary Judgment. (R. 34, Order Continuing Trial). On July 13, 2011, the court directed Embody to clarify whether his complaint included a claim under the Second Amendment in addition to the Fourth Amendment claim. (R. 41, Order to Clarify). On July 18, 2011, Embody responded that he was making a Second Amendment claim. (R. 42, Plaintiff's Response to Order of the Court).

On July 20, 2011, the district court entered an Order and Memorandum granting Ward's Motion for Summary Judgment and dismissing this case with prejudice. (R. 43, Memorandum of the Court; R. 44, Order). The clerk entered the

³ The correction denied that Ranger Joshua Walsh ever pointed a shotgun at Leonard Embody or ordered him to put his weapon on the ground.

Judgment the same day, July 20, 2011. (R. 45, Entry of Judgment). Embody filed a Notice of Appeal on August 9, 2011. (R. 46, Notice of Appeal).

STATEMENT OF THE FACTS

On Sunday afternoon, December 20, 2009, Leonard Embody, while dressed in camouflage, carrying what would later be determined to be an AK-47 pistol in a sling,⁴ entered Radnor Lake State Natural Area (“Radnor Lake”),⁵ a popular park in Nashville, Tennessee, turned on a tape recorder, and proceeded to walk on the trails. (R. 22-3, Plaintiff’s Response to Defendant’s Statement of Material Facts in Support of Ward’s Motion for Summary Judgment, ¶ 1). Embody’s weapon was fully loaded with 30 rounds in the magazine and a round in the chamber. (*Id.*, ¶ 6).

Just days before this, Embody had painted orange the tip of the AK-47’s barrel, or “barrel nut.” (*Id.*, ¶¶ 2-3). Federal law requires any toy, look-alike, or imitation firearm to have a blaze orange plug inserted in the muzzle end of the barrel. *See* 15 U.S.C. § 5001 (b)(1).

Embody anticipated that a ranger would stop him and ask about the weapon. (*Id.*, ¶ 7). When Park Ranger Joshua Walsh encountered him, Walsh initially was

⁴ Photographs of Embody’s weapon were taken later that day by defendant Ward. (R. 16-8, Ward affidavit, ¶ 2 and photo exhibits 1-3).

⁵ Radnor Lake is one of the state parks and natural areas governed by the Tennessee Department of Environment and Conservation.

unsure that the weapon was real because of the orange barrel tip. (*Id.*, ¶ 4; R. 16-2, Walsh deposition, pp. 4-5, 7). Walsh determined that Embody had a handgun permit. (R. 16-2, Walsh deposition, pp. 7-8).

Embodly recorded his discussion with Ranger Walsh. (R. 22-3, ¶ 9; R. 16-1, Embodly deposition, exhibit 5: CD Recording by Leonard Embodly, 12/20/01 (hereinafter “Recording”)).⁶ Embodly told Walsh and a passerby that he was carrying a real AK-47. (R. 22-3, ¶ 5; Recording). Walsh stated, “Technically it’s a handgun, but I don’t know why you need it out here.” (*Id.*, ¶ 8; Recording). Shortly after this, Ranger Walsh said to Embodly, “I’m pretty sure an AK-47 is not a handgun.” (*Id.*, ¶ 8; Recording).

During this discussion between Embodly and Walsh, a visitor walking by held his hands up, got to the side of the road, and asked if it was a real weapon. (*Id.*, ¶ 10). Walsh could tell that the visitor was not joking and was feeling

⁶ At the beginning of the recording, Embodly stated that it is Radnor Lake, December 20, 2009. There is then about a 28-minute interlude while Embodly continued walking. The discussion with Ranger Walsh is toward the end of the recording, about seven-eighths of the way through it.

Four copies of the Embodly CD recording are being sent by private overnight carrier to the Court and to parties on the Certificate of Service simultaneously with the filing of this brief.

In the district court, defendant Steve Ward filed a motion for leave to manually file the audio CD in support of his motion for summary judgment. (R. 19, Motion to Manually File Audio CD, 11/30/10). The district court granted Ward’s motion. (R. 20, Order Granting Motion to Manually File Audio CD, 12/03/10). Ward then filed the audio CD with the District Court. (R. 21, Notice of Manual Filing of Audio CD, 12/03/10).

threatened. (*Id.*, ¶ 11). As Walsh was following Embody, several other visitors stopped Walsh to tell him about a man with a weapon and to express their concern. (*Id.*, ¶12).

Walsh called his supervisor, Park Ranger Steve Ward, a law enforcement officer and the Radnor Lake Manager, at home. Walsh told Ward that there was a man on the trail with a weapon that Walsh thought was an airsoft (toy) gun, that the tip of the barrel was painted orange, but that the man had said it was real and that it was an AK-47. (*Id.*, ¶ 13). It was standard operating procedure to call an off-duty ranger only when there was an emergency, and Ward could tell by the tone of Walsh's voice that Walsh was very concerned. (*Id.*, ¶¶ 14, 15). While Ward was on the phone with Walsh, an elderly couple started beating on the door of Ward's house to tell him that there was a man on the road with an assault rifle. (*Id.*, ¶ 16).

Ranger Ward instructed Walsh to back off of the situation with Embody and to call the police. (*Id.*, ¶ 17). Walsh then followed Embody and kept Ward updated by phone about where Embody was headed and what he was doing. (*Id.*, ¶18).

Ward's priority was to get to Ranger Walsh. (*Id.*, ¶ 19). On the way, Ward called his supervisor, Chief State Park Ranger Shane Petty, to tell him about the situation. (*Id.*, ¶¶ 20-21). From the description of the weapon, Petty did not

believe it was a valid handgun. (*Id.*, ¶ 23). Petty and Ward agreed that Ward should do a “felony take down” of the man, that is, with Ward initiating the stop by display of his weapon. (*Id.*, ¶ 24). Petty contacted Assistant Commissioner Michael Carlton, also a law enforcement officer, to advise him of the situation at Radnor Lake and of the plan of action. (*Id.*, Exh. 7, Petty Affidavit, ¶ 7)

Steve Ward pulled up into the west parking lot at Radnor Lake, where Embody was standing near his car with the weapon positioned across his chest. (*Id.*, ¶¶ 26-27). With his shotgun pointed at Embody, Ward told Embody to put the weapon down and to lie down on the ground. (*Id.*, ¶¶ 28-29).

Embodly complied; Ward searched Embodly and then allowed him to get up. (*Id.*, ¶ 30). Ward did not handcuff Embodly. (*Id.*, ¶ 31). He allowed Embodly to use his cell phone and to make calls. (*Id.*, ¶ 32). Ward did not place Embodly under arrest and never told any other police officer to arrest him. (*Id.*, ¶¶ 33-34).

Embodly had come to Radnor Lake twice before in the Fall of 2009 carrying a Smith & Wesson revolver in a holster. (*Id.*, ¶ 35). During one of those visits, Ranger Ward had stopped him, reviewed his permit, talked with him briefly, and then walked away. (*Id.*, ¶ 36). But on December 20, 2009, Ward did not realize it was the same person at first. (*Id.*, ¶37).

Officers from the Metropolitan Nashville Police Department (“Metro Police”) arrived as Ward was patting down Embodly. (*Id.*, ¶ 38). Both the Metro

Police and the Tennessee park rangers have law enforcement jurisdiction over Radnor Lake. (*Id.*, ¶ 39). The Metro Police had technological capabilities for doing a weapons check that the park rangers did not have. (*Id.*, ¶ 40).

Ward told the police that he was concerned that the weapon was illegal. (*Id.*, ¶ 42). Ward then told Embody that he would need to wait there while they determined whether the weapon was legal. (*Id.*, ¶ 44). Ward photographed Embody's weapon, sling and ammunition that day. (*Id.*, ¶ 45; *see also* R. 16-8, Ward Affidavit, ¶ 2 and photo exhibits 1-3).

The Metro Police, in the course of researching the weapon, contacted the United States Bureau of Alcohol, Tobacco and Firearms ("ATF"); the ATF later advised that the weapon was manufactured as a pistol and that it met federal requirements for a pistol or handgun. (*Id.*, ¶ 49). After receiving this information, Ward then returned the weapon to Embody. (*Id.*, ¶ 50). The incident, including investigation lasted about two and a half hours, from 4:30 to 7:00 p.m. (*Id.*, ¶ 46). Embody agrees that during the investigation, Ward and the police were calm, courteous, and respectful. (R. 16, Exh. 1, Embody dep., pp. 63-64).

Embody filed complaints with the Metro Police Department and the Tennessee Department of Environment and Conservation. (R. 22-3, ¶¶ 51-52). The Metro Police Department investigated and concluded that the police had followed the established policy, rules, and procedure. (*Id.* ¶ 51). Department of

Environment and Conservation Assistant Commissioner Michael Carlton also investigated and concluded that Embody's complaint was unfounded. (*Id.*, ¶ 52). Carlton further found that Ward had probable cause to believe that Embody was in violation of Tenn. Code. Ann. § 39-17-1307 for illegal possession of a weapon, because the AK-47 semi-automatic weapon had been altered to resemble a toy for unknown reasons. (*Id.*, ¶ 53).

Six months before this incident, the Tennessee General Assembly had passed a law allowing persons with handgun permits to carry handguns into state parks and natural areas. *See* 2009 Tenn. Pub. Acts ch. 428 (codified as Tenn. Code Ann. § 39-17-1311(b)(1)(H), and popularly known as the "guns in parks" law). While it is a criminal offense to carry a weapon in a state park, the law creates an exception for

persons possessing a handgun, who are authorized to carry the handgun pursuant to § 39-17-1351 while within or on a public park, natural area, historic park, nature trail, campground, forest, greenway, waterway or other similar public place that is owned or operated by the state, a county, a municipality or instrumentality thereof, except as otherwise provided in subsection (d).⁷

Id.

⁷ Tenn. Code Ann. § 39-17-1311(d) permits municipalities and counties to continue to prohibit handguns in their parks.

Under Tenn. Code Ann. § 39-11-106(16), a “handgun” is “any firearm with a barrel length of less than twelve inches (12”) that is designed, made or adapted to be fired with one (1) hand.” Embody testified in his deposition that the weapon he was carrying on December 20, 2009, was a “Draco AK-47 pistol,” with a barrel length of eleven and a half inches (11 ½”). (R.16-1, Embody deposition at 71-72).

SUMMARY OF ARGUMENT

The district court correctly applied the analysis for qualified immunity when it determined that Park Ranger Steve Ward did not violate Leonard Embody’s rights under the Fourth Amendment. The court found that Ward acted with reasonable suspicion in stopping Embody pursuant to Tenn. Code Ann. § 39-17-1351(t), which authorizes him as a law enforcement to detain a handgun-permit holder carrying a handgun in a state park when he reasonably believes it is necessary for the protection of the permit holder, the officer, or another individual or individuals. Here, Embody was carrying a questionable AK-47 that had been altered to resemble a toy, was dressed in camouflage, and was frightening other park visitors with his appearance and weapon.

Further, Ward’s display of his own weapon when stopping Embody did not violate Embody’s constitutional rights. Ward had consulted with his superior law

enforcement officers before taking any action. His immediate superior did not believe the weapon was a valid handgun, and together, Ward and his superior concluded that the right plan of action was to detain the individual through a “felony take down” with the stop initiated by Ward’s weapon. Ward’s display of force lasted only as long as was necessary to ensure that Embody complied with Ward’s order to put the weapon on the ground and to lie down on the ground. After Ward checked for weapons, he allowed Embody to stand and to use his cell phone. He did not put him in handcuffs or place him under formal arrest. After the Metropolitan Nashville Police, who had responded to the scene, ran a weapons check and consulted with the Bureau of Alcohol, Tobacco and Firearms, and after this investigation showed that Embody’s weapon was a legal handgun, Ward returned the weapon to Embody and allowed him to leave.

The district court also correctly ruled that Ward’s actions did not violate the Second Amendment. Embody does not challenge the constitutionality of Tenn. Code Ann. § 39-17-1351(t), that authorized Ward to detain a permit holder when he reasonably believes it is necessary for his own safety or the safety of others. The district court had determined already that Ward had reasonable grounds for exercising that authority. The court also correctly found that Embody did not have an independent right to carry his weapon in the state park under the Second Amendment.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT DEFENDANT TENNESSEE STATE PARK RANGER STEVE WARD ACTED IN AN OBJECTIVELY REASONABLE MANNER UNDER THE FOURTH AMENDMENT BY TEMPORARILY DISARMING LEONARD EMBODY IN A STATE PARK.

A. The doctrine of qualified immunity protects Steve Ward as to Embody's Fourth Amendment claim. Qualified Immunity protects a law enforcement officer from personal liability in the performance of discretionary functions.

Government officials, including police officers, are immune from civil liability unless in the course of performing their discretionary functions they violate the plaintiff's clearly established constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Hills v. Kentucky*, 457 F.3d 583, 587 (6th Cir. 2006) . Qualified immunity balances two important interests: the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009).

In the present case, the district court applied the two-step inquiry described in *Saucier v. Katz*, 533 U.S. 194 (2001), for determining whether a law enforcement officer is entitled to qualified immunity. (R. 43, Memorandum at 12). Under this inquiry, the first question is whether any constitutional violation was

committed; if so, the next question is whether that right was clearly established at the time of the violation. 533 U.S. at 201.

As the district court's Memorandum reflects, courts have the discretion to decide which of the two *Saucier* questions in the qualified immunity inquiry should be addressed first in light of the circumstances in the particular case at hand. (R. 43, Memorandum at 13, citing *Pearson*, 129 S.Ct. at 818). However, the core analysis in *Saucier* remains. See *Jones v. Byrnes*, 585 F.3d 971, 976 (6th Cir. 2009). The district court concluded that the appropriate inquiry in this case was to determine whether Ward violated Embody's rights under the Fourth Amendment.⁸ (R. 43, Memorandum at 13). The court ultimately held that Ward had not violated Embody's rights, and it dismissed this case. (*Id.*).

B. The District Court correctly held that Steve Ward had not violated Embody's Fourth Amendment rights.

1. An investigatory stop is permissible under the Fourth Amendment when a law enforcement officer has reasonable suspicion of criminal activity.

The Fourth Amendment to the United States Constitution provides that “the right of persons to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. U.S. Const., amend 4;

⁸ The district court applied the same *Saucier* analysis as to whether Ward violated Embody's rights under the Second Amendment. (R. 43, Memorandum at 13. The district court found no violation. (R. 43, Memorandum at 17).

Terry v. Ohio, 392 U.S. 1, 9 (1968). The Constitution does not forbid all searches and seizures – only unreasonable searches and seizures. *Terry*, 392 U.S. at 9. The interest in effective crime prevention and detention “underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.” *Terry*, 392 U.S. at 22.

Investigatory stops and seizures are analyzed under the Fourth Amendment, which plainly does not mandate perfection on the part of the law enforcement officer or require that only actual criminals be detained. *Terry*, 392 U.S. at 9. An investigatory stop is permissible if supported by an officer’s “reasonable suspicion” that criminal activity is afoot. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). “Reasonable suspicion” requires more than a “mere hunch” but is satisfied by a likelihood of criminal activity less than probable cause. *Dorsey v. Barber*, 517 F.3d 389, 395 (6th Cir. 2008). In determining whether the officer acted reasonably, due weight must be given to the specific reasonable inferences that the officer is entitled to draw from the facts in light of the officer’s experience. *Terry*, 392 U.S. at 27. “[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Id.* Reasonable suspicion is measured by “all the information available

to law enforcement officials at the time.” *Feathers v. Aey*, 319 F.3d 843, 849 (6th Cir. 2003).

2. The District Court did not err in holding that Steve Ward had a reasonable suspicion of criminal activity when he temporarily detained Embody.

Embodly argues that the district court erred in concluding that Ward’s stopping of Embodly was reasonable; Embodly contends that he had not been threatening and that Ward had examined Embodly’s handgun permit when Embodly was walking through Radnor Lake on a previous visit. (Appellant’s Brief at 8). However, the reasonableness of a stop is determined by two factors: “(1) whether there was a proper basis for the stop, which is judged by examining whether the law enforcement officer was aware of specific and articulable facts that gave rise to a reasonable suspicion; and (2) whether the degree of intrusion into the suspect’s personal security was reasonably related in scope to the situation at hand, which is judged by the reasonableness of the officer’s conduct given the officer’s suspicions and the circumstances.” *United States v. Hardnett*, 804 F.2d 353, 356 (6th Cir. 1986).

Under the first *Hardnett* factor, Ward was acting on specific and articulable facts when he stopped Embodly. Ward, who was off duty and at home at the time, had received an emergency call from Ranger Walsh that a man was walking through Radnor Lake dressed in camouflage and carrying a high-powered weapon

in a tactical sling and that the weapon had been modified to look like a toy with an orange tip, even though the man claimed it was a real AK-47. (R. 22-3, Plaintiff's Response to Defendant's Statement of Undisputed Facts, ¶ 13). Ward could tell from Ranger Walsh's tone of voice that Walsh was very concerned. (*Id.*, ¶ 15). At the same time Ward was getting this information, an elderly couple was beating on the door of Ward's house to tell him about a man with an assault weapon. (*Id.* at 20).

Even if Ward had known that this report involved the man he had previously encountered walking through Radnor Lake with his children while wearing a holstered Smith and Wesson and carrying his handgun permit, the circumstances on December 20, 2009 were very different. On this occasion, Embody was dressed in camouflage and openly carried in a tactical sling an AK-47 that he had altered to look like a toy.

Embodly later testified that the barrel length of his weapon was eleven and a half inches (11 ½"), which is just under the twelve-inch (12") maximum barrel length for a weapon to come within the definition of a "handgun" under Tennessee law. (R. 16-1, Embodly deposition at 71). *See also* Tenn. Code Ann. § 39-11-106 (16). When Ward encountered Embodly in the parking lot, it would not have been possible for him to determine if the weapon was within a half-inch of the definition of a "handgun" while still standing at a safe distance from someone carrying an

altered AK-47. Embody seems to suggest that Ward needed only to measure the weapon's barrel length. However, Ward's reasonable suspicions were aroused by the alteration of the weapon, the fact that Embody was frightening people, and Embody's manner of dress. Even if Ward had been aware of Embody's handgun permit, that awareness would not have dispelled his concerns.

Tenn. Code Ann. § 39-17-1351(t) authorizes a law enforcement officer to disarm a permit holder when the officer reasonably believes it is necessary for the protection of the permit holder, officer or other individual or individuals:

Any law enforcement officer in this state or of any county or municipality may, within the realm of the officer's lawful jurisdiction and when the officer is acting in the lawful discharge of the officer's duties, disarm a permit holder at any time when the officer reasonably believes it is necessary for the protection of the permit holder, officer or other individual or individuals. The officer shall return the handgun to the permit holder before discharging the permit holder from the scene when the officer has determined that the permit holder is not a threat to the officer, to the permit holder, or other individual or individuals provided that the permit holder has not violated any provision of this section and provided the permit holder has not committed any other violation that results in the arrest of the permit holder.

Tenn. Code. Ann. § 39-17-1351(t). When Embody dressed in camouflage, altered an AK-47 to resemble a toy, and walked through Radnor Lake confusing another law enforcement officer and frightening the visitors, it was reasonable for Ranger Ward to believe that disarming Embody was necessary for the protection of himself and others. Under the first *Harnett* inquiry for reasonableness of a stop,

Ward had specific and articulable facts for temporarily detaining Embody. The district court properly concluded that Ward had acted reasonably within his authority under state law in stopping and detaining Embody: “Thus, under Tenn. Code Ann. § 39-17-1351(t), the Court concludes that Ward had a reasonable belief to disarm Plaintiff as ‘necessary for the protection of the permit holder, officer or other individual or individuals’ in the park area until such time as Plaintiff’s weapon was determined to be lawful.” (R. 43, Memorandum at 14).

Under the second *Hardnett* inquiry, the investigation and resulting intrusion were reasonable under the circumstances. “The whole point of an investigatory stop, as the name suggests, is to allow police to investigate.” *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002). Moreover “[i]f the purpose underlying a *Terry* stop – investigating possible criminal activity – is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief period involved in *Terry*.” *Michigan v. Summers*, 452 U.S. 692, 700, n.12 (1981); *Gallegos*. Instead of looking at the time frame, a trial court should “examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.” *United States v. Sharpe*, 470 U.S. 675, 687 (1985).

In this case, Embody paraded his altered, confusing, and frightening AK-47 through Radnor Lake Park on December 20, 2009, a Sunday afternoon five days before Christmas. While doing so, he contemplated that he would be stopped and detained by police. (R. 22-3, ¶ 7). As noted above, it was reasonable for Ward to stop and detain Embody to determine whether his AK-47 was real. Simply measuring the barrel length would not have been sufficient in this case. The officers did pursue a means of investigation that was likely to confirm or dispel their suspicions as quickly as they could. The Metro officers conducted their research and tried to contact an ATF officer to determine whether the AK-47 had been illegally altered. (*Id.*, R. 22-3, ¶ 49). Matters were complicated by the fact that it was late Sunday afternoon just before Christmas. Embody further complicated matters and extended the length of the detention when he insisted that a Metro Police Department supervising officer be called to the scene, even after he was told that it would lengthen his detention. (R. 16-1, Embody deposition at 68). As soon as an ATF agent was consulted and confirmed that the gun was a handgun, Embody was released. (R. 22-3, ¶ 50). Under *Hardnett*, the stop was reasonable.⁹

⁹ The district court ruled that Ward did not violate Embody's Fourth Amendment rights under the first prong of the *Saucier* analysis. It did not need to address the second prong, i.e., whether the right was clearly established at the time. However, even under the second *Saucier* prong, it would have been proper to dismiss Embody's claim. When this incident occurred, the "guns in parks" law was only

II. THE DISTRICT COURT CORRECTLY RULED THAT DEFENDANT WARD DID NOT VIOLATE EMBODY'S SECOND AMENDMENT RIGHTS BY TEMPORARILY DISARMING HIM.

The Second Amendment provides: “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. 2. However, “[t]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.” *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). See also *Hamblen v. United States*, 591 F.3d 471, 479 (6th Cir. 2009), *cert. denied*, 552 U.S. 992 (2010).

In the present case, the district court relied on the Supreme Court's decisions in *Heller*, 554 U.S. 570, 635 (2008), which held that a governmental ban on handgun possession in the home violated the Second Amendment, and *McDonald v. City of Chicago*, ___ U.S. ___, 130 S.Ct. 3020, 3047 (2010), which extended the

six months old. Further, there was no case law guiding law enforcement officers regarding disarming handgun permit holders under Tenn. Code Ann. § 39-17-1351(t).

However, state law gave park rangers the authority to maintain order in the state parks for the public welfare. Tenn. Code Ann. § 11-3-101. In a post 9/11 world, officers have discretion to investigate circumstances suggesting possible terrorist activity, such as SWAT gear attire. *Center for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 827-28 (6th Cir. 2007). Embody's camouflage attire along with his assault weapon in a popular recreational area would suggest such circumstances. Further, while Embody may have been walking toward his car when he was stopped, the Fourth Amendment does not require an officer “to simply shrug his shoulders and allow a crime to occur or a criminal to escape.” *Adams v. Williams*, 407 U.S. 143, 145 (1972).

holding in *Heller* to the states. (R. 43, Memorandum at 15).¹⁰ As the District Court stated, *Heller* did not define the scope of a citizen's rights under the Second Amendment beyond the home but made it clear that the rights secured by the Second Amendment were not unlimited and that the Second Amendment did not preclude “*laws forbidding the carrying of firearms in sensitive places. . .*” (*Id.* at 16 (citing *Heller*, 534 U.S. at 627) (emphasis retained)).

The District Court related these principles to this case:

Here, Tenn. Code Ann. § 39-17-1351(t) governs authorizes [sic] temporary seizure of weapons that raise a threat to public safety [in] Tennessee; Plaintiff does not challenge the constitutionality of Tenn. Code Ann. § 39-17-1351 on his Second Amendment claim. *Yet, the site of this seizure of Plaintiff's weapon occurred in a state park and this presents a significant fact for Plaintiff's Second Amendment claim.*

(R. 43 at 16) (emphasis added). The district court then referred to decisions from other circuits that upheld gun bans in open public places with high numbers of people such as schools, government buildings, the national parks, and a post office parking lot. (*Id.* at 17 (citing *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *United States v. Dorosan*, 2009 WL 3294733 (5th Cir. 2009); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009)). The court concluded: “Given that Plaintiff was in personal possession of a loaded weapon in a public park, the Court

¹⁰ The incident in this case took place before *McDonald* was decided. It would not have been clearly established on December 20, 2009 that the Court's holding in *Heller* extended to the states.

concludes that the temporary seizure of Plaintiff's weapon did not violate the Second Amendment." (*Id.* at 17).

Embody contends that the district court erred when it "disregarded" the Tennessee statute that permitted him to carry a loaded handgun in a state park such as Radnor Lake. (Appellant's Brief at 9-10). However, permit holders do not have an unfettered or unconditional right to carry a handgun in state parks – permit holders are still subject to being disarmed under Tenn. Code Ann. § 39-17-1351(t). In fact, Tenn. Code Ann. § 39-17-1311(b)(1)(H), which creates the "guns in parks exception" incorporates Tenn. Code Ann. § 39-17-1351 by reference.¹¹ Section (t) of Tenn. Code Ann. § 39-17-1351 *does not* permit a permit holder to possess a handgun in a state park and create a threat to a law enforcement officer or others, as it allows a law enforcement officer to disarm a permit holder in such a circumstance.

Contrary to Embody's argument, the district court did not disregard the "guns in parks" law, Tenn. Code Ann. § 39-17-1311(b)(1)(H) – it concluded that Ward was entitled to disarm Embody under Tenn. Code Ann. § 39-17-1351(t) "as

¹¹ Tennessee Code Annotated § 39-17-1311(b)(1)(H) provides in pertinent part:
[P]ersons possessing a handgun, who are authorized to carry the handgun pursuant to § 39-17-1351 while within or on a public park, natural area, historic park, nature trail, campground, forest, greenway, waterway or other similar public place that is owned or operated by the state, a county, a municipality or instrumentality thereof, except as otherwise provided in subsection (d).

‘necessary for the protection of the permit holder, officer or other individual or individuals’ in the park area until such time as Plaintiff’s weapon was determined to be lawful.” (R. 43, Memorandum at 14 (quoting Tenn. Code Ann. § 39-17-1351(t)). Under *Heller*, *McDonald*, and related cases from the Fourth, Fifth, and Ninth Circuits, the district court also concluded that Embody had no independent right under the Second Amendment to bring a handgun into a state park. (R. 43, Memorandum at 16-17). Accordingly, the District Court properly concluded that the temporary seizure of Embody’s weapon did not violate the Second Amendment. (*Id.* at 17).

The facts of this case illustrate the tough judgment calls that a law enforcement officer must make, especially when dealing with an individual armed with an assault weapon. Embody’s motives are unclear as to why he came to Radnor Lake that day with a weapon that he anticipated would get the attention of the Park Rangers (*see* R. 22-3, ¶ 7), and that had a barrel length just barely within the maximum barrel length to qualify as a “handgun” under state law. (R. 16-1, Embody deposition at 71). *See also* Tenn. Code Ann. § 39-11-106 (16)). His motives are also unclear for painting the barrel tip orange to resemble a toy, for dressing in camouflage, and for turning on his recording device as soon as he got out of his car upon arriving at Radnor Lake that day. Perhaps his purpose was to test park rangers to see how well they knew the newly enacted “guns in parks” law.

However, Ranger Ward was required to follow not only the “guns in parks” law, but also Tenn. Code Ann. § 39-17-1351 and to protect the general public at Radnor Lake park. In doing so, “no more than a reasonable degree of certainty can be demanded.” *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952). As for Embody, whose own actions raised reasonable officer suspicions: “[It is not] unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.” *Id.*

When Ward was asked about the “guns in parks” law, he stated that while the law could have been written better, “it’s just something that we have to deal with as law enforcement officers.” (R. 16-3, Ward deposition at 39). When asked what he was going to do when he saw the next citizen walking in Radnor Lake with a gun similar to the one in this case, he answered, “I’m going to make sure my officers and our visitors are safe, that’s what I’m going to do.” (*Id.*).

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

s/Mary M. Bers
MARY M. BERS, BPR # 013159
Senior Counsel

s/Dawn M. Jordan
DAWN M. JORDAN, BPR # 020383
Civil Rights and Claims Division
Office of the Attorney General
P. O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-1845

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), this is to certify that the foregoing brief complies with the type-volume limitation of that rule by containing 6,214 words.

s/ Mary M. Bers

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2011, a true and exact copy of the foregoing was sent to all parties indicated on the electronic filing receipt by operation of the Court's electronic filing system, including Phillip L. Davidson, 2400 Crestmoor Road, Suite 107, Nashville, TN 37215.

s/Mary M. Bers

NO. 11-5963**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT****Leonard S. Embody, Plaintiff-Appellant****v.****Steve Ward, Defendant-Appellee****DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS BY
APPELLEE/DEFENDANT STEVE WARD**

Pursuant to Sixth Circuit Rule 30(b) and (f), Appellee/defendant Steve Ward designates relevant District Court documents:

RECORD #	DESCRIPTION	DATE
1	Complaint	2/08/10
4	Answer by Steve Ward	2/26/10
14	Order granting Plaintiff Embody's Motion to Amend Complaint	11/09/10
15	Amended Complaint	11/09/10
16	Motion for Summary Judgment by Steve Ward; Exhibit 1: Deposition of Leonard Embody and exhibits; Exhibit 2: Deposition of Joshua Ward; Exhibit 3: Deposition of Steve Ward and Exhibits; Exhibit 4: Affidavit of Michael Carlton and Exhibit A; Exhibit 5: Affidavit of Lt. Natalie Lockey and Exhibit A, Police Complaint Investigation; Exhibit 6: Affidavit of William T. Long and Exhibit A, Curriculum Vitae, Exhibit B, Expert Report; Exhibit 7: Affidavit of Shane Petty; Exhibit 8: Affidavit of Steve Ward, and Exhibits 1-7, photos; Exhibit 9 Defendant's Request for Admissions with Plaintiff's responses	11/30/10

RECORD #	DESCRIPTION	DATE
17	Statement of Material Facts by Steve Ward in Support of Motion for Summary Judgment	11/30/10
18	Memorandum of Law by Steve Ward in Support of Motion for Summary Judgment	11/30/10
19	Motion by Steve Ward for leave to manually file audio CD in support of motion for summary judgment	11/30/10
20	Order granting defendant Steve Ward's motion for leave to manually file audio CD in support of motion for summary judgment	12/03/10
21	Notice of manual filing of audio CD by Steve Ward in support of motion for summary judgment	12/03/10
22	Response to motion for summary judgment by Leonard Embody; Exhibit 1: Statement of material facts in dispute which preclude summary judgment; Exhibit 2: Memorandum brief; Exhibit 3: Plaintiff's responses to statement of material facts in support of motion for summary judgment	12/15/10
23	Motion by Steve Ward to file reply in support of motion for summary judgment	12/16/10
24	Order granting Motion by Steve Ward to file reply in support of motion for summary judgment	12/20/10
25	Reply by Steve Ward in support of motion for summary judgment	12/28/10
26	Responses by Steve Ward to plaintiff's statement of material facts in dispute which preclude summary judgment	12/28/10
27	Notice of amendment to responses by Steve Ward to plaintiff's statement of material facts in dispute which preclude summary judgment	12/29/10
43	Memorandum of the Court	07/20/11
44	Order granting motion for summary judgment by Steve Ward	07/20/11
45	Entry of Judgment	07/20/11

RECORD #	DESCRIPTION	DATE
46	Notice of Appeal by Leonard Embody	08/09/11

CERTIFICATION OF DESIGNATION

I hereby certify that all of the above documents are properly made a part of the record in the District Court.

s/Mary M. Bers