No. 14-56615 [DC# 2:13-cv-02605]

IN THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

SIGITAS RAULINAITIS,

Plaintiffs-Appellants, v.

VENTURA COUNTY SHERIFFS
DEPARTMENT, et. al.,

Defendants-Appellees.

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

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

No corporate Apellants.

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ISSUES PRESENTED

This issue on this appeal is quite simple: can Defendant exercise discretion to define "residency" far in excess of that found by this Court or as defined by State law so that he can deny Plaintiff the ability to exercise a fundamental liberty. The answer is a resounding no; an elected official can not exercise any discretion when it comes to issuing a license necessary to exercise a fundamental liberty. This case arise from the following facts- Plaintiff lives in Ventura, his Drivers License is in Ventura, he is registered to vote in Ventura, defendant has a definition of residency that exceeds the legal bounds, conducted days of surveillance, observed Plaintiff sleep in a home he owns, concluded he was not a resident of Ventura and therefore not entitled to exercise his fundamental rights. Defendant's exercise of discretion violated Plaintiff's Second Amendment Rights by denying him the license needed to exercise those Rights outside the home.

STATEMENT OF JURISDICTION

This is a 42 U.S.C. § 1983 action. The District Court had jurisdiction pursuant to 28 U.S.C. § 1343. The District Court granted summary judgment for Defendant-Appellee (hereinafter "Appellee"), and entered judgment in their favor under Federal Rule of Civil Procedure 56 on September 30, 2014.

Appellants filed a notice of Appeal on October 6, 2015, in accordance with Federal Rules of Appellate Procedure 3 and 4 and Ninth Circuit Rules 3-1, 3-2 and 3-4. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

There being no real factual dispute, the underlying matter was resolved by Joint Summary Judgments upon stipulated facts and a stipulated briefing schedule. The Magistrate issued her opinion on September 30, 2015 and Plaintiff promptly filed Notice of Appeal. The Magistrate concluded that an elected official had unfettered discretion to create his own definitions, and Appellant contends this grant of discretion violates the Law.

STATEMENT OF FACTS

The undisputed evidence was that Plaintiff declared:

In support of his Motion for Summary Judgment, Plaintiff has declared:

1. I am a resident and domiciliary of Ventura County where I maintain my primary home in and am registered with the DMV as my residence and with the Secretary of State to vote. If I am ever absent from my Ventura home, it remains my permanent home where I plan on returning.
2. Ventura is the place where I remain when not called elsewhere for labor or other special or temporary purpose, and to which I return in seasons of repose.
3. I have the intention of remaining in Ventura, and, whenever I am absent I have the intention of returning.

The Sheriff did not dispute Plaintiff's facts and instead contended he had unfettered discretion to create his own definition and to conduct surveillance upon applicants to see where they slept at night. The Defendant defines it as: the County in which a person spends most of his or her time and conducts most of his or her activities. This surveillance, on a few specific nights did not locate Plaintiff, or located him at one of his other properties he admits owning.

In reality, the law is much clearer:

> Appellants' submission of their signed registration affidavits was sufficient compliance with this requirement. Under California law, a person who signs an affidavit of registration has certified that the contents of the affidavit are true and correct. No other written proof of residency is required. (Elec.Code §§ 301, 500, subd. (j).)
> Collier v. Menzel (1985) 176 Cal.App.3d 24, 31-32

The licensing statute itself prohibits the Defendant from compelling information beyond that contained therein, and nowhere in the application does it inquire about the number of nights spent in a particular location. It is almost as if Kim Davis insisted upon proof an applicant was gay before refusing to give them a marriage license.

STANDARD OF REVIEW ON SUMMARY JUDGMENT

An order granting summary judgment on the constitutionality of a statute or ordinance is reviewed de novo. Nunez by Nunez v. City of San Diego (9th Cir. 1997) 114 F.3d 935, at 940. The standard governing this Court's review is the same as that employed by trial courts under Federal Rule of Civil Procedure 56(c), with the Court determining, after independently viewing the evidence and all inferences therefrom in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact, and whether the District Court correctly applied the law. *See* Twentieth Century-Fox Film Corp. v. MCA, Inc. (9th Cir. 1983) 715 F.2d 1327, 1328-29 ; *see also*, Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1035.

On a motion for summary judgment, as at trial, the substantive law determines burden of proof issues and evidentiary standards. It dictates what the moving party must show to prevail on its motion and what the non-moving party must show, if anything, to resist the motion. *See* Nissan Fire & Marine Ins. Co. v. Fritz (9th Cir. 2000) 210 F.3d 1099, 1102-03.

SUMMARY OF ARGUMENT

The District Court erred in granting Defendant, an elected official, discretion to deny a license necessary to exercise a Fundamental Right, especially, whereas here, the Sheriff has used this discretion to create vague policies and quasi legislative actions beyond that required by the legislature, in essence ignoring all laws and invading an applicants privacy by seeking to quantify where he sleeps at night. The Statute requires only that: The applicant is a resident of the county or a city within the county… Pen. Code, § 26150. The Defendant defines it as: the County in which a person spends most of his or her time and conducts most of his or her activities.

From this discrepancy and based upon his limited surveillance, Defendant divined that while Plaintiff may have met the State Standard, he did not meet the Sheriff's personal standard and so his license application was denied. This discretion is not afforded by the law and the exercise thereof violated Plaintiff's Second Amendment Rights.

ARGUMENT

The Second Amendment protects the rights of law abiding citizens to keep and bear arms for self defense and in California that requires a license where the right is to be exercised outside of the home. The Sheriff is responsible for issuing licenses, but Defendant refuses to abide by his ministerial obligations, instead imposing his own desires and beliefs upon he he will deem appropriate to be able to exercise their rights. Such conduct is repugnant to the US Constitution and should not be countenanced by this Court.

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

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

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

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

Here Defendants definition is not even consistent with state law, especially when the statute is read consistent therewith. California uses two terms to define a persons' home for the purpose of conferring legal rights such as voting and jurisdiction and Plaintiff meets either standard, thus making Defendants denial curious.

> Courts and legal writers usually distinguish 'domicile' and 'residence,' so that 'domicile' is the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning, but which the law may also assign to him constructively; whereas 'residence' connotes any factual place of abode of some permanency, more than a mere temporary sojourn. 'Domicile' normally is the more comprehensive term, in that it includes both the act of residence and an intention to remain; a person may have only one domicile at a given time, but he may have more than one physical residence separate from his domicile, and at the same time.
> Smith v. Smith (1955) 45 Cal.2d 235, 239.

As the California Supreme Court has stated, a person can have many residences, but only one domicile, and the Statute at issue in this case refers to residence, not domicile:

> Section 200 of the Elections Code provides: "(a) Except as provided in this article, the term 'residence' as used in this code for voting purposes means a person's domicile. [¶] (b) The domicile of a person is that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning. At a given time, a person may only have one domicile. [¶] (c) The residence of a person, as used in this article, is that place in which the person's habitation is fixed for some period of time, but wherein he or she does not have the intention of remaining. At a given time, a person may have more than one residence."
> Walters v. Weed (1988) 45 Cal.3d 1, 6

Defendant has changed the statutory definition of resident and instead uses Domicile, but regardless, has somehow come to the conclusion that Plaintiff does not reside in Ventura County, presumably because Plaintiff has several homes. Such action is inconsistent with his duties and with the clearly stated legislative intent:

> In testifying before the Senate Committee on Elections and Reapportionment as to the purpose of Senate Bill No. 1653, the bill's author stated: "I'm sure you recognize the fact that a person can have more than one residence but a person cannot have more than one domicile and so [Senate Bill No. 1653] seeks to arrive at that particular point.... [The bill attempts] to set forth ... in statutory form for the first time some of the court decisions on the question of domicile and residence ... [so] the Clerks and the voters will know where people should vote.... [Senate Bill No. 1653] also defines what's meant by domicile and residence; a question of act and intent required to establish a domicile...." (Transcript of Hg. on Voter Residency and Registration before Sen.Com. on Elec. and Reapportionment (Mar. 5, 1976) pp. 6–13.)
> Walters v. Weed (1988) 45 Cal.3d 1, 9

Put simply, the Sheriff's duty here is ministerial and he cannot supplant his own discretion with the clearly stated legislative intent or personal feelings. Moreover, had the legislature meant to say domicile, then they could have done so as the statute in question was enacted after the Supreme Court made clear that people can be residents of more than one County, though, such analysis is not necessary as Defendants own evidence establishes Plaintiff is both a resident and domiciliary of Ventura:

> The question is ultimately one of legislative intent, as "[o]ur fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) In this search for what the Legislature meant, "[t]he statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs.
> Martinez v. Combs (2010) 49 Cal.4th 35, 51

Penal Code § 26150 was added by Stats.2010, c. 711 (S.B.1080), § 6, operative Jan. 1, 2012. Pen. Code, § 26150. Smith v. Smith, was decided in 1955 and clearly stated "whereas 'residence' connotes any factual place of abode of some permanency, more than a mere temporary sojourn." and "a person may have only one domicile at a given time, but he may have more than one physical residence separate from his domicile, and at the same time." Smith v. Smith (1955) 45 Cal.2d 235, 239.

Clearly, the Sheriffs' definition goes far beyond the legislative intent and the Supreme Court ruling and seeks to amend the law to serve his own purpose requiring, what is essentially, proof of domicile "The County in which a person spends most of his or her time and conducts most of his or her activities." Plaintiff submits that the Sheriffs' act of exceeding the clear statement of the law violates his second amendment rights as a permit granted under Penal Code § 26150 is the only way Plaintiff can exercise his second amendment rights outside of the home in California.

CONCLUSION

The Magistrate erred in engaging in an analysis of the scope and reasonableness of of the subjective intent of an elected official regarding his decision to deny Plaintiff the license needed to exercise a Fundamental Right and for that reason alone should be reversed. Moreover, the overwhelming evidence demonstrates that Plaintiff is a Legal Resident of Ventura County and entitled to receive his license from the Sheriff therein.

Date: November 2, 2015

s/ Jonathan Birdt
Jonathan W. Birdt (SBN# 183908)
Plaintiff-Appellant

CERTIFICATE OF SERVICE

On November 3, 2015 I emailed this document to current counsel for Respondent as follows:

marina.Porche@ventura.org
lisa@proctershyer.com

I declare under Penalty of Perjury under the laws of the State of California that the foregoing is true and correct.

November 3, 2015 _____/s/_____
Jonathan Birdt