No. 14-56615 [D.C. 2:13-cv-02605]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIGITAS RAULINAITIS

Plaintiff-Appellant

v.

VENTURA COUNTY SHERIFF'S DEPARTMENT

Defendant-Appellee

SUPPLEMENTAL BRIEF BY APPELLEE VENTURA COUNTY SHERIFF'S DEPARTMENT

On Appeal from the United States District Court
For the Central District of California
Hon. Margaret A. Nagle

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OTHER AUTHORITIES

I. UNDER *PERUTA V. COUNTY OF SAN DIEGO*, SHERIFF DENIAL OF A LICENSE TO CARRY A CONCEALED WEAPON INVOKES NO SECOND AMENDMENT PROTECTION

Peruta v. County of San Diego (9th Cir. 2016) 824 F.3d 919, 924 ("*Peruta*"), held that the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public. *Peruta* further clarified that, "[b]ecause the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry . . . is necessarily allowed by the Amendment." (*Id.* at p. 939.)

In support of its holding, *Peruta* reviewed history from jurisdictions across the United States, before and after the Civil War, and noted multiple instances, with only one brief exception, where state courts concluded that members of the general public could be prohibited from carrying concealed weapons. (*Peruta*, *supra*, 824 F.3d at pp. 928-936.) *Peruta* also found that the United States Supreme Court had previously made it clear that it understood the Second Amendment as not protecting the right to carry a concealed weapon:

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> "[T]he first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus . . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons."

(*Peruta*, *supra*, 824 F.3d. at pp. 938-939, citing *Robertson v. Baldwin* (1897) 165 U.S. 275, 281-282 [17 S.Ct. 326, 41 L.Ed. 715].)

Peruta even commented that under English law the carrying of concealed weapons has been specifically prohibited since at least 1541. (*Peruta*, *supra*, 824 F.3d. at pp. 930-931.) Legal historical scholarship notes that the public carry of lethal arms was banned and/or limited centuries earlier under English law. (See, e.g., Charles, *The Faces of the Second Amendment Outside the Home: History versus*

Ahistorical Standards of Review (2012) 60 Clev.St.L.Rev.1, 10, 20 ["Overall, the historical evidence is convincing that the [1328] Statute of Northhampton was not regulating dangerous conduct with arms, but the act of carrying arms by itself"].) Along the same vein, in the United States outside of the antebellum slaveholding South, the public carry of lethal arms was historically much less prevalent, public carry restrictions appear to have gone unchallenged, and the prevalent view accepted robust local regulation of the right to carry, including, in various states and cities, prohibitions on carrying firearms in public. (Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context* (2015) 125 Yale L.J. Forum 121, 127-134, fns. 2, 61, 68, 69.)

Consistent with well more than 500 years of referenced antecedents for *Peruta*'s interpretation of the Second Amendment, states currently criminalize the possession as well as carrying of various forms of concealed lethal weapons. By way of example, in California, Penal Code section 21310 criminalizes the carrying of a concealed dirk or dagger; Penal Code section 21810 criminalizes possession, among other things, of the concealed weapon of metal knuckles; Penal Code section 20910 criminalizes possession, among other things, of the concealed weapon known as a "writing pen knife"; Penal Code section 22210 criminalizes possession, among other things, of the concealed weapon known as a leaded cane or slungshot; Penal Code

section 20510 criminalizes possession, among other things, of the concealed weapon known as the cane sword; and Penal Code section 22410 criminalizes possession, among other things, of the concealed weapon known as a shuriken. In criminalizing possession, these referenced California statutes have the effect of criminalizing both open and concealed carry of the same weapon.

Peruta's conclusion that "the Second Amendment does not protect, *in any degree*, the carrying of concealed firearms by members of the general public" (*Peruta*, *supra*, 824 F.3d. at p. 942, italics added) by implication also recognizes that numerous state laws currently criminalizing carry of various other types of concealed lethal weapons do not violate the Second Amendment.[1/] The continued ability to enforce laws prohibiting the possession and carry of lethal weapons in public is of no small significance. As with England in centuries past, states currently rely on such laws to protect public safety.

Further, against this tradition of heavy local regulation of lethal arms – including bans on both open and concealed carry for many types of lethal weapons –

[1/] *District of Columbia v. Heller* (2008) 554 U.S. 570, 581 [128 S.Ct. 2783, 171 L.Ed.2d 637] ("*Heller*"), discussing example of bows and arrows, made clear that the term "arms" in Second Amendment applied to more than firearms, and "was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity." However, *Heller* limits the right to keep and bear arms to the sorts of weapons "in common use at the time" and not extending to weapons "not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." (*Id*. at pp. 625-627.)

the Second Amendment does not accord firearms any special status or exemption from state regulation not accorded to other lethal arms. The Second Amendment does not contain a double-standard placing firearms in a privileged position.

If there is no Second Amendment right to carry concealed firearms in public, a local sheriff's denial of a license to carry a concealed weapon ("CCW license") raises no Second Amendment issues. Be it right or be it wrong, a sheriff's denial infringes upon no Second Amendment rights. Whether a sheriff exercises unfettered discretion or not in the review of county residency requirements for a CCW license, a sheriff's denial does not implicate the Second Amendment.

Under *Peruta*, if appellant Sigitas Raulinaitis ("Raulinaitis") disagrees with appellee Ventura County Sheriff Department's ("the Sheriff") denial of a CCW license, that is simply not sufficient to state a claim under section 1983 of title 42 of the United States Code ("section 1983"). Section 1983 applies only to the violation of federal constitutional or statutory rights. (*Tatum v. Moody* (9th Cir. 2014) 768 F.3d 806, 814; *Galen v. County of Los Angeles* (9th Cir. 2007) 477 F.3d 652, 662; see also *Erdelyi v. O'Brien* (9th Cir. 1982) 680 F.2d 61, 63 [no property right in CCW licenses protected by Fourteenth Amendment]; *Nichols v. County of Santa Clara* (1990) 223 Cal.App.3d 1236, 1241 [in light of broad statutory discretion granted to sheriff in issuance of CCW licenses, applicant for CCW license has no

legitimate claim of entitlement under state law, and therefore no "property" interest to be protected by due process clause of United States Constitution].)

Based on *Peruta*, and consistent with the longstanding history and current practice of state prohibitions on the concealed carry of lethal weapons by members of the general public, Raulinaitis's section 1983 lawsuit does not demonstrate any federal constitutional nexus or cognizable constitutional violation arising out of the Sheriff's denial of a CCW license to Raulinaitis.

II. CALIFORNIA LAW PERMITS PUBLIC CARRY OF CERTAIN NON-LETHAL AND LESS LETHAL DEFENSIVE WEAPONS OTHER THAN FIREARMS; HENCE, CONSISTENT WITH *CAETANO V. MASSACHUSETTS*, EXISTING STATE LAW PERMITS RAULINAITIS REASONABLE ACCESS TO ARMS FOR SELF-DEFENSE

In his supplemental brief, Raulinaitis argues that the recent Supreme Court decision in *Caetano v. Massachusetts* (2016) 136 S.Ct. 1027 [194 L.Ed.2d 99, 84 USLW 4133] ("*Caetano*"), supports his section 1983 claim notwithstanding *Peruta's* holding. In *Caetano*, the weapon at issue was a non-lethal stun gun carried in a purse outside the home. (*Id*. at p. 1029.) However, although *Peruta* was decided after *Caetano*, *Peruta* did not not cite, much less discuss, *Caetano*. In fact,

Caetano is factually inapposite because *Caetano* involved a non-lethal stun gun, rather than a lethal firearm.

In any event, California law permits the general public, with a few specified restrictions, to lawfully carry non-lethal arms, including stun guns, for personal self-defense in public. In addition, under California law adults may also carry "less lethal weapons," such as Taser brand conducted electrical weapons ("taser"), for use in public.

Under California law, any person may purchase, possess or use a stun gun, as long as the person is not a convicted felon, previously convicted of assault in any jurisdiction, previously convicted of misuse of a stun gun under Penal Code section 244.5 or addicted to any narcotic drug. (Pen. Code, § 22610, subds. (a), (b).) Penal Code section 17230 defines "stun gun" as "any item, except a less lethal weapon, used or intended to be used as either an offensive or defensive weapon that is capable of temporarily immobilizing a person by the infliction of an electrical charge." No sheriff permit is required to purchase, possess or use a stun gun. (Pen. Code, § 22610.) In addition, a minor at least 16 years of age, with the written consent of a parent or legal guardian, may also possess a stun gun. (Pen. Code, § 22610, subd. (d).)

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Under California law, a person over the age of 18 may purchase, possess or use tear gas in specified quantities, for self-defense, as long as the person is not a convicted felon, previously convicted of assault in any jurisdiction, previously convicted of misuse of tear gas or addicted to any narcotic drug. (Pen. Code, § 22810, subds. (a), (b), (e)(1), (g).) Under Penal Code section 17240, subdivision (a), "'tear gas' applies to and includes any liquid, gasesous or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise disperse in the air." A minor at least 16 years of age, with the written consent of a parent or guardian, may also possess tear gas for self-defense. (Pen. Code, § 22815.) No sheriff permit is required to carry tear gas. (Pen. Code, § 22810.) One common form of tear gas is known as "oleoresin capsicum," "OC spray" or "pepper spray."

Modern tasers that use compressed nitrogen gas to propel barbed electrodes at another person's body or clothing to deliver a disabling electrical charge are defined as a "less lethal weapon" under California law.[2/] Penal Code section 16780 states, "'Less lethal weapon' means any devise that is designed to or that has been

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[2/] When tasers formerly used smokeless powder for propulsion, *People v. Heffner* (1977) 70 Cal.App.3d 643, 647, 652, classified tasers as a firearm. Penal Code section 16520, subdivision (a), currently defines the term "firearm" as "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion."

converted to expel or propel less lethal ammunition by any action, mechanism, or process for the purpose of incapacitating, immobilizing or stunning a human through the infliction of any less than lethal impairment of physical condition, function, or sense, including physical pain or discomfort. It is not necessary that a weapon leave any lasting or permanent incapacitation, discomfort, pain, or other injury or disability in order to qualify as a less lethal weapon." Under Penal Code section 16770, "'less lethal ammunition' means any ammunition that satisfies both of the following requirements:

> "(a) It is designed to be used in any less lethal weapon or any other kind of weapon (including, but not limited to, any firearm, pistol, revolver, shotgun, rifle, or spring, compressed air or compressed gas weapon).
>
> "(b) When used in a less lethal weapon or other weapon, it is designed to immobilize, incapacitate, or stun a human being through the infliction of any less than lethal impairment of physical condition, function, or senses, including physical pain or discomfort."

Tasers may also be used like stun guns when, rather than firing barbs, they are applied directly to the skin of another person to deliver a painful electrical charge.

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(California Department of Justice, Law Enforcement Policy & Procedures Manual (Mar. 2015) p. 57.)

Under Penal Code section 19405, the sale of a "less lethal weapon" to a person under 18 years of age gives rise to a misdemeanor; however, sales to adults are not criminally prohibited.[3/] Penal Code section 19400 governs the official work-related purchase, possession and transport of "less lethal weapons" by peace officers and custodial officers.

Given California laws permitting members of the public to carry non-lethal weapons and less lethal weapons for self-defense in public, it is a false dichotomy for Raulinaitis to posit that his only two options for self-defense in public in California are the open carry of firearms or the concealed carry of firearms. Should this court interpret *Caetano* as a harbinger of a Second Amendment right to carry a non-lethal stun gun for self-defense in public, Raulinaitis may currently exercise this option under California law. Hence, consistent with *Peruta* and *Caetano*, the Second Amendment right to keep and bear arms for personal self-defense is not infringed as long as Raulinaitis may reasonably exercise the right to keep and bear non-lethal arms, such as a stun gun, for self-defense in public.

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[3/] Tasers are marketed to law enforcement and consumers with different capabilities.

In summary, contrary to the entire thrust of Raulinaitis's supplemental brief, given Raulinaitis's ablity to carry non-lethal and less lethal arms for self-defense, even with the Sheriff's denial of a CCW license, there is no "complete ban" on Raulinaitis's ability to bear arms for self-defense in public.

III. INDEPENDENT OF *PERUTA*, THIS COURT SHOULD AFFIRM SUMMARY JUDGMENT FOR THE SHERIFF BASED ON RAULINAITIS'S ACTUAL LOS ANGELES COUNTY RESIDENCY AND HIS ILLEGITIMATE FORUM SHOPPING IN VENTURA COUNTY

Under California law, county residency (or principal place of employment or business) is a necessary prerequisite for a sheriff to issue a CCW license to an applicant. (Pen. Code, § 26150, subd. (a)(3).) As set forth in the record below, Raulinaitis only applied for a CCW license in Ventura County after he was denied by Los Angeles County, his feigned Ventura County residency was exposed during the Sheriff's post-application investigation and Raulinaitis stipulated to the court that he did not meet the Sheriff's definition of residency. (ER 26-64, ER 78-125, ER 134-182, SER 36-42, SER 58-74, SER 86-91, SER II, 105-138.) Thus, independent of *Peruta*'s holding, Raulinaitis's section 1983 claim lacks merit because he is not entitled to a CCW license.

IV. CONCLUSION

Therefore, consistent with *Peruta*, given Raulinaitis's existing reasonable options under California law to bear arms (other than lethal firearms) for self-defense in public, and based on the record evidence of Raulinaitis's illegitimate forum shopping for a CCW license, this court should affirm the district court's grant of summary judgment to the Sheriff.

Respectfully submitted,

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Date: September 12, 2016

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 12, 2016, I electronically filed the foregoing **SUPPLEMENTAL BRIEF BY APPELLEE VENTURA COUNTY SHERIFF'S DEPARTMENT** with the Clerk of the United States Court of Appeals.

I also served the foregoing **SUPPLEMENTAL BRIEF BY APPELLEE VENTURA COUNTY SHERIFF'S DEPARTMENT** on:

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On September 12, 2016, by mailing to said attorney a correct copy thereof, contained in a sealed envelope, with postage paid, and deposited in the U.S. mail at Ventura, California on said day.

/s/ Marina Porche_____
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