UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LEVERN T. GREEN AND MEGHAN GREEN	:	DOCKET NO. 3:09-cv-01170-MRK
VS.	:	
TOWN OF GROTON, CHIEF OF POLICE KELLY FOGG, OFFICER NICHOLAS PARHAM	:	JULY 27, 2009

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REMAND TO STATE COURT

The Plaintiffs in the above matter respectfully submit this Motion for Remand on the grounds that this case presents issues in which State law predominates, including a number of questions that are of first impression in Connecticut. These reasons are more fully explained below.

I. FACTS

This action for damages arises out of the unjustified trampling of peaceable citizens' fundamental constitutional rights by members of the Town of Groton Police Department. The Plaintiffs, Levern T. Green & Meghan Green, are residents of Groton, CT. Prior to December 2008, the Plaintiff Levern T. Green applied to the Town of Groton Police Department for a temporary pistol permit. On December 8, 2008, the Groton Police Department denied his permit application on the grounds that he was a convicted felon. Soon thereafter, on the morning of December 26, 2008, Officer Nicholas Parham and other members of the Town of Groton Police Department arrived at the Plaintiffs' home in order to search for and confiscate certain weapons that they claimed were on the premises. Complaint, First Count, ¶¶ 1-5.

The police officers who came to search the Plaintiffs' home did not have a warrant to search the premises or seize property. The officers demanded entry into the Plaintiff's home and were refused entry, whereupon they called for a more senior officer to assist on the scene. A supervisor or officer of higher rank then arrived on the scene, and ordered the officers to restrain Mr. Green while he entered the Plaintiff's home, over his objections, to interrogate Mrs. Green, who was pregnant at the time, concerning the alleged weapons allegedly on the premises. *Id.*, ¶¶ 6-8. The officers then detained the Plaintiff Levern Green without cause or justification, and one or more members of the Town of Groton Police Department entered the residence without the Plaintiff's consent, without a warrant and without probable cause that a crime had been or was about to be committed, and proceeded to interrogate the Plaintiffs and search for weapons. *Id.*, ¶¶ 9-10.

The situation quickly went from bad to worse, as members of the Town of Groton Police Department expressly and impliedly threatened the Plaintiff Levern Green with arrest and intimidated both Plaintiffs, and finally coerced Mr. Green into opening a locked safe in which an unloaded pistol was stored. The police then seized and confiscated the unloaded handgun along with ammunition clips, a holster, and some ammunition. *Id.*, ¶¶ 11-13. Next, apparently unsatisfied with the fruits of their illegal efforts, the officers placed Mr. Green in a police vehicle and drove him outside of the jurisdiction to his mother's residence at 25 Moore Avenue in New London, CT where they gained access to the home and seized and confiscated a shotgun. Notably, the police failed or refused to provide the Plaintiff a receipt for the shotgun. *Id.*, ¶¶ 14-15. Since the time of this illegal home invasion, the Plaintiff has not been arrested or charged

with a crime but, upon information and belief, a case remains "open" and "under investigation." *Id.*, ¶ 16.

As a result of these outrageous and unjustified actions by the Town of Groton, and its agents, servants and/or employees, the Plaintiffs claim various violations of their constitutional rights, including violations of Art. I, § 7 of the Connecticut constitution, as well as the 4th & 14th Amendments and 42 U.S.C. § 1983, by subjecting them to an unlawful search of their home and seizure of property (First - Fourth Counts). In addition, Levern Green claims violations of Art. I, § 8 of the Connecticut constitution, the 5th and 14th Amendments to the United States Constitution and Section 1983, by compelling him to give evidence against himself and depriving him of liberty and property (Fifth and Sixth Counts); a violation of Art. I, § 15 of the Connecticut constitution, by depriving him of the right to bear arms in defense of himself and the State; (Seventh Count); a violation of Conn. Gen. Stat. § 27-2, by depriving him of his right to bear arms as a member of the unorganized militia of the State of Connecticut (Eighth Count); a violation of 10 U.S.C. § 311, by depriving him of his right to bear arms as a member of the unorganized militia of the United States (Ninth Count); and a violation of his rights to keep and bear arms and to procedural due process, under Conn. Gen. Stat. § 29-38c (Tenth Count). Similar claims are asserted against Chief of Police Kelly Fogg (Eleventh – Twentieth Counts) and Officer Nicholas Parham (Twenty-First – Thirtieth Counts). As a result of these violations of the federal and State constitutional and statutory rights, the Plaintiffs have suffered a loss of valuable personal property as well as frustration, embarrassment, humiliation, and emotional distress.

Only 12 of the Complaint's 30 counts (Counts Three, Four, Six, Nine, Thirteen, Fourteen, Sixteen, Nineteen, Twenty-Three, Twenty-Four, Twenty-Six, and Twenty-Nine) assert claims based on a federal Constitutional provision or federal statute. The other 18 counts are based on Connecticut statutes or constitutional provisions, and significantly, at least nine of those counts present novel issues under State law. Therefore, the Court, in its sound discretion, should remand this case to the Superior Court.

II. ARGUMENT

A. State Law Predominates in this Matter

The removal statute provides for remand when State law predominates in a removed action containing separate and independent removable and non-removable claims. See 28 U.S.C. § 1441(c).[1] While the Plaintiffs do not dispute that Counts Three, Four, Six, Nine, Thirteen, Fourteen, Sixteen, Nineteen, Twenty-Three, Twenty-Four, Twenty-Six, and Twenty-Nine contain claims that are removable to this Court, the rest of the case is otherwise not removable. A full 60 percent of the claims in this case are based on State statutes or State constitutional provisions, and at least half of the State-law claims involve issues of first impression under Connecticut law, including the scope of the right of Connecticut citizens to bear arms on behalf of themselves and the State under Art. § 15 of the State constitution; the meaning and scope of the right to bear arms as a member of the State's unorganized militia under Conn. Gen. Stat. §

[1] "Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." 28 U.S.C. § 1441(c).

27-2; and the rights protected and guaranteed by Conn. Gen. Stat. § 29-38c. Given the predominance of State law in this case, this matter should be remanded to the Superior Court.

B. Unsettled Issues of State Law Should Be Decided by State Courts

It is well established that the district courts should not decide issues of federal constitutional law if a case can be decided on State law grounds. *See, e.g., Schmidt v. Oakland Unified School District*, 457 U.S. 594 (1982); *Miami Univ. Associated Student Gov't v. Shriver*, 735 F.2d 201 (6th Cir. 1984). Where the meaning or scope of a State constitutional provision or statute has never been interpreted by a State court, a district court should defer deciding the case pending the resolution of the State constitutional questions by the State courts, a procedure which aims to avoid "needless friction" between federal and State courts. *Reetz v. Bozanich*, 397 U.S. 82 (1970) (citing *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640-41). District courts may stay proceedings pending resolution of State law claims in State court. *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983). A stay is appropriate in cases seeking mandatory relief in the form of money damages. *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706-715-23 (1996). This case raises mostly issues involving State law, including the following issues that have yet to be addressed by a State court, none of which require the application of federal law to be decided.

1. The Plaintiff Has a Fundamental Right to Keep and Bear Arms Guaranteed by the Connecticut Constitution

It is well established that the right to bear arms under Art. I § 15 is fundamental and entitles one to procedural due process. *Rabbitt v. Leonard*, 36 Conn. Supp. 108, 111-12, 413

A.2d 489, 491 (1979). The Plaintiffs are not aware of any reported decisions construing the nature and extent of this right in the context of the individual's right to bear arms on behalf of the State as part of the unorganized militia under Conn. Gen. Stat. § 27-2, or in the context of an illegal search and seizure solely for the purpose of locating and seizing firearms when no other crime had been or was about to be committed, and without probable cause or a required seizure warrant.

2. The Plaintiff is a Member of the State's Militia

The scope of rights under the State's militia statute, Conn. Gen. Stat. § 27-2, has not been construed by any State court. Unless disqualified by operation of State law, the Plaintiff is a member of the Connecticut militia, in particular, the "unorganized militia." Conn. Gen. Stat. § 27-2 provides that:

> The militia shall be divided into four classes as follows: The unorganized militia, the organized militia, the national guard and the naval militia. The national guard for the purposes of this chapter shall consist of the national guard and the air national guard. The unorganized militia shall consist of all male citizens and all male residents of the state who have declared their intention to become citizens of the United States, between the ages of eighteen and forty-five years, not exempt from military duty by federal or state laws or by such reasons of physical or mental disabilities as shall be prescribed in general orders or regulations published by the adjutant general and approved by the governor and who are not members of the organized militia or of the national guard or of the naval militia, and all female citizens and all female residents of the state who have declared their intention to become citizens of the United States, between the ages of eighteen and forty-five years, who may voluntarily offer their services to the state. The organized militia shall consist of the governor's guards, the state guard and such other military forces as may be designated by the governor as commander-in-chief, which may hereafter be organized under the provisions of the laws of this state. The national guard shall consist of such forces as may be organized and maintained by this state pursuant to the laws and regulations of the United States

> relating to the national guard. The naval militia shall consist of such persons as may enlist or be appointed or commissioned therein as a special force for coast protection and as a naval reserve and shall be organized and maintained by this state pursuant to the laws and regulations of the United States relating to the naval militia and may include a marine corps branch of the naval militia subordinate thereto in all matters pertaining to command, discipline or administration. The organized militia, the national guard, the naval militia and marine corps branch of the naval militia, whenever organized, shall be, for all purposes under the general statutes, the armed forces of the state.

Conn. Gen. Stat. § 27-2 (emphasis added). The nature and extent of this right and duty should be decided in State court before this Court rules on any related federal constitutional questions.

3. Warrantless Seizures of Guns are Prohibited by State Law

While Conn. Gen. Stat. § 29-38c(a) authorizes seizure of firearms (pursuant to a warrant) from persons posing "a risk of imminent personal injury to himself or herself, or to other individuals," the Defendants never undertook such an inquiry as to the Plaintiff Levern Green or obtained the requisite warrant. Subsection (a) specifically requires an "independent investigation" and determination that "probable cause exists and that there is no reasonable alternative available to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm."[2]

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[2] Conn. Gen. Stat. § 29-38c(a) provides:

> (a) Upon complaint on oath by any state's attorney or assistant state's attorney or by any two police officers, to any judge of the Superior Court, that such state's attorney or police officers have probable cause to believe that (1) a person poses a risk of imminent personal injury to himself or herself or to other individuals, (2) such person possesses one or more firearms, and (3) such firearm or firearms are within or upon any place, thing or person, such judge may issue a warrant commanding a proper officer to enter into or upon such place or thing, search the same or the person and take into such officer's custody any and all firearms. Such state's attorney or police officers shall not make such complaint unless such state's attorney or police officers have

Section 29-38c(b) provides that "A warrant may issue only on affidavit sworn to by the complainant or complainants before the judge and establishing the grounds for issuing the warrant, which affidavit shall be part of the seizure file." Subsection (b) lists the factors that must be considered by the court in determining whether there are grounds for the issuance of a firearms seizure warrant, as well as the factors used to evaluate whether "recent threats or acts of violence" constitute probable cause to believe that the individual in question poses a risk of imminent personal injury to himself others:

> In determining whether grounds for the application exist or whether there is probable cause to believe they exist, the judge shall consider: (1) Recent threats or acts of violence by such person directed toward other persons; (2) recent threats or acts of violence by such person directed toward himself or herself; and (3) recent acts of cruelty to animals as provided in subsection (b) of section 53-247 by such person. In evaluating whether such recent threats or acts of violence constitute probable cause to believe that such person poses a risk of imminent personal injury to himself or herself or to others, the judge may consider other factors including, but not limited to (A) the reckless use, display or brandishing of a firearm by such person, (B) a history of the use, attempted use or threatened use of physical force by such person against other persons, (C) prior involuntary confinement of such person in a hospital for persons with psychiatric disabilities, and (D) the illegal use of controlled substances or abuse of alcohol by such person. If the judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, such judge shall issue a warrant naming or describing the person, place or thing to be searched. The warrant shall be directed to any police officer of a regularly organized police department or any state police officer. It shall state the grounds or probable cause for its issuance and it shall command the officer to search within a reasonable time the person, place or thing named for any and all firearms. A copy of the warrant shall be given to the person named therein together with a notice informing the person that such person has the right to a hearing under this section and the right to be represented by counsel at such hearing.

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conducted an independent investigation and have determined that such probable cause exists and that there is no reasonable alternative available to prevent such person from causing imminent personal injury to himself or herself or to others with such firearm.

Conn. Gen. Stat. § 29-38c(b). Subsection (c) states that the application for the warrant and all supporting affidavits must be filed with the clerk of the court, and once executed, the warrant must be returned to court with a written inventory of all firearms seized. Conn. Gen. Stat. § 29-38c(c). Subsection (d) then provides, among other things, that "Not later than fourteen days after the execution of a warrant under this section, the court . . . shall hold a hearing to determine whether the seized firearms should be returned to the person named in the warrant or should continue to be held by the state." Conn. Gen. Stat. § 29-38c(d). Finally, Subsection (e) provides that the person whose firearms have been ordered seized may transfer the guns to any person eligible to possess them. Conn. Gen. Stat. § 29-38c(e). None of these statutory requirements were met in this case, underscoring the utter unlawfulness of the Defendants' actions.

Although State law prohibits felons from possessing firearms, *see e.g.*, Conn. Gen. Stat. §§ 53a-217 and 29-28,[3] the police cannot ignore the fundamental constitutional guarantees of liberty, privacy, and security and invade the sanctity of one's home for no other reason than that a gun may be on the premises. Also, it is unclear how such a ban is constitutional, especially "now that the Supreme Court, in *District of Columbia v. Heller*,[4] not only has confirmed that the Second Amendment secures a personal right to keep and bear arms, but also has emphasized its historical tie to the right of self-defense[.]" See "Why Can't Martha Stewart Have a Gun?" *Harvard Journal of Law & Public Policy,* Vol. 32, at 696 (demonstrating that "a lifetime ban on

[3] Federal law has a similar prohibition. See 18 U.S.C. § 922(g).

[4] 128 S. Ct 2783 (2008).

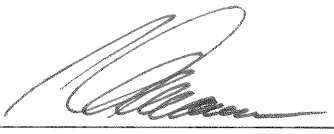
any felon possessing any firearm is not 'longstanding' in America," nor is it "supported by the common law or the English right to have arms at the time of the Founding; but that "it does impair the 'core conduct' of self-defense in the home—at least for a felon who has completed his sentence, or someone who shares his household."). At least one commentator has concluded that "stripping a person of his right to keep and bear arms for a 'felony' conviction is constitutionally dubious unless the conviction was for a 'crime of violence,' a term having a longstanding yet flexible meaning specially developed for arms regulations;" and that even for "persons convicted of crimes of violence, a lifetime ban on all keeping of firearms by such felons is also constitutionally dubious." *Id.* at 697.

It is interesting to note that U.S. Congressman Bart Stupak (D-MI) has introduced legislation (H.R. 2153, the Second Amendment Restoration Act) to restore the gun rights of individuals convicted of minor, non-violent crimes. Although the Court of Appeals for the Second Circuit has held that the Second Amendment is not incorporated by the 14th Amendment as applicable against state and local governments, see *Bach v. Pataki*, 408 F.3d 75, 84-86 (2d Cir. 2005), this issue may be decided by the Supreme Court during its next term. Given the current state of the law in this Circuit, the Plaintiff did not assert a violation of his Second Amendment right to bear arms, but he does assert his right to bear arms under Art. I, § 15 of the State constitution, individually and as a member of the unorganized militia, and the question of his status as a convicted felon (the conviction having been for a non-violent offense), is likely to be an issue in the case.

III. CONCLUSION

For these reasons, the Court should remand this case to the Connecticut Superior Court, Judicial District of New London.

THE PLAINTIFFS,

By 

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CERTIFICATION

I hereby certify that a copy of the foregoing was filed electronically pursuant to the Court's Electronic Filing Order with a copy mailed to the following counsel of record on July 27, 2009:

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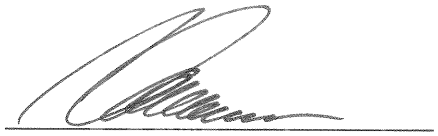

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