UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GEORGE FREEMAN and
FLORIDA CARRY, INC.,

Plaintiffs,

v. CASE NO: 8:15-CV-2262-T-30EAJ

CITY OF TAMPA, FLORIDA, a municipality, ROCCO CORBINO, an individual, TRAVIS A. RICHARDS, an individual, JOHN DOES, Three Unknown Officers of the Tampa Police Department, individually, RONALD E. GRAHAM, in his official capacity, RONALD E. GRAHAM, individually, ERIC WARD, Chief, in his official capacity, ERIC WARD, Chief, individually, ROBERT F. BUCKHORN, in his official capacity, and ROBERT F. BUCKHORN, individually,

Defendants.
_____/

ORDER

THIS CAUSE comes before the Court upon Defendants' Motion for Summary Judgment (Dkt. 44) and Plaintiffs' Response in Opposition (Dkt. 58). The Court, upon review of the motion, response, record evidence, and being otherwise advised in the premises, concludes that the motion should be granted in part and denied in part.

RELEVANT FACTS[1]

Plaintiffs George Freeman and Florida Carry, Inc. filed the instant action under Florida Statute § 790.33, the firearms preemption statute, and 42 U.S.C. § 1983, against various Defendants related to the events that occurred on June 13, 2015, when Freeman was fishing at the Ballast Point Pier while openly carrying a firearm. The pier is located in Ballast Point Park, a public park that is frequented by families, fishermen, and other members of the public. Freeman, who is left handed, was in possession of an openly carried firearm in a vertical shoulder holster on his right side. Freeman, a Florida Concealed Weapons Firearms License holder, was also in possession of a concealed firearm on his belt. Freeman visited the park/pier to exercise his Second Amendment rights.

The record reflects that the Tampa Police Department ("TPD") received a call from a concerned citizen who was at the park and saw a man showing a gun at the park. Defendants Sergeant Ronald Graham and Officer Rocco Corbino, police officers employed by the TPD, arrived at the Ballast Point Pier to investigate the complaint. Upon their arrival, Graham spoke to a witness who told him there was a "white male on the pier carrying a firearm." The witness also told Graham that "a few citizens were afraid of the subject due to the display of the firearm so they decided to leave the park." Because the witness did not describe the white male in any detail, Graham and Corbino proceeded to the pier to look for him.

[1] Plaintiffs did not provide any record evidence in support of their response. The only record evidence in this case is the evidence referenced in Defendants' motion.

At the pier, Graham and Corbino observed a white male, who was later identified as Freeman, fishing while wearing a shoulder holster containing a silver firearm that was clearly visible. Freeman had fishing equipment with him. Graham disarmed Freeman by taking the firearm from his shoulder. During a pat down check, Corbino located a gold/black firearm in Freeman's front waist band. They seized this firearm as well. Freeman informed them that he had a concealed weapons permit.

While still on the pier, Graham and Corbino took Freeman's wallet, which contained his driver's license and concealed weapons permit, and keys. The officers instructed Freeman to gather his belongings and they escorted Freeman off the pier to Corbino's patrol vehicle. Freeman walked in front of the officers and was not touched or restrained as he left the pier.

Defendant Officer Travis Richards arrived at the park around the same time that Corbino and Graham were exiting the pier with Freeman. Richards was equipped with a department issued body camera that recorded most of the events that took place after his arrival. The record reflects that Richards turned off the video twice during the incident, which equates to about nine minutes of events not being captured on the video.[2]

Upon Richards' arrival, a white male approached him and identified himself as the person who called 911. Richards advised the man that openly carrying a firearm while

[2] The video was provided to the Court in a DVD format. It is broken into three parts. The length of the first video is 16:24 minutes. The break between video one and video two is approximately six minutes. The length of the second video is 14:00 minutes. The break between video two and video three is approximately three minutes. The length of the third video is 11:45 minutes.

fishing was legal in Florida. Richards then walked over to where Graham and Corbino were located with Freeman. Corbino handed Richards the two firearms that were taken from Freeman and asked Richards to run them. Richards took the firearms and went to his patrol car, called dispatch, and communicated the make, model, and serial number for each firearm. While Richards was running the firearms, Graham asked Freeman to have a seat on the sidewalk and Freeman sat on the sidewalk under a large, shady oak tree. The record reflects that, while seated on the sidewalk, Freeman had possession of his fishing pole, plastic bag, beverage, bucket, and cellphone. Freeman was seated on the sidewalk for approximately forty minutes while the officers investigated and debated Florida law on the issue of whether Freeman had violated the law when he openly carried his firearm while fishing.

The record is undisputed that Corbino and Graham were uncertain about whether Freeman's actions violated Florida law. On the date of the incident, the City of Tampa did not have any local ordinances, administrative rules, regulations, or policies that conflicted with Florida Statute § 790.33. Specifically, prior to September 2014, City Code section 16-49 prevented firearms in City parks. It is undisputed that the City of Tampa amended the ordinance in September of 2014, approximately nine months before the incident, to remove the prohibition.

For a large portion of the three-part video, Richards, who believed Freeman's conduct was lawful, unless an ordinance stated otherwise, researched the relevant Florida statute on his computer (located inside his patrol car), and the three officers debated the law and whether an exception existed for openly carrying a firearm while fishing at a public park.

The video reflects that Richards informed Corbino and Graham that he was pretty certain that Florida law allowed Freeman to openly carry his firearm while fishing.[3]

In video one, while Richards attempted to locate the applicable Florida statute, the dispatcher responded that Freeman's firearms were negative, i.e., they had not been reported stolen. Richards then continued to search for the applicable statute. The video reflects that Corbino went to Richards' patrol car and told Richards that he read the open carry law and did not see anything on fishing. At the conclusion of video one, Richards located the applicable Florida statute and then turned off the video to allow Corbino to read the statute and the officers to discuss the law.

At the beginning of video two, Corbino and Richards talked to Freeman, who was still seated on the sidewalk. They talked generally to Freeman about why he was at the pier exercising his constitutional rights. Graham was not part of this discussion because he was in a patrol car reading the Florida Statute. Graham then called Richards over to the patrol car and indicated that he could not find the fishing exception that Richards referenced. They then talked about the Florida statute. After directing Graham to the relevant statute, Richards rejoined Freeman and Corbino and they continued talking. Video two reflects that, once

[3]In his interrogatories, Richards stated that he did not believe Freeman had violated Florida law by openly carrying his firearm while fishing, but, because Freeman had already been detained by the time he arrived on the scene, he made "every effort to educate Officer Corbino and Sgt. Graham about the exemption for fishing." He also stated that he heard Corbino and Graham "mention a City ordinance but [he] was not aware that there had been a City ordinance preventing firearms in City parks . . ." (Dkt. 44-6 at ¶3).

Graham finished reading the statute, the three officers left Freeman sitting on the sidewalk and continued to discuss Florida law. Richards turned off the video during this discussion.

The third video reflects that Richards handed Freeman a card with the incident number on it. Richards then asked Freeman if it would be okay for them to return his firearms to him at Freeman's vehicle. Richards also asked Freeman for permission to look at another gun that Plaintiff mentioned was in his vehicle during their previous conversations. The record reflects that Freeman consented to the request. Richards then confirmed that Freeman was okay with the search and Freeman again indicated his consent. Freeman then collected his belongings and walked the officers to his truck.

Once at Freeman's truck, Graham used Freeman's keys to open the truck. Freeman stated where the firearm was located and Graham retrieved a rifle from the rear driver's side of Freeman's truck and removed the magazine. Graham then passed the rifle to Richards and Richards informed Freeman that they were going to run the rifle's serial number. After the serial number was run, Richards advised Freeman that they were placing Freeman's firearms in envelopes and leaving them on the front passenger seat of Freeman's truck. Freeman stated "okay."

In video three, Richards explained to Freeman that he would be trespassed from the park and handed Freeman a trespass warning that Corbino completed. Graham explained to Freeman that he understood Freeman's right to demonstrate, but they had to balance that right against the rights of the park patrons who were concerned about their safety. Freeman indicated that he understood. Graham told Freeman that he appreciated Freeman's

cooperation and apologized for any inconvenience. Graham and Richards wished Freeman luck and Freeman then left.

The Trespass Warning stated that "[s]ubject was fishing at pier while carrying openly a handgun in a side holster. Tampa Police received a complaint from [a] citizen who was fearful of subject's firearm." (Dkt. 44-3). The Trespass Warning was effective for 180 days for city parks or other public property.

The record reflects that Freeman was detained by Defendant Officers, including the time prior to Richards' arrival at the scene, for approximately seventy minutes.

On or about June 19, 2015, (six days after issuance of the trespass warning), TPD's legal advisor, Assistant City Attorney Kirby C. Rainsberger, learned about the incident. That same day, Rainsberger rescinded the trespass warning and wrote Freeman a letter advising Freeman that he was free to visit the park. According to Rainsberger's Affidavit, he rescinded the trespass warning because "it was issued contrary to established Department policy and procedure." (Dkt. 45). He then followed up with TPD by publishing Legal Bulletin 15-08, which reminded TPD police officers about the relevant Florida statute and its exceptions.

On June 24, 2015, Freeman and Florida Carry, Inc. filed this action. This case is now at issue upon Defendants' motion for summary judgment.

SUMMARY JUDGMENT STANDARD OF REVIEW

Motions for summary judgment should be granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). The substantive law applicable to the claimed causes of action will identify which facts are material. *Id.* Throughout this analysis, the court must examine the evidence in the light most favorable to the non-movant and draw all justifiable inferences in its favor. *Id.* at 255.

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The evidence must be significantly probative to support the claims. *Anderson*, 477 U.S. at 248-49 (1986).

This Court may not decide a genuine factual dispute at the summary judgment stage. *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). "[I]f factual issues are present, the Court must deny the motion and proceed to trial." *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248;

Hoffman v. Allied Corp., 912 F.2d 1379 (11th Cir. 1990). However, there must exist a conflict in substantial evidence to pose a jury question. *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989).

DISCUSSION[4]

I. Section 1983 Claims (Counts 7-10)[5]

Defendants first argue that Defendant Officers are entitled to qualified immunity as a matter of law for all of Freeman's section 1983 claims. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

42 U.S.C. § 1983. Thus, to state a prima facie claim under section 1983, Freeman must establish that (1) Defendants' conduct caused the constitutional violation, and (2) the challenged conduct was committed "under color of state law." *See Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1276-77 (11th Cir. 2003).

With respect to qualified immunity, the Eleventh Circuit explains that:

> When government officials act in a way that knowingly violates a clearly established statutory or constitutional right of which a

[4] The Court will discuss the claims in the same order as they are discussed in Defendants' motion.

[5] The Court previously dismissed Count 11 (Dkt. 15).

> reasonable person would have known, they are not immune from suit and may be held liable for the damage their actions caused. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). But when these same officials make decisions that do not knowingly violate such rights, they are not required to defend themselves in a lawsuit seeking damages. *Id.* They are "immune" from suit. *Id.* We call this defense "qualified immunity" because the official is immune from a damage lawsuit, qualified upon his ability to show that he did not knowingly violate the plaintiff's clearly established constitutional right. *Id.*

Ray v. Foltz, 370 F.3d 1079, 1081-82 (11th Cir. 2004).

Freeman's main section 1983 claim arises under the Fourth Amendment, which prohibits unreasonable searches and seizures. This claim is premised on the Defendant Officers' detention of Freeman for approximately seventy minutes, which Freeman claims was unreasonable because Freeman was engaging in lawful conduct. Defendants argue that they are entitled to qualified immunity as a matter of law because they did not knowingly violate the law; rather, they claim that they did not know at first that Florida law permitted a citizen to open carry a firearm while fishing and they were simply investigating the law before they released Freeman.

Defendants' argument is without merit. Florida law was clear at the time of the incident that Freeman was permitted to open carry his firearm while fishing on the pier. And a city ordinance contrary to that law did not exist. The record reflects that Defendants were ignorant about the law. Indeed, for most of the three-part video, Defendants are observed researching the law, debating the law, and appear utterly confused as to whether an exception for fishing applied. This ignorance does not entitle them to qualified immunity. *See Heien*

v. North Carolina, 135 S. Ct. 530, 539-40 (2014) ("Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."); *see also United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016) ("*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an unambiguous statute."); *United States v. Alvarado-Zarza*, 782 F.3d 246, 249-50 (5th Cir. 2015) (mistake of law not objectively reasonable where statute is "unambiguous" and "facially gives no support" to officer's interpretation). Accordingly, Defendants' argument that they are entitled to qualified immunity fails and their motion for summary judgment is denied as to this issue.[6]

Defendants' motion is granted, however, with respect to Freeman's section 1983 claim that Defendants seized and searched his phone in violation of the Fourth Amendment. As Defendants point out, the record is undisputed that Freeman had possession of his cellphone the entire time he was detained. Indeed, at one point in the video, Freeman indicated to Richards that his wife was calling him. Freeman also showed his phone to Richards. Freeman's arguments to the contrary are not supported in the record. Freeman does not point the Court to *any* record evidence supporting his claims related to a purported search of his cellphone other than his counsel's legal argument, which is insufficient. Accordingly, to the extent that Freeman claims that seizure of his cellphone resulted in a Fourth Amendment violation, Defendants are entitled to summary judgment.

[6] Nothing in this Order should be interpreted as ruling in favor of Freeman on his Fourth Amendment claims.

Defendants' motion is also granted to the extent that Freeman claims that the search of Freeman's truck and brief seizure of his firearm (located in his truck) caused a separate Fourth Amendment violation. The record is undisputed that Richards asked for Freeman's permission to search his truck and firearm and Freeman consented to these searches. The video shows that Richards confirmed Freeman's consent a few seconds later. Moreover, the record reflects that the interactions between Freeman and Defendant Officers were relaxed, nonconfrontational, and Freeman did not appear stressed in any way. *See United States v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989) ("In order for consent to a search to be deemed voluntary, it must be the product of an essentially free and unconstrained choice."). Under these circumstances any separate Fourth Amendment claim related to the search of Freeman's truck and firearm fails as a matter of law.

Finally, although Defendants concede that Defendant Officers' actions of trespassing Freeman from the park violated Freeman's First Amendment right to engage in expressive association during the six days that it remained in effect, Defendants' motion is granted with respect to Freeman's section 1983 claim arising under the Second Amendment. As Defendants point out, there is no binding law establishing that a private cause of action exists against an individual under the facts presented in this case. And it is undisputed that Defendants did not deprive Freeman of the right to keep or bear arms in toto.

In sum, Freeman's section 1983 claims related to his detention for approximately seventy minutes, which arises under the Fourth Amendment, and the violation of his First Amendment right not to be trespassed from a public park, must be resolved by the jury.

Defendants' motion for summary judgment is granted as to Freeman's remaining section 1983 claims.

II. Claims under Florida Statute § 790.33 (Counts 1-6 and 12)

Defendants argue that the record is undisputed that Plaintiffs cannot establish any claims under Florida Statute § 790.33 as a matter of law. The Court agrees. Section 790.33 states in relevant part:

> (1) Preemption.—Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.
> (2) Policy and intent.—
> (a) It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.
> (b) It is further the intent of this section to deter and prevent the violation of this section and the violation of rights protected under the constitution and laws of this state related to firearms, ammunition, or components thereof, by the abuse of official authority that occurs when enactments are passed in violation of state law or under color of local or state authority.
> (3) Prohibitions; penalties.—
> (a) Any person, county, agency, municipality, district, or other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition, as declared in subsection (1), by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein.
> . . .

> (f) A person or an organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of this section may file suit against any county, agency, municipality, district, or other entity in any court of this state having jurisdiction over any defendant to the suit for declaratory and injunctive relief and for actual damages, as limited herein, caused by the violation. A court shall award the prevailing plaintiff in any such suit:
>
> 1. Reasonable attorney's fees and costs in accordance with the laws of this state, including a contingency fee multiplier, as authorized by law; and
> 2. The actual damages incurred, but not more than $100,000.

The record is undisputed that the City of Tampa and TPD did not enact or cause to be enforced any local ordinance, administrative rule, regulation, or policy that conflicted with section 790.33. In fact, the evidence demonstrates that the TPD's legal advisor issued Legal Bulletin 2011-10 in August 2011, approximately two months before the penalty provisions of section 790.33 became effective. Legal Bulletin 2011-10 explained the State's preemption of firearm regulation. It further explained that the City ordinances that conflicted with the firearm preemption would be amended. The Legal Bulletin referenced the firearm statutes that officers were most likely to encounter and the Legal Bulletin advised that "[o]fficers should always check the list of exceptions set out in F.S. 790.25(3) before making a charging decision in any particular case." (Dkt. 45-1). The issuance of Legal Bulletin 2011-10 and subsequent amendment of the ordinance that conflicted with section 790.33 (approximately nine months before the June 2015 incident) establishes that there was no violation of section 790.33 in order to maintain a claim against any of the Defendants in this case.

It is worth emphasizing that, contrary to the allegations of the complaint, the record is also undisputed that the City of Tampa and TPD did not have any written or unwritten

policies or rules that conflicted with Chapter 790 at the time of the incident. To the contrary, the City's attorney published training bulletins, one as recent as September 2014, that explained Florida's firearm laws in an attempt to ensure that police officers were in compliance with these laws.

Accordingly, Defendants' motion for summary judgment is granted as to Plaintiffs' claims under Florida Statute § 790.33. Simply put, the record is undisputed that a violation of section 790.33 did not occur.

III. Claims for Declaratory and Injunctive Relief (Counts 13-14)[7]

Defendants' final summary judgment argument is that Plaintiffs are not entitled to declaratory or injunctive relief. The Court agrees because the Court has ruled in Defendants' favor on the section 790.33 claims, which are the only claims that would provide the remedy of declaratory and injunctive relief. Moreover, the record is undisputed that the trespass warning issued to Freeman was rescinded/voided. Accordingly, any relief related to the trespass warning—other than any individual damages Freeman may have suffered during the time that it was in effect—has been provided.[8]

It is therefore **ORDERED AND ADJUDGED** that:

1. Defendants' Motion for Summary Judgment (Dkt. 44) is granted in part and denied in part as explained herein.

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[7] The complaint mistakenly titles Count 14 as Count "XII." (Dkt. 2).

[8] Freeman conceded in his response that summary judgment is appropriate for the claims he asserted in Count 14.

2. Freeman's section 1983 claims related to his detention for approximately seventy minutes, which arises under the Fourth Amendment, and the violation of his First Amendment right not to be trespassed from a public park, must be resolved by the jury. Defendants' motion for summary judgment is granted as to all other claims, including all claims brought by Plaintiff Florida Carry, Inc.

DONE and **ORDERED** in Tampa, Florida on December 8, 2017.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

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