21-1658-cv

United States Court of Appeals
for the
Second Circuit

JOHN DOES 1-10,

Plaintiffs-Appellants

v

SUFFOLK COUNTY, NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF IN FURTHER SUPPORT PRELIMINARY INJUNCTION MOTION

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PRELIMINARY STATEMENT

The plaintiffs have established a substantial likelihood of success on the merits of their appeal and underlying claims (and sufficiently serious questions going to the merits making them fair ground for litigation), imminent and irreparable harm in the absence of the requested relief, and have demonstrated that the benefits of enjoining Suffolk County's policy tips in the favor of all purchasers of the CT4-2A, including the plaintiffs, and serves the public interest. *Connecticut State Police Union v. Rovella*, 494 F. Supp. 3d 210, 219 (D. Conn. 2020) (cases cited).

I. APPLICATION OF STATE LAW, NOT ITS INTERPRETATION

Success on the merits of the underlying action revolves around the 'application', not an 'interpretation', of state law to the specifications of the CT4-2A.

A. The Avoidance of Sworn Testimony

The plaintiffs submitted the declaration of the manufacturer of the CT4-2A Other Firearm, under the penalty of perjury, averring the CT4-2A does not fit within the definitions of any proscribed firearm under the Penal Law. [Exhibit 3].

The SCPD Letter is unsigned, and the County has presented no documentary evidence or declaration from any County law enforcement officer supporting its policy. The only support for the County's policy lies in the non-

expert attorney opinion regarding the weapons classification of the CT4-2A and empty speculations that the documented threats subjecting non-compliant purchasers – like the plaintiffs – "to arrest and criminal charges for [the] purchase and continued possession of said firearm" may not happen because they have not been arrested yet. [Exhibit 1].

B. New York Law, When Applied to the Specifications of the CT4-2A, Establishes a Likelihood of Success on the Merits

There is no 'interpretation' of state law required. Adjudication of the constitutional claims involves applying the Penal Law to the specifications of the CT4-2A to determine whether the policy being enforced by Suffolk County is or is not unconstitutional.

Application of the Penal Law will reveal that the policy violates the Fourth Amendment. The seizure of the CT4-2A and/or the arrest of non-compliant purchasers is unreasonable because the CT4-2A is not 'contraband'. The policy violates the Fifth Amendment Takings Clause because the policy subjects all purchasers to the loss and/or "beneficial use of their property", which categorically requires government compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). Likewise, the policy violates the Fourteenth Amendment.

C. The County Fails to Commit to the Statute Being Violated

The County has still not committed to identifying which section of the Penal Law the CT4-2A violates.

> "It is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not " 'plainly and unmistakably' " proscribed.

United States v. Diaz, 712 F.2d 36, 40 (2d Cir. 1983) quoting, *United States v. Gradwell*, 243 U.S. 476 (1917).

The County argues the CT4-2A is "truly an assault weapon" under § 265.00(22)(c)(vii) – which would make it a 'pistol' with prohibited characteristics. Then, the County argues that the CT4-2A could also be a rifle under § 265.00(22)(a), but it fails to place the CT4-2A within any specific criminal statute. [Appellee's Brief at p. 10].[1] The County randomly cites certain features outlawed under § 265.00(22) without committing to which type of gun they contend the CT4-2A is – a pistol or a rifle. [Appellee's Br. at 10].

[1] Plaintiffs never argued that the CT4-2A "cannot be an assault weapon because it is not designed for concealment". [Appellee's Brief at p. 10]. The CT4-2A cannot be defined as a 'pistol' because – at over 26" in length, it is not a concealable weapon, and therefore it does not fit the definition of a "semiautomatic pistol" with the enumerated features. See, § 265.00(22)(c).

Definitions matter. A gun cannot be both a pistol and a rifle.[2] The fact that neither Suffolk County's Police Department nor its District Attorney's Office can pin down the specific section of the Penal Law under which they are confiscating property and - like the Geheime Staatspolizei - are threatening to arrest and prosecute innocent people, should send chills down the spine of every ethical being in this judicial system.

Applying § 265.00(3), (11), (12), and (22) to the features of the CT4-2A, the CT4-2A does not fit within any definition under those sections. Therefore, there is no provision of the Penal Law that criminalizes the possession of the CT4-2A.

D. § 265.00(3) Proscribes 'Concealable' Guns

While § 265 does not define 'pistol' [3], New York trial and appellate courts have held that the term 'pistol' relates to 'concealable' guns. "The legislative intent in the adoption of section 265.00(3) is to proscribe possession of weapons which can be 'concealed upon the person'." *People v. Eldridge*, 53 A.D.2d 1037, 1038 (4th Dep't 1976) (dismissing indictment charging defendant with a sawed-off shotgun 27 inches in length); C.f., *People v. Briggs*, 19 N.Y.2d 37, 41 (1966) (felony covering a person 'who has' or 'carries concealed upon his person' a

[2] Appellee's Brief at p. 10.
[3] The common definition of "pistol" is a 'handgun'. https://www.merriam-webster.com/dictionary/pistol

loaded firearm…relate(s) to concealment…"); *People v. Adams*, 28 A.D.2d 708 (2d Dep't 1967) (possession of a loaded rifle does not constitute crime of 'possession of a loaded firearm').

The requirement that pistols and revolvers (concealable handguns) be licensed, but not rifles and shotguns, further supports the conclusion that 'pistols' refers to 'concealable' guns. Accord, *People v. Raso*, 9 Misc. 2d 739, 743 (Co. Ct. 1958) (same conclusion "reinforced by the fact that the licensing provisions…speak solely of pistols and revolvers…").

Similarly, the federal Gun Control Act of 1968, defines 'pistol' as "a weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand…"[4] 18 U.S.C. 921(A)(29); 27 CFR 478.11. See also, New Jersey Attorney General's Office Opinion at Exhibit 7]. The New York Legislature adopted the ATF's definition of "rifle" [compare § 265.00(11) to 26 U.S.C. Chapter 53 § 5845(c)] and "shotgun" [compare Penal § 265.00(12) to 26 U.S.C. Chapter 53 § 5845(d)][5], reinforcing the position that New York employs a definition of 'pistol' consistent with federal law; Connecticut General Statutes § 29-27 & 53a-3(18), where the CT4-2A is also

[4] https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-gun-control-act-definition-pistol

[5] Suffolk County DA Timothy Sini also relied on the ATF's guidance in rendering a decision on the legality of the "Shockwave" and "Tac-14". [Exhibit 8]. As DA Sini's decision indicates, it is well-settled that any gun over 26 inches is not 'concealable'. [*Id.*].

legal, adopted the same definition and further defines a 'pistol' as any firearm having a barrel less than 12 inches long, which the CT4-2A does not.

The CT4-2A is not made or intended to be held and fired by the use of a single hand. [Exhibit 3]. The second vertical fore grip eliminates the intent to fire the CT4-2A through the use of a single hand. [*Id.*]. The ATF has long held the existence of a vertical foregrip demonstrates that the gun is not designed to be held and fired by the use of a single hand.[6] Rather, the vertical foregrip evidences an intention to design a "short-barreled rifle", which would require registration with the ATF. However, the CT4-2A's overall length, which exceeds 26 inches, removes it from the definition of 'short-barreled rifle'. [Exhibit 3 at ¶ 20; § 265.00(3)(c)]. The "assault pistol" the County alludes to is illustrated below[7]:

[6] https://www.atf.gov/firearms/docs/open-letter/all-ffls-may2006-open-letter-adding-vertical-fore-grip-handgun/download

[7] https://www.atf.gov/firearms/docs/undefined/atf-national-firearms-act-handbook-chapter-2/download

A plain view of an "assault pistol" demonstrates that the CT4-2A is not a 'pistol' with a vertical foregrip, as illustrated above. [Compare, Exhibit 3, at photographs].

The length of the unconcealable CT4-2A at over 26 inches removes it from the definition of 'pistol', and thus from the definition of "assault pistol" under § 265.00(22).[8]

With regard to the County's reference to the ATF's position on stabilizing braces, taken from a June 2021 proposed amendment to existing federal regulations[9], the ATF has previously found that the forearm brace feature of the type that exists in the CT4-2A configuration (foam-type rubber and two Velcro straps) does not convert the weapon to be fired from the shoulder, nor does it render the firearm subject to the National Firearm Act. [Exhibit 6].

Moreover, the ATF specifically noted that the proposed amendment would not affect 'stabilizing braces' designed to conform to the arm, not for use as a buttstock.[10] A plain view of the CT4-2A demonstrates that the CT4-2A forearm brace is designed to conform to the forearm. It was not intended nor designed,

[8] The overall weight of the CT4-2A is immaterial; weight exceeding 50 ounces applies to 'pistols' under § 265.00(22)(c)(vii), which the CT4-2A is not.
[9] On June 24, 2021, forty-eight Senators submitted a joint letter to the ATF opposing the proposed amendment. https://www.gunowners.org/wp-content/uploads/Letter-to-AG-and-Acting-Dirctor-of-ATF-6.24.2021.pdf
[10] https://www.atf.gov/rules-and-regulations/factoring-criteria-firearms-attached-stabilizing-braces

nor is it cognizable that its form and/or make-up would allow for use as a stock. [Exhibit 3]. The spineless cylindrical inner tube of the CT4-2A does not allow for a stock to ever be attached. Thus, the CT4-2A *cannot* be defined as a 'rifle' because its objective design features and characteristics indicate it was designed specifically *not* to be fired from the shoulder.[11]

II. THE COUNTY CONCEDES ARREST IS IMMINENT

Irreparable harm is the single most important prerequisite to the Court's issuance of preliminary injunctive relief. *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir.2009).

"In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm." *Valenzuela Arias v. Decker*, No. 20 CIV. 2802 (AT), 2020 WL 1847986, at *5 (S.D.N.Y. Apr. 10, 2020) citing, *Connecticut Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004); *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) (no separate showing of irreparable harm is necessary); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("[I]t is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm.") (emphasis

[11] The ATF June 2021 proposal would "[a]mend the definition of "rifle" in 27 CFR 478.11 and 479.11, respectively, by adding a sentence at the end of each definition to clarify that the term 'rifle' includes any weapon with a rifled barrel and equipped with an attached 'stabilizing brace' that has objective design features and characteristics that indicate that the firearm is designed to be fired from the shoulder." https://www.atf.gov/rules-and-regulations/factoring-criteria-firearms-attached-stabilizing-braces

supplied).

When a plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) ("The standard established in *Babbitt* 'sets a low threshold and is quite forgiving to plaintiffs seeking such pre-enforcement review,' as courts are generally 'willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund.').

As the SCPD Letter provides, any purchaser who fails to surrender their gun "may be subject to arrest and criminal prosecution charges for the purchase and continued possession of said firearm." [Exhibit 1].

The County threatens the imminent arrests of the John Does:

> "It is only if the recipient 'fail[s] to present the weapon' that they may be subject to arrest and criminal charges for the 'purchase and continued possession of said firearm.' (Exhibit 1). Thus, it is entirely within the Does' control whether they choose to trigger their own arrests."

[Appellee's Brief at p. 12-13].

Because the plaintiffs have not surrendered, and are not going to surrender, their lawfully purchased and owned property, they face imminent arrest, as confirmed by the County above.

Apart from the direct harm of an arrest, even if later dismissed the purchasers face losing their right to possess a handgun in New York State. See, *Velez v. DiBella*, 77 A.D.3d 670, 670–71, (2d Dep't 2010) (arrests resulting in the dismissal of charges or resolutions in favor of the pistol license applicant did not preclude the statutory licensing officer from denying the application) (citing cases).

At the very least, Suffolk County's policy requires all purchasers to surrender lawfully possessed property for "inspection and disposition" [12] – to be 'disposed of'. Whether the confiscation is temporary or permanent, the government cannot confiscate private property without compensation. See, *Duncan v. Becerra*, 742 F. App'x 218, 222 (9th Cir. 2018) (affirming preliminary injunction of California's magazine ban statute, which sought to deprive plaintiffs of the use and possession of property).

[12] Disposition: the act or the power of disposing; Disposing: to get rid of, to deal with conclusively, to transfer to the control of another.
https://www.merriam-webster.com/dictionary

III. THE FEDERAL COURTS INTERPRET STATE LAWS

The County's representation that federal courts cannot interpret state law or that it is "inappropriate" is nonsensical. [Appellee's Br. at 16].

When deciding a question of state law, the courts "look to the state's decisional law, as well as to its constitution and statutes." *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 497 (2d Cir. 2020) citing, *In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir. 2013).

Even assuming this case requires an 'interpretation', rather than an 'application', of state law, where state law is unsettled the court is "obligated to carefully ...predict how the state's highest court would resolve the uncertainty or ambiguity." *Ibid.* Where sufficient precedent does not exist to make the determination, this Court "has the option of certifying the question to the New York Court of Appeals." (*Id.* at n. 2).

As noted above, New York's courts have already determined that 'pistol' refers to a concealable gun. This interpretation is further buttressed by subdivisions (b), (c), and (d) of § 265.00(3), which criminalize certain types of rifles and shotguns based on an overall length of less than 26 inches. Together with the above arguments, the sound conclusion is that a gun exceeding 26 inches in length is neither a 'pistol' nor an illegal firearm under those provisions.

The remaining subdivision, § 265.00(3)(e), is inapplicable because the CT4-2A does not fit the definition of a rifle or a shotgun. [Exhibit 3].

IV. AN INJUNCTION SERVES THE PUBLIC INTEREST

"The public interest favors the exercise of constitutional rights by law-abiding responsible citizens. And it is always in the public interest to prevent the violation of a person's constitutional rights." *Duncan v. Becerra*, 265 F. Supp. 3d at 1136 citing, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), aff'd sub nom., *Burwell v. Hobby Lobby Stores*, Inc., —— U.S. ——, 134 S.Ct. 2751 (2014).

Plaintiffs were all subject to, and passed, a federal background check before purchasing the CT4-2A. The County makes no claim that any of the purchasers pose a danger to the general public or that exigent circumstances warrant the immediate confiscation of any purchaser's property or their arrest for the mere possession of the CT4-2A.[13]

CONCLUSION

The plaintiffs' motion for a preliminary injunction pending this appeal should be granted.

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[13] The County's characterization of the CT4-2A as a 'semi-automatic pistol' requires comment. Almost all lawfully owned pistols possessed and used in America are 'semi-automatic' handguns, the exceptions being bolt or lever action handguns. A 'fully automatic' pistol would be a 'machine pistol', which is capable of burst fire or fully automatic fire with a single pull of the trigger and is illegal *per se* in New York State. § 265.00(1).

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief was prepared using Microsoft Word 2016 and, according to that software, it contains 2,598 words, not including the cover, Table of Contents, Table of Authorities, and this Certificate of Compliance.

/s/ Amy L. Bellantoni
Amy L. Bellantoni