

Appeal Number 11-5963

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

LEONARD S. EMBODY,)	
)	
Plaintiff/Appellant,)	
)	
v.)	Oral Argument Requested
)	
STEVE WARD, individually,)	
)	
Defendant/Appellee.)	

**On Appeal from a Grant of Summary Judgment in Favor of the
Defendant/Appellee in Civil Action No. 3:10-cv-0126 in the United States
District Court for the Middle District of Tennessee**

BRIEF SUBMITTED ON BEHALF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit

Case Number: 11-5963

Case Name: Leonard S. Embody v. Steve Ward,
individually

Name of Counsel: Phillip L. Davidson

Pursuant to 6th Cir. R. 26.1, Leonard S. Embody, the Plaintiff/Appellant, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly 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 publicly 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.**

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STATEMENT CONCERNING ORAL ARGUMENT

Since the United States Supreme Court's seminal Opinions in District of Columbia v. Heller, 554 US 570 (2008) and McDonald v. Chicago, 561 US ---, 130 S.Ct. 3020 (2010), litigation regarding parameters surrounding civilian use and possession of firearms has, predictably, proliferated and it is not unreasonable to suggest that this trend will continue. Since this case involves a Tennessee statute – TCA § 39-17-1311[b][H] – expressly approving the carrying of a handgun in State Parks that has not yet been scrutinized by either Tennessee's Court of last resort or by this Court, it is respectfully suggested that oral argument would be of significant benefit to this tribunal.

JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Tennessee had jurisdiction over the instant controversy by virtue of 42 USC § 1983, which is a Federal question within the meaning of 28 USC § 1331. Jurisdiction was also conferred on the Court below by 28 USC § 1343. This Circuit Court of Appeals has jurisdiction over this controversy by virtue of this being a direct appeal as of right within the meaning of Rules 3 and 4 of the Federal Rules of Appellate Procedure. The Appellant's Notice of Appeal (RE46) was timely filed on August 9, 2011.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Did not the District Court err in holding that the record before it sustained, as a matter of law, Defendant's seizure of both Mr. Embody and his lawful handgun?
2. Did not the District Court err in holding that the record before it failed to demonstrate genuine issues of material fact with regard to Mr. Embody's Second Amendment claim?

STATEMENT OF THE CASE

This 42 USC § 1983 lawsuit was initially filed on February 8, 2010 (Complaint, RE1); an Answer was filed on February 26, 2010 (Answer, RE4). On November 2, 2010, Mr. Embody moved to amend his Complaint (Motion, RE13), and that Motion was granted on November 9, 2010 (Order, RE14). The Amended Complaint was filed on November 9, 2010 (RE15). The Defendant filed a Motion for Summary Judgment on November 30, 2010 (Motion, RE16), to which the Plaintiff responded on December 15, 2010 (Response, RE22). With Court approval, the Defendant replied to that Response on December 20, 2010 (Reply, RE25). By Memorandum and Order both dated July 20, 2011, U.S. District Judge William J. Haynes, Jr. granted the Defendant's Motion for Summary Judgment, and dismissed Mr. Embody's suit in its entirety (Memorandum, RE43; Order,

RE44). This timely appeal followed (Notice of Appeal, RE46, filed August 9, 2011).

STATEMENT OF FACTS

NB: A full understanding of the facts of this case requires that one be cognizant at the outset of the 2009 Amendment to TCA § 39-17-1311, which expressly permits persons who hold a valid handgun permit to carry a handgun in Tennessee State Parks. That Amendment is codified at TCA § 39-17-1311[b][H].

Radnor Lake State Park is located in Nashville, Tennessee. On December 20, 2009, Leonard Embody came to Radnor Lake. In his possession, openly carried, was a Draco AK-47 pistol. It is undisputed that Mr. Embody had a legal, current handgun permit (Defendant's Motion for Summary Judgment, RE16, Ex. 1, Dep. Embody pps. 30, 44). Mr. Embody commenced walking through the park. During his walk, Mr. Embody was stopped by Park Ranger Joshua Walsh, who recognized immediately that the weapon Mr. Embody was carrying was, in fact, a handgun (Defendant's Motion for Summary Judgment, RE16, Ex. 2, Dep. Ranger Walsh p. 5). Walsh was well-acquainted with Tennessee law concerning handguns (Id., p. 5). Walsh did not believe that Mr. Embody was in any way threatening or confrontational, and indeed he was aware that Mr. Embody had a valid handgun permit (Id., pps. 5-8). Ranger Walsh stayed with Mr. Embody until Embody was arrested by the Defendant, Park Ranger Steve Ward, and was in constant

communication with Ward during that period concerning Mr. Embody (Id., pps. 7-11). Like Ranger Walsh, Defendant was fully familiar with Tennessee law concerning the carrying of handguns in State Parks (Defendant's Motion for Summary Judgment, RE16, Ex. 3, Dep. Ward p. 6). Of compelling interest in context is the fact that the Defendant had previously encountered Mr. Embody at Radnor Lake. On that prior occasion, Mr. Embody was accompanied by his two daughters and was carrying a handgun; Ward determined then that Mr. Embody had a valid permit to carry that firearm (Id., p. 8; see also p. 27).

Ranger Walsh never told Ranger Ward that anything that Mr. Embody had done, or was doing, was in any way threatening to anyone (Id., pps. 12-13). Inexplicably, Ward has testified that he stopped Mr. Embody because of "citizen safety" (Id., p. 18).

Ultimately, the Defendant confronted Mr. Embody in the Radnor Lake parking lot as Mr. Embody was attempting to get into his automobile; no one else was present (Defendant's Motion for Summary Judgment, RE16, Ex. 1, Dep. Embody p. 61; Ex. 3, Dep. Ward p. 13). Ward detained Mr. Embody by pointing a shotgun at him and telling him to put his handgun on the ground, an instruction with which Mr. Embody complied (Defendant's Motion for Summary Judgment, RE16, Ex. 3, Dep. Ward pps. 13-14, 28-30).

SUMMARY OF ARGUMENT

Respectfully, the District Court either misconstrued, or misinterpreted, the undisputed facts in the record before it as to both the Fourth Amendment and Second Amendment claims asserted by the Plaintiff, or both. The result was to apply an incorrect Rule 56 standard, thus creating reversible error as to both theories of recovery.

ARGUMENT

The Standard of Review. In that the District Court granted the Defendant/Appellee's Motion for Summary Judgment as contemplated by Rule 56 of the Federal Rules of Civil Procedure, the standard of review is *de novo* on the record, with no presumption of correctness. Allen v. Michigan Department of Corrections, 165 F3d 405 at 409 (6th Cir. 1999).

Summary Judgment Standards. In its Memorandum (RE43), the District Court correctly stated the operative standards applicable to a Rule 56 qualified immunity case. These standards are exceedingly well-settled, and require no recapitulation here. As will be demonstrated, it is in the application of those standards that the District Court's errors are to be found. For the convenience of the Court, Mr. Embody's claims will be addressed in the order in which they were addressed by the District Court.

Wrote the Court:

“Given the circumstances here, the Court deems the appropriate inquiry here is to determine whether the Defendant violated Plaintiff’s rights under the Second and Fourth Amendments.”

Memorandum, RE43, p. 13.

That was and is precisely the correct inquiry. But respectfully;

1. Did not the District Court err in holding that the record before it sustained, as a matter of law, Defendant’s seizure of both Mr. Embody and his lawful handgun?

Counter intuitively, the District Court clearly based its Fourth Amendment conclusion on the appearance of the legal weapon carried by Mr. Embody, and on Mr. Embody’s clothing. Noting that “...several park visitors expressed concern about Plaintiff...” (Memorandum, RE43, p. 14), the Court somehow conflated the color of the barrel tip of the handgun (Memorandum, RE43, p. 13) and Mr. Embody’s choice of wearing “camouflage dress” (Memorandum, RE43, p. 14), into an “objectively reasonable” seizure (Memorandum, RE43, p. 14). In so doing, the Court disregarded TCA § 39-17-1311[b][H] and relied on TCA § 39-17-1351[t] to reach its decision. So, the inquiry becomes an examination of the genuine issues of material fact concerning that statute’s requirement of a “[reasonable belief that] it is necessary for the protection of the permit holder, officer or other individual or individuals.”

Since no Court in either Tennessee or the Sixth Circuit (other than the District Court's Memorandum in the case at bar) has so much as mentioned, much less interpreted, that statute, we must look to the concept of the "reasonable belief" of a law enforcement officer. Fortunately, the case law provides us with the necessary guidance.

In context, a law enforcement officer's "reasonable belief" need not be supported by *prime facie* evidence of wrongdoing but it must be based on more than "mere suspicion." U.S. v. Ferguson, 8 F3d 385 at 392 (6th Cir. 1993), *en banc*. It requires either the "probability" or a "substantial chance" of wrongdoing. Illinois v. Gates, 462 US 213 at 244, n.13 (1983). Finally one must look to the "totality of the circumstances" from the perspective of the law enforcement officer. Ferguson, also at 392. As this Court aptly noted in U.S. v. Pruitt, 458 F3d 477 (6th Cir. 2006), "common sense" must necessarily be applied to all of these criteria. Pruitt at 482. The District Court was right in observing that "...the threshold question of reasonableness of a search and/or seizure is to be resolved by the Court." (Memorandum, RE43, p. 11). The difficulty here is that after correctly resolving the issue of the Court's function, the District Court resolutely ignored much of the record before it. Application of the "common sense" requirement of which we were reminded in Pruitt leads inexorably to a contrary result. As noted in the Statement of Facts, the Defendant Park Ranger was fully familiar with

Tennessee law concerning the carrying of handguns in State Parks such as Radnor Lake. And, although utterly ignored by the Court, it is undisputed in the record that Ranger Ward had previously encountered Mr. Embody at Radnor Lake. On that prior occasion, Mr. Embody was accompanied by his two daughters and was carrying a handgun; Ward determined then that Mr. Embody had a valid permit to carry that firearm. Somehow, the District Court concluded that the color of the tip of Mr. Embody's firearm and his choice of clothing - the only factors mentioned by the Court - made it "reasonable" for a Park Ranger to stop and seize a citizen known to the Ranger to have a valid permit and who had done absolutely nothing in any way threatening. As to the question of a "clearly established statutory or constitutional right," the case *sub judice* leaves absolutely no doubt: Ward had actual knowledge of Tennessee's statutory law expressly permitting exactly what Mr. Embody was doing.

"Common sense" simply will not permit the conclusion reached by the Court that Ranger Ward acted in an "objectively reasonable" way. Mr. Embody threatened absolutely no one and nothing he did or failed to do was in any way threatening. There was no "probability" or "substantial chance" of wrongdoing. At the very most, one might argue that Ranger Ward somehow conceived a "mere suspicion" but as articulated earlier that is not nearly enough. The District Court's

holding that Ward met a reasonable objective standard in his treatment of Leonard Embody is demonstratively erroneous as a matter of law.

2. Did not the District Court err in holding that the record before it failed to demonstrate genuine issues of material fact with regard to Mr. Embody's Second Amendment claim?

The District Court's grant of summary judgment on Mr. Embody's Second Amendment claim is difficult to reconcile with the facts of the case. The Court begins its analysis by holding implicitly that McDonald v. Chicago, 561 US ---, 130 S.Ct. 3020 (2010) does not protect weapons possession outside of one's home, relying on dicta in a Fourth Circuit case, U.S. v. Masciandaro, 638 F3d 458 (4th Cir. 2011) that is diametrically off-point. First, Masciandaro is at present the subject of an application for *certiorari* before the United States Supreme Court.¹ Second, and of even greater importance, Masciandaro involved the violation of a Federal statute prohibiting carrying a loaded handgun in a National Park, whereas the case at bar involves a Tennessee statute that expressly permits such conduct in a State Park such as Radnor Lake. Disregarding this statute was an error, the District Court stretched its reliance to a Ninth Circuit case - Nordyke v. King, 563 F2d 439 (9th Cir. 2009)² – and an unreported Fifth Circuit case - U.S. v. Dorosan,

¹ Filed June 22, 2011.

² Nordyke has been severely criticized. See, e.g., Nat'l. Rifle Ass'n., Inc. v. City of Chicago, Ill., 567 F3d 856 (7th Cir. 2009)

2009 WL 3294733 (5th Cir. 2009) – that both pre-date McDonald. Most telling of all, the District Court *made no reference at all* to TCA § 39-17-1311[b][H], the statute wherein Tennessee’s General Assembly flatly and unequivocally made it lawful for persons such as Mr. Embody to carry a handgun in a Tennessee State Park. The District Court concluded:

“Given that Plaintiff was in personal possession of a loaded weapon in a public park, the Court concludes that the temporary seizure of Plaintiff’s weapon did not violate the Second Amendment.”

Memorandum, RE43, p. 17.

In reassembling Mr. Embody’s Second Amendment claim; it is undisputed that Leonard Embody had a valid gun permit. It is undisputed that at the time in question, he was in a Tennessee State Park. It is undisputed that the weapon that he carried was a legal weapon. It is undisputed that TCA § 39-17-1311[b][H] means exactly what it says: TCA § 39-17-1311[b][H] gives every person similarly situated to Leonard Embody the unalloyed right to do precisely what Mr. Embody was doing when he was detained. With the greatest deference to the District Court, it is extremely difficult to construct a set of facts showing a more patent *per se* Second Amendment violation.

CONCLUSION

It is obvious from reading the Court's Order that it was disturbed by the orange tip on the barrel on Mr. Embody's handgun and that Mr. Embody was wearing camouflage clothing. The Court was disturbed by the fact that the gun was loaded. None of these things have anything whatsoever to do with the issues that were before this District Court, or those before this tribunal. Yet, as articulated above, one could easily conclude that singly and in combination that these irrelevancies were decisive in the case, utterly ignoring the Tennessee statute that controls major aspects of the matter. There was nothing objectively reasonable about what Ranger Ward did. The seizure is as pure a Second Amendment violation as could be imagined. The record shows without dispute that Ward had personal knowledge and understanding of applicable Tennessee handgun law. Leonard Embody earnestly submits that the result obtained below be reversed, and this case remanded for a hearing on the merits. Settled principles of law will admit of no other result.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief contains 3,148 words as calculated by automated word count (MS Word) and is otherwise in compliance with Rule 32 of the Federal Rules of Appellate Procedure.

/s/ Phillip L. Davidson

Phillip L. Davidson

CERTIFICATE OF SERVICE

I certify that an exact copy of this Brief was provided electronically as required by the Local Rules of the United States Court of Appeals for the Sixth Circuit to:

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Designation of Record on Appeal

Sixth Circuit

Case Number: 11-5963

Case Name: Leonard S. Embody v. Steve Ward,
individually

Counsel for Appellant designates the following documents for inclusion in the electronic Record on Appeal:

Lower Court Case No.: 3:10-cv-0126
Middle District of Tennessee

RE #	Description of Pleading, Transcript or Other Filing
n/a	Docket sheet, U.S. District Court Middle District of Tennessee No.: 3:10-cv-0126
15	Amended Complaint (11/9/10)
16	Defendant's Motion for Summary Judgment (11/30/10) Ex. 1: Dep. Embody, plus exhibits redacting No. 5 Ex. 2: Dep. Walsh Ex. 3: Dep. Ward, including exhibits Ex. 4: Affidavit Carlton, including exhibits Ex. 5: Affidavit Lokey, including exhibits Ex. 6: Affidavit Long, including exhibits Ex. 7: Affidavit Petty Ex. 8: Affidavit Ward, including exhibits Ex. 9: Responses to Defendant's Requests for Admissions Ex. 10: Tenn. Pub. Ch. 428 (2009)

- 22 Plaintiff's Responses to Defendant's Motion for Summary Judgment (12/15/10)
 - Ex. 1: Plaintiff's Statements of Disputed Material Fact which Preclude Summary Judgment
 - Ex. 2: Plaintiff's Brief
 - Ex. 3: Plaintiff's Responses to Defendant's Statement of Undisputed Material Fact

- 26 Defendant's Responses to Plaintiff's Statement of Disputed Material Fact (12/28/10)

- 43 Memorandum Opinion (7/20/11)

- 44 Order Granting Defendant's Motion for Summary Judgment (7/20/11)

- 46 Notice of Appeal (8/9/11)