

10-4215-CV

In The United States Court of Appeals
for the
Second Circuit

JAMES F. GOLDBERG,

Plaintiff-Appellant,

v.

TOWN OF GLASTONBURY, MICHAEL FURLONG, Sergeant, Glastonbury Police Department, Town of Glastonbury, KENNETH LEE, Officer, Glastonbury Police Department, Town of Glastonbury, SIMON BARRATT, Officer, Glastonbury Police Department, Town of Glastonbury,

Defendants-Appellees.

*On Appeal from the United States District Court
for the District of Connecticut (New Haven)*

BRIEF FOR PLAINTIFF-APPELLANT
JAMES F. GOLDBERG
WITH SPECIAL APPENDIX

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Connecticut, Stefan R. Underhill, Judge, granting the Defendants Michael Furlong, Simon Barratt, and Kenneth Lee summary judgment against the Plaintiff James F. Goldberg upon his claims of unlawful arrest and unreasonable search and seizure of property and person in violation of the Fourth and Fourteenth Amendments of the United States Constitution brought pursuant to 42 U.S.C. § 1983.¹ (September 17, 2010, Hr'g Tr. at 42-49, A305-A312)

Final judgment in favor of the Defendants Town of Glastonbury, Michael Furlong, Simon Barratt, and Kenneth Lee entered on September 20, 2010. (Judgment, A330)

The jurisdiction of the district court derived from 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(a)(4). Timely notice of appeal was filed in the district court on October 19, 2010. (Notice of Appeal, A328) Appellate jurisdiction is founded in 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Was the investigatory stop of the Plaintiff conducted by the three Town of Glastonbury police officers justified at its inception and, if so, reasonably

¹ The Plaintiff does not appeal the district court's grant of summary judgment in favor of the Defendant Town of Glastonbury in Count Two.

related in scope to the circumstances which justified the interference in the first place?

II. Did the three police officers have probable cause to arrest the Plaintiff?

III. Did the Plaintiff establish his entitlement to summary judgment in Count One alleging unreasonable search and seizure and unlawful arrest against the three Town of Glastonbury police officers sued in their individual capacities as a matter of law or, alternately, do genuine issues of material fact exist to preclude summary judgment against the Plaintiff in Count One?

STATEMENT OF THE CASE

Plaintiff James F. Goldberg (“Goldberg”) appeals from the final judgment entered in the action below on September 20, 2010, in favor of the Defendants Michael Furlong, Simon Barratt, and Kenneth Lee² and from a Ruling rendered by The Honorable Stefan R. Underhill on September 17, 2010, granting the Defendants’ Motion for Summary Judgment and denying Plaintiff’s Motion for Summary Judgment.³ (September 17, 2010, Hr’g Tr. at 42-49, A305-A312)

² The Plaintiff does not appeal the district court’s grant of summary judgment in favor of the Defendant Town of Glastonbury in Count Two.

³ The district court did not issue a written decision on its Ruling granting the Defendants’ and denying the Plaintiff’s cross-motions for summary judgment. (September 17, 2010, Hr’g Tr. at 42-49, A305-A312) The court’s Ruling denying the Plaintiff’s Motion for Reconsideration of the denial of an oral motion made by Plaintiff at argument on September 17, 2010, to supplement the record with the transcript of a 911 call is reported at Goldberg v. Town of Glastonbury, 2010 WL 4681249 (D. Conn.) (unpublished). See Local Rule 28.1(b) (“In the statement of

Goldberg filed a Complaint on November 21, 2007, in the District of Connecticut alleging in Count One unlawful arrest and unreasonable search and seizure of property and person in violation of the Fourth and Fourteenth Amendments of the United States Constitution brought pursuant to 42 U.S.C. § 1983. Goldberg alleged that the three Town of Glastonbury Defendant police officers lacked reasonable and articulable suspicion to detain him at the Chili's Restaurant in Glastonbury on June 21, 2007, and lacked probable cause for his subsequent arrest. The parties filed cross-motions for summary judgment and the district court heard oral argument on September 17, 2010.

At oral argument, the district court articulated the issue for determination: "Was there probable cause or with respect to the qualified immunity issue, was there arguable probable cause for the arrest?" (September 17, 2010, Hr'g Tr. at 4:8-10, A267) The court and the parties agreed that a claim under the Second Amendment to the United States Constitution had not been raised by Goldberg. (September 17, 2010, Hr'g Tr. at 4:12-19, A267)

The court began its inquiry by asking Goldberg's counsel why a Terry⁴ stop was not warranted to determine whether Goldberg possessed a valid state permit to carry a pistol or revolver. (September 17, 2010, Hr'g Tr. at 5:1-4, A268)

the case, an appellant's brief must name the judge or agency official who rendered the decision appealed from and cite the decision or supporting opinion, if reported.")

⁴ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Goldberg's counsel responded that "there was no indication that Mr. Goldberg was engaged in criminal conduct, about to engage in criminal conduct or was threatening criminal conduct." (September 17, 2010, Hr'g Tr. at 5:5-8, A268)

Accordingly, Goldberg's open carry or inadvertent open carry of a pistol "was no different than him walking into Chili's with a bag, with a wallet, with any other item that it's lawful to carry. The fact that it was a firearm made absolutely no difference and it constituted no reason for the police to approach him in any way."

(September 17, 2010, Hr'g Tr. at 5:8-14, A268) The court responded that the difference was "it is illegal for the vast majority of people in Connecticut to carry it into Chili's or to display it or to possess it openly."⁵ (September 17, 2010, Hr'g

⁵ The record does not contain any evidence, statistical or otherwise, to form a conclusion regarding the number or percentage of people in Connecticut holding valid state permits. The court relied upon the same unsupported conclusion a second time in stating that Goldberg's counsel was "ignoring the fact that, as I said, for the vast majority of Connecticut residents, it would be illegal to do what Mr. Goldberg did." (September 17, 2010, Hr'g Tr. at 63:3-5, A269) Then a third reference to the "vast majority" occurred when the court said again that "the vast majority of people in Connecticut are not legally able to do what Mr. Goldberg did" (September 17, 2010, Hr'g Tr. at 6:20-22, A269) Again, in a fourth statement regarding the number of people holding valid state permits in Connecticut, the court relied on its unsupported conclusion, not based on any evidence in the record, that "[t]he vast majority of people who have a pistol on their side don't necessarily have a valid permit for the gun." (September 17, 2010, Hr'g Tr. at 4:21-23, A270) The court's basis for stating that not only do the vast majority of people not have permits but even the vast majority of people carrying pistols are doing so illegally without permits, although not supported by any evidence in the record, may be found in the court's personal anecdotal reference to its own status as an individual who does not possess a valid permit. (September 17, 2010, Hr'g Tr. at 7:24, A270) In addition as a district court judge it is

Tr. at 5:15-18, A268) Goldberg's counsel rejected the principle that the popularity of lawful conduct decides the degree of rights afforded an individual engaging in the lawful conduct.⁶ (September 17, 2010, Hr'g Tr. at 8:5-15, A271) The court then agreed stating "whether it's 1 percent or 99 percent" did not matter to its analysis. (September 17, 2010, Hr'g Tr. at 9:2-3, A272) To support its position next, the court referenced the fact that Goldberg was in a public place that had been the subject of "armed robberies" on two occasions within the previous five years.⁷ (September 17, 2010, Hr'g Tr. at 9:3-6, A272)

presumed that familiarity with firearms is overwhelmingly skewed to those charged with violations of federal weapons statutes because valid permit holders who abide by the law and are contributing members of society do not appear in federal court related to firearms except to the extent they bring lawsuits alleging violations of their civil rights.

⁶ See September 17, 2010, Hr'g Tr. at 8:23-25, 9:1, A272, A273 ("[I]t's not a matter of record how many people in Connecticut hold state permits because from our position that's not the issue. If it's 1 percent, if it's 99 percent, the same rule applies.").

⁷ In fact, the record reveals in an Affidavit by the Chili's manager, Laura Smith, that the restaurant had been robbed twice in five years, "once by several armed gunmen, who had employees lay facedown on the floor, and another time when two men broke in with a hammer and tied up a manger and an employee with electrical ties." (Affidavit of Laura Smith ¶ 14, A213) So there was only one armed robbery, not two. The record is void of any evidence regarding the statistical significance of one armed robbery within the previous five years at a restaurant located in Glastonbury, whether that was in fact the only armed robbery occurring during the entirety of the restaurant's existence, whether other establishments in the area had been robbed more or less often, whether if an individual such as Goldberg holding a valid state permit and a pistol would have intervened to prevent the armed robbery, and how such a measure of previous crimes at various establishments could be ascertained by permit holders prior to entering establishments unless establishments were required to post their previous

The court ignored the intent of the state legislature expressed through General Statutes § 29-35(a) that a valid permit holder may lawfully carry his or her pistol in public, openly or concealed. In response to a statement by Goldberg's counsel that "we have a state legislature that could add to the state statutes if you hold a state permit ..." the court responded: "But we're not here to talk about what the state legislature could do." (September 17, 2010, Hr'g Tr. at 10:18-21, A273) However, it is an issue for the legislature because the legislature is the branch that enacts laws by the will of the people. When law enforcement exceeds the law to accomplish ends it deems worthy, the will of the people is trampled. In explanation, Goldberg's counsel argued:

The police have a concern about people carrying firearms, openly carrying firearms. And so what they try to do, because there is no law that can place you under arrest for openly carrying a firearm, is they tried to fit it into the breach of peace statute by saying that he was engaged in threatening behavior. There's no evidence in Laura Smith's affidavit that was submitted by the defendants that Mr. Goldberg engaged in any threatening behavior.

(September 17, 2010, Hr'g Tr. at 11:12-20, A274) See also Affidavit of Laura Smith, A212-A213) Furthermore, Goldberg's counsel continued:

So, even though the police were concerned about Mr. Goldberg carrying a firearm or pistol, it's legal and

subjection to crime as a warning to permit holders that they may be held responsible for any lingering distress on the part of the employees working at such establishments.

there's nothing that – there's nothing that anyone can do or say to get away from that fact that he was engaged in completely lawful behavior and we don't condone our police just walking up to people engaged in completely lawful behavior and demanding from them proof either that they are allowed to drive and they are allowed to be in this country or they are allowed to carry a firearm. That's just not the law and it was clearly established at the time that that's not the law.

(September 17, 2010, Hr'g Tr. at 12:13-23, A275)

The court had framed the issue at the argument's commencement: "Was there probable cause or with respect to the qualified immunity issue, was there arguable probable cause for the arrest?" (September 17, 2010, Hr'g Tr. at 4:8-10, A267) The court and the parties had agreed that a claim under the Second Amendment to the United States Constitution had not been raised by Goldberg. (September 17, 2010, Hr'g Tr. at 4:12-19, A267) Then the court modified the issue to implicate rights afforded under the Second Amendment by only considering whether the act of possessing a firearm in a public place in Connecticut constitutes *per se* reckless conduct should someone in proximity express inconvenience, annoyance, or alarm at the sight of a firearm. (September 17, 2010, Hr'g Tr. at 15:16-19, A278)⁸

⁸ The court erroneously concluded that the law prefers an individual leave his or her weapon in a motor vehicle rather than carry it into a restaurant. First, if access is gained to the motor vehicle by an individual other than the permit holder, the permit holder may lose his or her permit for recklessly leaving it behind beyond the personal safekeeping of the holder and face arrest for breach of the peace in the

According to the court, simply displaying a weapon constitutes reckless conduct (September 17, 2010, Hr’g Tr. at 16:9-11, A279) so that it was “unrealistic” to expect the police officers “not to go up as a matter of officer safety, disarm the person before politely asking for the permit.” (September 17, 2010, Hr’g Tr. at 18:13-18, A281) Goldberg’s counsel argued otherwise:

Well, this is what’s going to happen in Connecticut if that becomes, if that becomes a matter of law. This is what’s going to happen. Anybody in Connecticut who exercises their right, which is now a Second Amendment right, to openly carry their pistol with a valid permit is subject to being stopped anytime and anywhere whenever somebody makes a call to the police and says I don’t like guns, I don’t think guns should be legal. I’m really scared of this guy. Come get him. That’s what is going to happen. You’re going to have people who are engaged in lawful behavior – fundamental, fundamental constitutional rights are implicated in this behavior now, who anybody’s going to be able to say I’m scared, I’m scared, and the police are going to come, they are going to be able to handcuff him and throw him up against the wall and demand his permit.

(September 17, 2010, Hr’g Tr. at 18:19-25, 19:1-9, A281, A282) In attempting to explain Goldberg’s position that the conduct or emotions of the restaurant manager

second degree based on such reckless conduct. Second, the permit is a permit to carry not a permit to leave a weapon unattended. See September 17, 2010, Hr’g Tr. at 15:20-25, A278 (“And so we have here is a gentleman who instead of leaving his gun locked in his car for the few minutes that he has to go in to pick up the dinner, instead, straps it on and walks in.”). The purpose of a weapon is self-defense and protection. Leaving a weapon in a motor vehicle defeats this purpose especially when entering a restaurant that has been the subject of “armed robberies.”

responsive to Goldberg's lawful conduct could not form the basis for Goldberg's detention or arrest, an analogy was drawn to a time in the United States when the mere presence of a black man in a white neighborhood caused annoyance and alarm. White people were threatened by the mere presence of a black person in the neighborhood. The police were called, perhaps by 911 dispatch or its predecessor, and immediately responded. The black person was stopped, detained, told not to return, and often arrested. (September 17, 2010, Hr'g Tr. at 26:1-9, A289) Under these circumstances it was reckless for a black person to enter a white neighborhood knowing how it could upset white people and make them feel inconvenienced, annoyed, or alarmed. The court rejected the similarity. (September 17, 2010, Hr'g Tr. at 26:10-122, A289) To the court, the mere presence of a gun impacts the totality of the circumstances to always allow police officers to detain an individual. (September 17, 2010, Hr'g Tr. at 28:20-24, A291)

The court then ruled. Applying a totality of the circumstances, the court found that the Defendant police officers had reasonable suspicion for the Terry stop and probable cause for the arrest and, even if the court was incorrect, qualified immunity protected the Defendants' conduct. (September 17, 2010, Hr'g Tr. at 43:14-23, A306) In response to the Plaintiff's request for articulation as to the basis for probable cause, the court began with the breach of peace statute finding that Goldberg engaged in reckless conduct by not leaving his pistol in his motor

vehicle and carrying it visibly into the restaurant. (September 17, 2010, Hr’g Tr. at 47:5-13, A310) The court determined that carrying the pistol “created a risk that those in the facility would feel threatened.”⁹ (September 17, 2010, Hr’g Tr. at 47:14-18, A310) Finally, the court concluded that the police officers were “protected by qualified immunity in the event that there’s a later determination that in fact they did not have probable cause to arrest him.” (September 17, 2010, Hr’g Tr. at 49:6-9, A312)

STATEMENT OF RELEVANT FACTS

Goldberg entered a Chili’s Restaurant (“Chili’s”) in Glastonbury, Connecticut, on the night of June 21, 2007, to place an order for food to take with him from the premises for consumption elsewhere. (Defs.’ Rule 56(A)1 Statement ¶¶ 6,7; A198)¹⁰ The Chili’s manager, Laura Smith (“Smith”), noticed that Goldberg carried a firearm into the restaurant on his side secured in a holster. (Affidavit of Laura Smith (hereinafter, “Smith Aff.”) ¶ 4, A212) Smith called 911 emergency dispatch and inquired whether it is legal in Connecticut to openly carry

⁹ It is undisputed that Goldberg did not engage in any threatening conduct. See Deposition Transcripts of Glastonbury Police Department Chief Thomas Sweeney and Sergeant Michael Furlong (There was no complaint from Smith, or anyone else, that Goldberg was acting in a threatening manner (Deposition of Chief Thomas Sweeney Dep. at 71:15-19; A178); was “threatening, physically threatening anybody in the take-out area of the restaurant,” (Deposition of Sergeant Michael Furlong at 50:17-23; A82); or had drawn his gun from the holster.).

¹⁰ Each statement of fact in this section relies upon the Defendant municipal law enforcement officers’ trial court testimony and evidentiary submissions.

a gun.¹¹ (Deposition of Glastonbury Police Department Chief Thomas Sweeney (hereinafter, “Sweeney Dep.”) at 70:22-25, 71:1, A177, A178)¹²

There was no complaint from Smith, or anyone else, that Goldberg was acting in a threatening manner (Sweeney Dep. at 71:15-19, A178); was “threatening, physically threatening anybody in the take-out area of the restaurant,” (Deposition of Sergeant Michael Furlong (hereinafter, “Furlong Dep.”) at 50:17-23, A82); or had drawn his gun from the holster. (Furlong Dep. at 50:13-16, 103:21-25, 104:1-3, A82, A117, A118) No information was provided by dispatch to indicate that any crime had been committed. (Furlong Dep. at 57:9-12, 16-18, A85)

In response to Smith’s call, the Glastonbury Police Department (GPD) dispatched Officer Simon Barratt (“Officer Barratt”) to the restaurant (Sweeney Dep. at 71:11-14, A178) (GPD Report, A214) for a report of a male in possession

¹¹ Goldberg moved at the September 17, 2010, oral argument on the parties’ cross-motions for summary judgment to supplement the record with a transcript of Smith’s June 21, 2007, 911 call to dispatch. (Docket #53, A7) (September 17, 2010, Hr’g Tr. at 36:13-21, A299) The district denied Goldberg’s oral motion, finding the 911 call “irrelevant.” (September 17, 2010, oral argument Hr’g Tr. at 37:24-25, 38:1-8, A300-A301) The court denied Goldberg’s motion for reconsideration (Ruling, A325). A transcript of the 911 call was attached to Goldberg’s motion for reconsideration. (Ex. to Pl.’s Mot. for Reconsideration, A315-A324) See Deposition of Glastonbury Police Department Chief Thomas Sweeney at 71:18-19, A178 (“But again the tape speaks for itself.”).

¹² The Glastonbury Police Department did not receive any other dispatch calls regarding Goldberg except the one from Smith. (Deposition of Glastonbury Police Department Chief Thomas Sweeney at 71:2-5, A178)

of a gun. (Deposition of Officer Simon Barratt (hereinafter, “Barratt Dep.”) at 10:3-7, A148) Officer Barratt understood from dispatch that the Chili’s manager was concerned “about his [Goldberg’s] intent in the restaurant.” (Barratt Dep. at 10:6-7, A148) Regardless, dispatch did not maintain continuous contact with Smith while Officer Barratt was en route (Deposition of Officer Kenneth Lee (hereinafter, “Lee Dep.”) at 25:18-20, A161) so that it was necessary for Smith to provide additional information to dispatch in a subsequent call. (Lee Dep. at 25:18-20, A161) Officer Kenneth Lee (“Officer Lee”) and Sergeant Michael Furlong (“Sergeant Furlong”) responded to Chili’s with Officer Barratt. (GPD Report, A215)

None of the three officers drew their weapons as they entered Chili’s together in a single file. (Furlong Dep. at 64:22-25, 65:10-12, A86, A87) Sergeant Furlong observed Goldberg “sitting on a bench in the take-out area of the restaurant” ... “carrying a handgun in a holster on his right hip.” (Furlong Dep. at 66:23-25, 67:1, A88, A89) Goldberg was silent and had his arms folded on his chest. (Furlong Dep. at 76:3-4, 9-12, A95) Sergeant Furlong did not observe any “commotion” in the restaurant (Furlong Dep. at 74:10-13, A93) or anyone in a state of distress as he entered. (Furlong Dep. at 74:14-18, A93)¹³ The officers did

¹³ Compare Sergeant Furlong’s deposition testimony to the police report prepared by Officer Barratt for submission to the state criminal court session in support of probable cause: “Because of the large commotion created and distress to staff and

not tell anyone in Chili's to clear the area or evacuate the restaurant. (Barratt Dep. at 18:15-24, A153)

Sergeant Furlong "gave a verbal command to Mr. Goldberg to show me [Sergeant Furlong] his hands." (Furlong Dep. at 74:19-23, A93) Goldberg showed Sergeant Furlong his hands. (Furlong Dep. at 75:7, A94) Sergeant Furlong's purpose was to "investigate a criminal complaint." (Furlong Dep. at 81:2, A100) He was focused on "officer safety, the handgun, and securing the weapon" (Furlong Dep. at 81:4-7, A100) At this point it was still a criminal complaint only and Sergeant Furlong had not "made an arrest opinion in his head" (Furlong Dep. at 81:14-16, A100) After Goldberg compliantly showed his hands upon Sergeant Furlong's command, Sergeant Furlong ordered Goldberg to "stand up" and "turn away." (Furlong Dep. at 81:19-22, A100) Goldberg immediately showed his hands upon command. Goldberg immediately stood up upon command. Goldberg immediately turned away from Sergeant Furlong upon command. (Furlong Dep. at 81:23-25, 82:1-7, A100, A101)

Officer Barratt then placed handcuffs on Goldberg. (Furlong Dep. at 82:10-13, A101) Goldberg did not resist being handcuffed. (Furlong Dep. at 86:20-22, A105) He never acted in a violent or hostile manner toward Sergeant Furlong, Officer Barratt, or Officer Lee. (Furlong Dep. at 86:23-25, 87:1-2, A105, A106)

customers Goldberg was placed under arrest for breach of peace." (GPD Report at 2, A215)

Goldberg never resisted arrest. (Furlong Dep. at 87:3-4, A106) (Barratt Dep. at 31:8-10, A156) According to Officer Lee: “He [Goldberg] was compliant. I mean, you know, he put his arms up; and, you know, they – he grabbed the gun. He was compliant the whole time.” (Lee Dep. at 32:17-20, A166) As Officer Barratt handcuffed Goldberg, Goldberg was instructed that he was “not being placed under arrest” but “detained.” (Furlong Dep. at 82:23-25, A101) Sergeant Furlong continued staring at Goldberg’s gun after Goldberg was handcuffed. (Furlong Dep. at 84:7, A103) The gun was a “concern” to Sergeant Furlong. (Furlong Dep. at 84:7-8, A103)

Goldberg’s handgun was securely fastened in his holster. (Furlong Dep. at 88:12-14, A107) When Sergeant Furlong attempted to remove the handgun from Goldberg’s holster, the handgun did not “come immediately out.” (Furlong Dep. at 88:5, A107) According to Sgt. Furlong, “[h]olsters are designed to not be easily removed by other people, other than the one that’s wearing the holster.” (Furlong Dep. at 88:5-8, A107) Sergeant Furlong had to “manipulate” the holster to remove it. (Furlong Dep. at 88:21, A107) Finally, after more than one attempt, Sergeant Furlong seized Goldberg’s holster and handgun. (Furlong Dep. at 88:11, 101:2-4, 137:8-11, A107, A115, A137) Sergeant Furlong did not ask permission from Goldberg to remove the gun. (Furlong Dep. at 100:20-23, A114) Goldberg did not

consent to the gun's removal. (Furlong Dep. at 100: 24-25, 25:1, A114, A115)

Sergeant Furlong then went to speak to Smith. (Furlong Dep. at 92:10-13, A109)

Sergeant Furlong did not take or subsequently prepare any notes of his conversation with Smith. (Furlong Dep. at 92:16-18, 96:20-23, A109, A112)

There were no witnesses to Sergeant Furlong's conversation with Smith. (Furlong Dep. at 92:19-21, A109) While Sergeant Furlong spoke to Smith, Goldberg remained handcuffed and "detained" by Officer Barratt and Officer Lee. (Furlong Dep. at 92:22-25, A109) Sergeant Furlong already had confirmed that Goldberg possessed a valid state permit to carry a pistol or revolver. (Furlong Dep. at 94:2-5, A110) Sergeant Furlong determined that Goldberg was in lawful possession of the handgun carried in a holster on his right hip. (Furlong Dep. at 94:9-18, A110)

According to Sergeant Furlong, Smith said that she was "upset and alarmed" after seeing Goldberg enter the restaurant with a "holstered weapon on his right hip." (Furlong Dep. at 94:22-25, A110) Allegedly, Smith reported that she believed other employees and customers were upset and alarmed too but Sergeant Furlong never "learned the identity of other individuals who were alarmed and concerned by the handgun." (Furlong Dep. at 95:8-18, A111) Sergeant Furlong never asked Smith for the names of the other individuals who were upset or alarmed. (Furlong Dep. at 95:11-14, A111) Smith did not identify any individuals she reportedly cleared from the area, tell Sergeant Furlong how many individuals

were involved in the clearing process, or describe the process except to the extent that it occurred “in a kind of low-keyed type of manner.”¹⁴ (Furlong Dep. at 96:5-7, 11-14, 17-19, A112) Sergeant Furlong did not conduct any interviews related to the investigation after speaking to Smith on June 21, 2007. (Furlong Dep. at 137:12-16, A137) He did not ask Smith if Chili’s had a policy prohibiting firearms on the restaurant premises. (Furlong Dep. at 128:4-7, A132) Sergeant Furlong did not observe any signs on the restaurant premises prohibiting the possession or carrying of firearms. (Furlong Dep. at 128:8-11, 127:9-15, A132, A131) (Sweeney Dep. at 94:11-15, A191)¹⁵

Sergeant Furlong made the decision to arrest Goldberg for breach of peace in the second degree. (Furlong Dep. at 108:15-18, A122) He was aware at the time of Goldberg’s arrest that Connecticut has no requirement that valid state permit holders conceal a pistol or revolver when carried. (Furlong Dep. at 127:5-8, A131) Sergeant Furlong based probable cause for arrest upon these factors:

¹⁴ See n. 2, supra.

¹⁵ At oral argument on the parties’ cross-motions for summary judgment, the court opined that it was undisputed that Smith “cleared that area of the restaurant of any patrons because she was so nervous that there was going to be a violent incident.” (September 17, 2010, Hr’g Tr. at 14:11-15, A277) Goldberg’s counsel responded that it was hard to dispute a conversation where there were no notes taken, no witnesses, and only the word of the two people involved, one of whom, Smith, failed to reference any clearing of the area in a subsequent affidavit. (September 117, 2010, Hr’g Tr. at 14:25, 15:1-5, A277, A278) (Smith Aff. ¶¶ 1-19, A212-A213) Smith’s affidavit does not corroborate Sergeant Furlong’s testimony that Smith told him she had cleared the restaurant area.

- “I’m observing an exposed handgun in a public restaurant that can conceivably be alarming or threatening behavior to other people, which I corroborated by speaking to Laura Smith.” (Furlong Dep. at 103:3-6, A117)
- “That Mr. Goldberg went into a public place with an exposed handgun. I would describe that as being reckless. An exposed handgun in a public place can be threatening behavior to the general public, which determined occurred from interviewing Laura Smith.” (Furlong Dep. at 109:4-9, A123) Based on our corroborative observations, three police officers observed an exposed handgun as well.” (Furlong Dep. at 109:12-14, A123)
- “An exposed handgun in a public place can be construed as a breach of peace” even independent of anything Smith or anyone else said. (Furlong Dep. at 112:14-21, A124)
- “The handgun. Again, his behavior, I would describe walking in a public place with an exposed handgun, I would describe as reckless conduct on his part, and I believe the exposed weapon poses threatening behavior to the general public. And those aspects were also considered during the determination of probable cause.” (Furlong Dep. at 116:1-7, A127)
- “I based that [conclusion that Goldberg engaged in threatening behavior] on going into a public place, having an exposed handgun, not in a police uniform or in any way associated with law enforcement. Going into a restaurant with the general public, people don’t know what the individual’s intentions are. That particular restaurant has been held up on more than one occasion¹⁶ and I feel wearing an exposed handgun under those circumstances would be threatening behavior.” (Furlong Dep. at 125:3-12, A130)

¹⁶ In a statement by Smith dated more than two years after Goldberg’s arrest, Smith recounts that the restaurant had been robbed twice during the previous five years, once by several armed gunmen and another time when two men entered the restaurant with a hammer and electrical zip ties. (Smith Aff. ¶ 14, A213) It is unknown whether Smith would have called the Glastonbury Police Department to report an individual with a hammer or electrical zip ties in public or if the Glastonbury Police Department would or has responded similarly.

- “My understanding of the question,¹⁷ it doesn’t have to be concealed but it has to be carried appropriately as to not invoke alarm.” (Furlong Dep. at 141:20-22, A139)
- “Again, the fact that it’s carried in public and it’s viewed in public, is – under the circumstances you described¹⁸ similar to this incident, I would describe it as reckless conduct to carry an exposed weapon in a public place even though you have a pistol permit.” (Furlong Dep. at 142:8-13, A140)

Goldberg, represented by counsel, appeared in state criminal court on July 30, 2007, before The Honorable Raymond R. Norko (“Judge Norko”) and moved for dismissal of the breach of peace in the second degree case, the return of his state permit, and the return of the pistol seized by the GPD on June 21, 2007. (July 30, 2007, Hr’g Tr., A220-221) Judge Norko ruled upon Goldberg’s motions orally from the bench on July 30, 2007, as follows: “All right, the court will recognize a nolle; grant the dismissal. Return the permit as requested by counsel; forfeit the weapon at this particular period of time.” (July 30, 2007, Hr’g Tr. at 3:15-18, A221) Judge Norko, by written order dated August 6, 2007, granted Goldberg’s

¹⁷ The question directed at Sergeant Furlong during his deposition: “Is it your understanding Sergeant Furlong, that an individual who has a pistol permit in the State of Connecticut is not required to conceal their weapon when they are out in public?” (Furlong Dep. at 131:9-13, A139)

¹⁸ The circumstances described to Sergeant Furlong during his deposition: “[A]n individual with a valid pistol permit can be out in public with an exposed weapon, but as long as they are not carrying it in a manner which invokes or provokes alarm, they are not in violation of the law; is that fair to say?” (Furlong Dep. at 142:1-5, A140)

motion to dismiss the criminal case arising from Goldberg's June 21, 2007, arrest by the GPD. (Order, A223)

When asked under what circumstances an individual with a valid state permit has the right to carry an exposed weapon in Connecticut, Sergeant Furlong responded: "I can't think of any. I believe the law is confusing." (Furlong Dep. at 142:15-20, A140) As to what makes the law confusing for Sergeant Furlong: "That you're not required to conceal it, but when it's carried in a public place, it can be inappropriate and it can be construed as a criminal offense." (Furlong Dep. at 143:3-8, A141) And by whom are the circumstances construed as criminal offense or not, according to Sergeant Furlong? "By a police officer." (Furlong Dep. at 143:9-10, A141) Presumably, by a police officer as confused as Sergeant Furlong about the right of a valid permit holder in Connecticut to openly carry a pistol or revolver without fear of arrest.

SUMMARY OF THE ARGUMENT

The decision rendered in the district court holding as criminally reckless the lawful open carry of a pistol in the State of Connecticut justifying government intrusion effectively creates a new exception to the Fourth Amendment protections afforded individuals to be free from unreasonable searches and seizures. This Goldberg exception grants unfettered authority to the government to detain any individual exercising his or her Second Amendment right to bear arms absent any

indicia of criminal conduct. Government entities across the United States will become familiar with the Goldberg exception to the Fourth Amendment with the result that the holdings in Heller¹⁹ and McDonald²⁰ will be eviscerated for what purpose is a right when it is burdened by the presumption that with the exercise of that right criminal conduct and violence are presumed and acted upon by the government to deny the individual freedom.

The matter below did not become a Second Amendment case until the district court held tantamount to its decision the involvement of a firearm. Just as Sergeant Furlong could not stop staring at Goldberg's gun even after Goldberg was handcuffed, the court could not consider Goldberg's rights absent subjective beliefs about firearms. See n. 5, supra.

Goldberg's conduct, in its entirety, was protected under the Fourth Amendment and the Second Amendment and condoned by a state legislature acting as the direct representative of the people in enacting General Statutes § 29-35. GPD Chief Sweeney, Sergeant Furlong, Officer Barratt, and Officer Lee all testified that an individual in possession of a valid state permit may lawfully openly carry a firearm in Connecticut. Sergeant Furlong admitted arresting Goldberg even though he found the law confusing. See Furlong Dep. at 143:3-8,

¹⁹ District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

²⁰ McDonald v. City of Chicago, Illinois, 561 U.S. ___, 130 S.Ct. 3020, 3023, 177 L.Ed.2d 894 (2010).

A141 (“That you’re not required to conceal it, but when it’s carried in a public place, it can be inappropriate and it can be construed as a criminal offense.”) Still, despite his own confusion, Sergeant Furlong detained and placed Goldberg under arrest. Confusion does not equate with reasonable suspicion or probable cause, arguable or otherwise.

The Defendants’ conduct and the district court’s affirmation of that conduct amounts to no less than retaliation for the exercise of a fundamental constitutional right. The district court’s decision has conveyed the message to every permit holder in Connecticut and the government agencies that enforce the laws:

Whatever the Supreme Court said in Heller and McDonald does not apply in Connecticut because any individual in Connecticut lawfully carrying a pistol openly is presumed to be engaged in criminal conduct and on the verge of committing violence.

ARGUMENT

I. Standard of Review

This Court reviews a district court grant of summary judgment de novo. Bounds v. Pine Belt Mental Health Resources, 593 F.3d 209, 214 (2d Cir. 2010) (dismissal); Tasini v. N.Y. Times Co., 206 F.3d 161, 165 (2d Cir. 2000) (summary judgment). In determining whether summary judgment is appropriate, all ambiguities must be resolved and all inferences drawn in favor of the non-moving

party. The Court will affirm only if the record reveals no genuine issue of material fact for trial. Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61 (2d Cir. 1998).

II. The Three Town of Glastonbury Police Officers Lacked Articulate Suspicion and Probable Cause, Arguable or Otherwise, to Detain and Arrest Goldberg, Respectively

A. Connecticut Breach of Peace Statute

Connecticut courts have upheld the breach of peace statute as constitutional despite numerous attacks. See State v. DeLoreto, 265 Conn. 145, 164 (2003) (Rejecting claim that breach of peace statute is “unconstitutionally vague as applied to him and unconstitutionally overbroad.”) Goldberg challenged the applicability, not the constitutionality, of the breach of peace in the second degree statute when he appeared in state criminal court on July 30, 2007. (July 30, 2007, Hr’g Tr. at 2:24-26, A220) (“We’re asking that the court grant the Motion. There’s no basis for the arrest in this instance.”) The court granted Goldberg’s motion for dismissal.

A deconstruction of the breach of peace statute and a review of Sergeant Furlong’s bases for Goldberg’s investigatory detention and subsequent arrest confirm the inapplicability of the statute to the totality of the circumstances on June 21, 2007, at the Chili’s in Glastonbury, despite the presence of a firearm. The breach of peace in the second degree statute begins with a prefatory clause

applicable to six separate acts.²¹ This clause provides two alternates for the *mens rea* element of the crime, specifically, an intent to cause inconvenience, annoyance or alarm or recklessly creating a risk of inconvenience, annoyance or alarm. Yet even if an individual possesses one of the two requisite *mens rea* for commission of a breach of the peace in the second degree, no crime has been committed until an actual breach of the peace occurs by one or more of six affirmative acts. No matter that Sergeant Furlong surmised that Goldberg acted with intention or with recklessness. The recklessness and intention must be attached to one or more of the six affirmative acts on the part of the individual accused of the breach.²² In Goldberg's case, whether or not Sergeant Furlong believed that Goldberg intended to or recklessly created a risk of inconvenience, annoyance or alarm, if Goldberg did not do one of the six affirmative acts attendant to the intentional or reckless *mens rea* then no breach of the peace occurred. Not one of the six affirmative acts

²¹ Section 53a-181(a) provides: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do. For purposes of this section, "public place" means any area that is used or held out for use by the public whether owned or operated by public or private interests."

²² By analogy and as example, if an individual intends to but does not write an Appellate Brief, a Brief will not be filed and the appeal will be dismissed.

in the breach of peace statute fits within the conduct described by Sergeant Furlong as justifying Goldberg's arrest.

First, was there reasonable suspicion or probable cause, arguable or otherwise, to believe that Goldberg had engaged in fighting or in violent, tumultuous or threatening behavior in a public place? No.²³ (General Statutes § 53a-181(a)(1).

Second, was there reasonable suspicion or probable cause, arguable or otherwise, to believe that Goldberg did strike or assault another person? No.²⁴ (General Statutes § 53a-181(a)(2).

Third, was there reasonable suspicion or probable cause, arguable or otherwise, to believe that Goldberg did threaten to commit any crime against another person or such other person's property? No.²⁵ (General Statutes § 53a-181(a)(3).

Fourth, was there reasonable suspicion or probable cause, arguable or otherwise, to believe that Goldberg did publicly exhibit, distribute, post up or

²³ See Statement of Facts (There was no complaint from Smith, or anyone else, that Goldberg was acting in a threatening manner (Deposition of Glastonbury Police Department Chief Thomas Sweeney at 71:15-19, A178); was "threatening, physically threatening anybody in the take-out area of the restaurant," (Deposition of Sergeant Michael Furlong at 50:17-23, A82); or had drawn his gun from the holster. (Deposition of Sergeant Michael Furlong at 50:13-16, 103:21-25, 104-3, A82, A117, A118))

²⁴ See n. 23 *supra*.

²⁵ See Statement of Facts (Sergeant Furlong's seven bulleted reasons for Goldberg's arrest).

advertise any offensive, indecent or abusive matter concerning any person?

No. (General Statutes § 53a-181(a)(4).

Fifth, was there reasonable suspicion or probable cause, arguable or otherwise, to believe that Goldberg did in a public place, use abusive or obscene language or make an obscene gesture? No. (General Statutes § 53a-181(a)(5).

Sixth, was there reasonable suspicion or probable cause, arguable or otherwise, to believe that Goldberg did create a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do? No.²⁶ (General Statutes § 53a-181(a)(6).

Not one of Sergeant Furlong's articulated bases for detaining and then arresting Goldberg meets the elements required by any one of the six affirmative acts for the commission of breach of the peace. In fact Sergeant Furlong's testimony and the testimony of GPD Chief Sweeney negate the court's finding that Sergeant Furlong reasonably believed Goldberg had affirmatively engaged in threatening behavior.²⁷ Threatening behavior is not passive. An individual's impression cannot turn another individual's lawful conduct into a criminal act.

The plain language of the breach of peace in the second degree statute in

²⁶ Even if one considers the open carry of a pistol or revolver by a valid state permit holder a public and hazardous or physically offensive condition, it is undeniable that Goldberg was licensed to do so.

²⁷ See n. 23 supra.

combination with the absence of any requirement in Connecticut law requiring the concealed carry of a pistol or revolver by a valid permit holder reinforces the lack of reasonable suspicion, arguable or otherwise, for believing that crime was afoot at Chili's, or for finding probable cause, arguable or otherwise, to arrest Goldberg for breach of peace in the second degree.

B. Georgia Public Gathering Law

Sergeant Furlong may have been within the confines of the Fourth Amendment had he detained and arrested Goldberg in Georgia prior to June 8, 2010, for a violation of Georgia's Public Gathering Law. However, even a state law codifying what the district court expressed about the *per se* recklessness of firearms in public places was deemed by the Georgia General Assembly as too vague for proper notice of what constitutes criminal conduct. The Georgia General Assembly amended Title 16 of the Official Code of Georgia Annotated, effective June 8, 2010, with the purpose of clarifying where persons with a license to carry may carry a weapon. Crimes and Offenses, 27 Ga. St. U. L. Rev. 131, 133 (2010-2011).²⁸ Section 1-3 of the Act strikes the language of the Public Gathering Law prohibiting guns at public gatherings. With the passage of the Act, a person with a license to carry may carry a weapon in any place not listed in the Act as prohibited,

²⁸ The substance of this section about Georgia's Public Gathering Law is attributed to an article, entitled Crimes and Offenses, in Volume 27 (2010-2011) of the Georgia State University Law Review.

though a property owner's right to prohibit guns from any property he or she owns or controls overrides a gun owner's right to carry on the property. (Georgia SB 308 § 1-3, SPA-17-SPA-21)

In amending the Public Gathering Law, Georgia legislators “intended to limit some of the places prohibited as ‘public gatherings’ and give citizens a clear understanding of where they can and cannot carry their licensed weapons.” 27 Ga. St. U. L. Rev. at 133. Prior to the amendment, the inclusion of a prohibition on carrying a licensed weapon in places vaguely defined as a “public gathering” was controversial and “a point of contention.” *Id.* The law had been challenged twice as unconstitutional. “Additionally, through the decades, both courts and attorneys general have had difficulty establishing where the line between public *place* and public *gathering lies.*” *Id.* (emphasis in original).

For example, in 1991 the Georgia Court of Appeals concluded that although a McDonald’s restaurant was a “public place” it was not a “public gathering.” *State v. Bums*, 200 Ga. App. 16, 16, 406 S.E.2d 547, 548 (App. Ct. 1991) (“[M]ere presence in a public place did not constitute a violation of O.C.G.A. § 16-11-127.”). The appellate court affirmed the trial court’s dismissal of the case, stating:

Such a construction would render licensing statutes unnecessary because of the potential of violating the statutes by carrying a weapon outside one's household, in public, where the possibility exists that people *might* gather around someone carrying a weapon.

Id. at 547.

In Connecticut, Sergeant Furlong did not even have a statute upon which he relied for his conclusion that carrying a gun into a public place constituted a breach of the peace. Where Georgia had such a statute, the people found it unworkable. If a written statute providing notice that weapons were not allowed at public gatherings defied reasonable application in Georgia then where no such statute exists, such as in Connecticut, it is not reasonable, arguably or otherwise, to base a seizure on the same basic principle, that carrying a weapon in public is *per se* reckless.

C. Connecticut Carry Statute

The plain language of General Statutes § 29-35 does not prohibit the open carry of a pistol or revolver any more than the statute prohibits the concealed carry of a pistol or revolver. General Statutes § 29-35(a) provides, in relevant part:

No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28(b).²⁹

²⁹ Section 29-35(a) provides in full: “No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. The provisions of this subsection shall not apply to the carrying of any pistol or revolver by any parole officer or peace officer of this state, or parole officer or peace officer of any other state while engaged in the pursuit of official duties, or federal marshal or federal law enforcement agent, or to any member of the armed forces of the United States, as defined in section 27-103,

When it is not implicit through stare decisis, tradition, or collective understanding of right versus wrong, the argument against presuming that the statutory silence of General Statutes § 29-35 provides notice that carrying a pistol or revolver openly constitutes criminal conduct is even more compelling, if the principle that due process mandates notice of criminal conduct can be made any more compelling

or of this state, as defined in section 27-2, when on duty or going to or from duty, or to any member of any military organization when on parade or when going to or from any place of assembly, or to the transportation of pistols or revolvers as merchandise, or to any person transporting any pistol or revolver while contained in the package in which it was originally wrapped at the time of sale and while transporting the same from the place of sale to the purchaser's residence or place of business, or to any person removing such person's household goods or effects from one place to another, or to any person while transporting any such pistol or revolver from such person's place of residence or business to a place or individual where or by whom such pistol or revolver is to be repaired or while returning to such person's place of residence or business after the same has been repaired, or to any person transporting a pistol or revolver in or through the state for the purpose of taking part in competitions, taking part in formal pistol or revolver training, repairing such pistol or revolver or attending any meeting or exhibition of an organized collectors' group if such person is a bona fide resident of the United States and is permitted to possess and carry a pistol or revolver in the state or subdivision of the United States in which such person resides, or to any person transporting a pistol or revolver to and from a testing range at the request of the issuing authority, or to any person transporting an antique pistol or revolver, as defined in section 29-33. For the purposes of this subsection, "formal pistol or revolver training" means pistol or revolver training at a locally approved or permitted firing range or training facility, and "transporting a pistol or revolver" means transporting a pistol or revolver that is unloaded and, if such pistol or revolver is being transported in a motor vehicle, is not readily accessible or directly accessible from the passenger compartment of the vehicle or, if such pistol or revolver is being transported in a motor vehicle that does not have a compartment separate from the passenger compartment, such pistol or revolver shall be contained in a locked container other than the glove compartment or console. Nothing in this section shall be construed to prohibit the carrying of a pistol or revolver during formal pistol or revolver training or repair."

than it is already. See McDonald v. City of Chicago, Illinois, 561 U.S. ___, 130 S.Ct. 3020, 3023, 177 L.Ed.2d 894 (2010) (“Unless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.”). When a criminal statute prohibits open carry or concealed carry, it states so. For example:

No person shall within the District of Columbia carry either openly or concealed on his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed.

Tuten v. United States, 460 U.S. 660, 661, 103 S.Ct. 1412, 1413, 75 L.Ed.2d 359 (1983). The plain language of General Statutes § 29-35 provides notice only that carrying a pistol or revolver on one’s person in Connecticut requires a state permit.

In construing a right related to a criminal statute the rule of strict construction applies. “The requirement that criminal statutes shall be strictly construed is predicated on two fundamental principles. First, the public is entitled to fair notice of what the law forbids. Second, legislatures and not courts are responsible for defining criminal activity.” State v. Cote, 286 Conn. 603, 616 (2008) (quoting State v. Skakel, 276 Conn. 633, 674-75, cert. denied, 549 U.S.1030 (2006)). If the courts are not responsible for defining criminal activity,

then the Glastonbury Police Department, through Sergeant Furlong, cannot be said to have that responsibility either.

A lawful act cannot become unlawful upon the whim or preference of a person who finds the lawful act inconvenient, annoying, or alarming.³⁰ When tobacco smoke caused patrons of restaurants and other establishments inconvenience, annoyance, or alarm, law enforcement did not arrest the smokers. The legislature changed the laws. The lawful practice of not wearing a helmet while operating a motorcycle in Connecticut may cause inconvenience, annoyance, or alarm but law enforcement does not arrest the operators. The legislature has not yet changed this law. The practice of arresting a pedestrian who happens to be in a

³⁰ In Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963), one-hundred-eighty-seven black high school and college students marched together in dispersed groups of approximately fifteen to the state capitol grounds to express dissatisfaction with discriminatory actions against black people and laws prohibiting black people in the State of South Carolina from enjoying the same privileges as white people. Id. at 230. Thirty or more law enforcement officers, who arrived at the grounds in advance of the students, allowed the students to pass with the warning that they could proceed as long as they were peaceful. Id. The march drew an audience of onlookers; but by all accounts through testimony there were no threats of violence or hostile behavior on the parts of the students or the audience. Law enforcement told the students to disperse and when the students did not they were arrested, charged, and convicted for breach of the peace. Id. at 234. The state charged that the students had engaged in “boisterous, loud, and flamboyant conduct,” which consisted of singing the national anthem and listening to a religious sermon. Id. at 233. In reversing the students’ convictions on First Amendment grounds, the Supreme Court described the underlying evidence of criminal activity as showing “no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.” Id. at 237.

neighborhood comprising residents not sharing the same skin color as the pedestrian, even though the residents may claim inconvenience, annoyance, or alarm at the presence of the pedestrian in their neighborhood, is a violation of the pedestrian's civil rights.³¹

Dissimilar to Georgia's former Public Gathering Law, the Connecticut carry law is not vague. An individual holding a state permit in Connecticut may carry

³¹ In Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963), three black students and one white student were convicted of criminal trespass for attempting to be served in a restaurant for white people only at the McCrory Five and Ten Cent Store in New Orleans. Id. at 268. The restaurant manager ordered the restaurant closed, asked the four students to leave, and contacted the store manager believing that the situation had created an "emergency." Id. The store manager called the police. After the police arrived, the store manager approached the four students and loudly demanded that they leave the restaurant. The students were peaceful but refused to leave. Each was convicted of criminal mischief and sentenced to jail. "Prior to this occurrence New Orleans city officials, characterizing conduct such as petitioners were arrested for as 'sit-in demonstrations,' had determined that such attempts to secure desegregated service, though orderly and possibly in-offensive to local merchants, would not be permitted." Id. at 269. The city's mayor has determined that "the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department." Id. at 271. The Supreme Court considered the mayor's statement as equal to an ordinance enacted by the city that black people would not be permitted service in restaurants for whites only. Id. at 273. Relying on Peterson v. City of Greenville, S.C., 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963), the Supreme Court reversed the convictions of the four students on Fourteenth Amendment grounds, holding that "the common law breach of peace doctrine under which defendants had been convicted was so general and vague that it allowed unconstitutional infringement of their First Amendment rights. Jack Greenberg, The Supreme Court, Civil Rights, and Civil Dissonance, 77 Yale L. J. 1520, 1531 (1968)

openly or carry concealed a pistol or revolver. General Statutes § 29-28(e)

provides:

The issuance of any permit to carry a pistol or revolver does not thereby authorize the possession or carrying of a pistol or revolver in any premises where the possession or carrying of a pistol or revolver is otherwise prohibited by law or is prohibited by the person who owns or exercises control over such premises.³²

The dispositive issue is whether the location or premises owner prohibits a state permit holder from carrying a pistol or revolver. If the law allows a state permit holder to carry, whether or not the carry is open or concealed makes no difference under the law. Both are allowed to the same and equal degree. By applying a *de facto* concealed carry requirement in public locations where others may experience annoyance or alarm, Sergeant Furlong unilaterally amended General Statutes § 29-35(a) to criminalize open carry in public places.³³ The potential for violating Sergeant Furlong's Law³⁴ by carrying a weapon, openly, outside one's dwelling, in public, where the possibility exists that people *might* have emotions experienced

³² Section 29-28(e) does not in itself provide a criminal penalty for its violation.

³³ See Dorothy E. Roberts, Forward: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing, 89 J. Crim. L. & Criminology 775, 777 (1998-1999) (“Laws that give police a wide net to trap citizens who look dangerous not only fail to give adequate notice to citizens of the nature of offending behavior but also allow police to discriminate against citizens based on personal prejudices.”).

³⁴ A valid state permit holder is subject to detention and arrest at any time when openly carrying in public creating a *de facto* law at the whim of Sergeant Furlong rather than according to the will of the people expressed through the state's representative legislative branch.

by humans everyday sometimes for rational reasons, oftentimes not, is limitless and unpredictable, so that no individual in compliance with General Statutes § 29-35(a) but openly carrying can be secure from a seizure by state or municipal government authorities at any time or in any place. The Ruling by the district court upholding Sergeant Furlong's seizure grants license to every law enforcement officer in the State of Connecticut to violate the Fourth Amendment rights of valid permit holders simply exercising their Second Amendment right to bear arms in self-defense.

D. The Incorporation of the Second Amendment Right to the States

In consideration of the United States Supreme Court's recent decisions interpreting the Second Amendment the exception carved by the district court burdening the Fourth Amendment rights of those exercising Second Amendment rights because of an assumed but unsupported connection between the lawful carrying of a pistol and the potential for violence has even greater import. While Goldberg did not allege a Second Amendment violation in his Complaint, the effect of the district court's analysis of Goldberg's Fourth Amendment claims was to burden Goldberg's Second Amendment rights.

In McDonald v. City of Chicago, Illinois, 561 U.S. ___, 130 S.Ct. 3020, 3023, 177 L.Ed.2d 894 (2010), incorporated the Second Amendment individual right to keep and bear arms through the Due Process Clause of the Fourteenth

Amendment as fully applicable to the States. The Supreme Court had not incorporated a right guaranteed under the first eight amendments to the U.S. Constitution for more than forty years when the McDonald decision issued on June 28, 2010.³⁵ The Second Circuit, as recently as January 29, 2009, had denied the applicability of the Second Amendment to the States, despite the U.S. Supreme Court's June 26, 2008, decision in District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), finding that a ban on handgun possession in the District of Columbia violated the amendment's right to keep and bear arms. See Maloney v. Cuomo, 554 F.3d 56, 58 (2d Cir. 2009) (“[T]he Second Amendment applies only to limitations the federal government seeks to impose on this right.”).³⁶

In McDonald, municipal residents sought a declaration that local laws “effectively banning handgun possession by almost all private citizens” violated the Second and Fourteenth Amendments.” McDonald, 130 S.Ct. at 3026. The federal district court dismissed the complaint and the Court of Appeals for the Seventh Circuit affirmed. Noting its decision two years prior, in Heller, “striking

³⁵ The last such case preceding McDonald was Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), incorporating the Fifth Amendment bar against double jeopardy to the States through the Fourteenth Amendment.

³⁶ The U.S. Supreme Court granted certification, vacated judgment, and remanded Maloney v. Cuomo sub nom. Maloney v. Rice, on June 29, 2010, to the court of appeals “for further consideration in light of McDonald v. Chicago, 561 U.S. ___ (2010).” Maloney v. Rice, ___ U.S. ___, 130 S.Ct. 3541, 177 L.Ed.2d 1119 (2010).

down a District of Columbia law that banned the possession of handguns in the home” on Second Amendment grounds, the McDonald court considered whether the Due Process Clause of the Fourteenth Amendment required application of the Second Amendment right to keep and bear arms to the States. McDonald, 130 S.Ct. at 3022, 3023. The “right to keep and bear arms” is “among those fundamental rights necessary to our system of ordered liberty.” McDonald, 130 S.Ct. at 3043. A fundamental right, such as the right to keep and bear arms, is “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” McDonald, 130 S.Ct. at 3035.

While ““longstanding regulatory measures”” such as ““prohibitions on the possession of firearms by felons and the mentally ill,”” ““laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms”” are not imperiled by incorporation, limitations on the legislative freedom and policy choices of the States and restrictions on ““experimentation and local variations”” are necessary consequences of the ““enshrinement of constitutional rights.”” McDonald, 130 S.Ct. at 3050 (quoting Heller, 128 S.Ct. at 2816-2817). “This conclusion is no more remarkable with respect to the Second Amendment

than it is with respect to all the other limitations on state power found in the Constitution.” McDonald, 130 S.Ct. at 3050.

III. Goldberg Established his Entitlement to Summary Judgment

The three Defendant Town of Glastonbury Defendant police officers conducted an unreasonable search and seizure of Goldberg and his property when they detained him and subsequently arrested him at Chili’s on June 21, 2007. The criminal statute applied in support of detention and arrest did not apply to the circumstances. In holding that the mere lawful act of carrying a gun into a public place implies a reckless *mens rea* subjecting the actor to liability for the feelings of others responsive to guns, the district court applied a Fourth Amendment analysis which makes an exception to the requirement that police officers have a reasonable and articulable suspicion and probable cause beyond the subjective fear of lawfully carried firearms. The district court’s application of a Fourth Amendment analysis which considers property differently when that property is a firearm\ and considers conduct differently when that conduct involves the lawful possession of a firearm eviscerates the Second Amendment rights afforded by the United States Constitution as confirmed in McDonald. See Clark M. Neily III, The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe Another Win for Originalism, 33 Harv. J. L. & Pub. Pol’y 185, 193 (2010) (“But for many of us, it remains not only a comfort but a source of pride that we live in a

country where the government is specifically forbidden from disarming its citizens, no matter what its stated justifications.”).

As the district court analysis and the testimony and evidence submitted by the Defendants states no more than that Goldberg was detained and arrested for openly carrying a gun into Chili’s without any allegation that Goldberg committed an affirmative act or a prohibited act that would make him subject to criminal liability Goldberg is entitled to summary judgment on Count One of his Complaint.

CONCLUSION

The Plaintiff respectfully requests that the judgment entered against the Plaintiff be vacated and the rulings granting summary judgment in favor of the Defendants on Count One and denying the Plaintiff’s Motion for Summary Judgment on Count One be reversed and Count One remanded to the district court for further proceedings.

Rachel M. Baird
Attorney for Plaintiff-Appellant

Dated: March 18, 2011

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. It contains 10,654 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(i).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure. It has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point type.

Rachel M. Baird
Attorney for Plaintiff-Appellant

Dated: March 18, 2011

10-4215-CV

In The United States Court of Appeals
for the
Second Circuit

JAMES F. GOLDBERG,

Plaintiff-Appellant,

v.

TOWN OF GLASTONBURY, MICHAEL FURLONG, Sergeant, Glastonbury
Police Department, Town of Glastonbury, KENNETH LEE, Officer, Glastonbury Police
Department, Town of Glastonbury, SIMON BARRATT, Officer, Glastonbury Police
Department, Town of Glastonbury,

Defendants-Appellees.

*On Appeal from the United States District Court
for the District of Connecticut (New Haven)*

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1 he was thrown up against the wall.

2 MS. BAIRD: I'm sorry, I probably misphrased it.
3 Whatever Mr. Goldberg alleged happened. They handcuffed
4 him and spun him around --

5 THE COURT: Spun him around to handcuff him.

6 MS. BAIRD: Yes, right.

7 THE COURT: Right.

8 MS. BAIRD: So, our argument was if they
9 shouldn't have detained him to handcuff him, they
10 certainly shouldn't have spun him around and that was
11 excessive.

12 THE COURT: All right. Okay.

13 I'm going to go ahead and rule on these motions
14 at this time. I'm not going to issue a written decision
15 and the transcript of this proceeding will serve as the
16 decision on these motions.

17 We have cross motions for summary judgment. And
18 looking at cross motions, I have to follow the traditional
19 standard for summary judgment motions which is to take the
20 evidence in the light most favorable to the nonmoving
21 party, resolve all inferences in favor of that party and
22 decide, looking at the evidence in that light, whether any
23 reasonable fact finder could rule for the nonmoving party
24 or, put differently, whether there are any genuine issues
25 of material fact for the fact finder to resolve.

1 When we have cross motions, that standard has to
2 be applied separately with respect to each motion. So
3 that with respect to the plaintiff's motion I'll look at
4 the evidence in the light most favorable to the defendant;
5 on the defendant's motion, I'll look at the evidence in
6 the light most favorable to the plaintiff.

7 Looking at the record in that light with respect
8 to each motion, I'm going to deny the plaintiff's motion
9 for summary judgment and grant the defendant's motions
10 defendant's motion for summary judgment in its entirety.

11 I believe that I've essentially set forth the
12 basis for the ruling in colloquy with counsel but I'll try
13 and summarize it briefly here.

14 In my view, looking at the totality of the
15 circumstances that faced these police officers when they
16 arrived at Chili's Restaurant, there was reasonable
17 suspicion to make a Terry stop and probable cause to make
18 an arrest for breach of the peace. Even if I'm wrong
19 about that, I believe that certainly there is qualified
20 immunity for those actions because reasonable police
21 officers could disagree about whether there was either
22 reasonable suspicion or probable cause to do what the
23 police officers did.

24 As a result, I believe there was no Fourth
25 Amendment violation with respect to either the stop or the

1 arrest, but that qualified immunity protects the police
2 officers in any event.

3 With respect to the excessive force claim, I
4 believe that there was not, as a matter of law, any
5 excessive force. As Mr. Goldberg admits, he was in effect
6 negligently injured as the police officers turned him
7 around to put handcuffs on him. There was not any
8 reckless or intentional conduct on their part to injure
9 him and he doesn't even suggest that there was.

10 The conduct that they engaged in was authorized
11 under the circumstances because there was both reasonable
12 suspicion and probable cause to support putting him in
13 handcuffs and the, the incidental contact that he suffered
14 as a result of being put in handcuffs is not excessive as
15 a matter of law.

16 It also does not satisfy the 1983 standard that
17 the conduct of the officers be either reckless or willful.

18 With respect to the Monell claim, there simply
19 is not any evidence about what the specific deficiencies
20 in the training program of the town were, nor is there any
21 evidence from which a reasonable fact finder could find
22 that the Town acted with deliberate indifference with
23 respect to its training on these issues or with respect to
24 these officers. And, accordingly, summary judgment will
25 be granted in favor of the defendants on each of these

1 counts.

2 I'm happy to articulate that ruling in greater
3 detail if either of you would like me to, or to try and
4 clarify any ambiguities in it if you'd like me to do that
5 at this time.

6 MS. BAIRD: Did I hear Your Honor to say you
7 were or were not going to issue a written decision?

8 THE COURT: I am not.

9 MS. BAIRD: I don't need --

10 THE COURT: Therefore, if you want any further
11 articulation, this is the time to request it so I can get
12 it down on the record now.

13 MS. BAIRD: If I could have a moment.

14 THE COURT: Sure.

15 (Pause)

16 MS. PAOFF: Your Honor, if we could just kind of
17 a description of the activity that serves as the basis for
18 the probable cause finding?

19 THE COURT: Sure. Before I do that I should
20 probably note that the qualified immunity ruling also
21 applies to the excessive force claim because, because the
22 officers were entitled to put Mr. Goldberg into handcuffs,
23 you know, the incidental injury that resulted from that
24 conduct is something that reasonable officers would not
25 have understood was something they were not permitted to

1 do. In other words, there was no intentional conduct
2 here. They didn't hit him. They didn't push him. They
3 didn't shove him. This was simply turning him around to
4 put the handcuffs on him, and certainly reasonable
5 officers could believe they were entitled to do that. The
6 fact that he happened to be injured as a result of turning
7 around --

8 MR. GERARDE: Excuse me, Your Honor.

9 Regarding -- if this is a request at this moment for an
10 articulation, I'd ask that the articulation include
11 everything that's been said already as well as what you're
12 about to say now, because a summary sometimes becomes the
13 capsule that winds up at the Court of Appeals and nothing
14 else counts, so either -- hate to say it -- write it all
15 out in detail or at least incorporate what we've already
16 said already.

17 THE COURT: Well, I'm happy to incorporate what
18 I've already said already.

19 MR. GERARDE: All right.

20 THE COURT: I think I tried to explain in some
21 detail why I believe there was probable cause, but I'm
22 also happy to try and articulate it further.

23 Let me start with the breach of peace statute,
24 which basically provides that a person is guilty of breach
25 of peace in the second degree when, with intent to cause

1 inconvenience, annoyance or alarm, or recklessly creating
2 a risk thereof, such person engages in fighting -- I'm
3 leaving some of it out -- or threatening behavior in a
4 public place.

5 What we have here in my view is reckless conduct
6 by Mr. Goldberg by his decision, first, not to leave the
7 gun in his car during the brief time that he was going to
8 get food at Chili's, which he certainly -- the record
9 demonstrates he was capable and able to do. He made a
10 decision not to do that. Instead, he placed the gun on
11 his hip in a manner that was visible to, obviously visible
12 to those who saw it because the restaurant manager saw and
13 called a 911 operator so clearly it was visible.

14 That conduct was perceived, reasonably perceived
15 by those persons at the restaurant as being threatening
16 conduct. It was threatening to them. And by putting the
17 gun on his hip in a visible way, he recklessly created a
18 risk that those in this facility would feel threatened.

19 He attempted to cover the gun with his shirt
20 because he knew that the sight of it might, in fact, cause
21 others to be frightened or intimidated. He was sitting in
22 the take out area with the gun exposed to view, having
23 already admitted that he, or having later admitted that he
24 knew that that conduct was potentially threatening to
25 others. And in light of the fact that the officers arrive

1 at the scene and determine that he, in fact, is wearing a
2 gun, that the manager, in fact, feels threatened, has, in
3 fact, taken steps to clear at least a portion of the
4 restaurant of patrons in order to avoid harm to them, the
5 fact that they are being dispatched to a location to
6 respond to a situation in and of itself is some evidence
7 that there is a dangerous, potentially dangerous situation
8 in effect at the restaurant.

9 And so it's not necessary that Mr. Goldberg have
10 intended to cause the harm under the statute. You can do
11 this recklessly. And it doesn't matter that he didn't
12 become violent, although that is one way of violating the
13 statute. It seems to me the statute here was potentially
14 violated sufficient to give rise to probable cause in the
15 police officer's minds that it had been violated by the
16 fact that he took the steps that I just mentioned.

17 So, that's the essential basis of the probable
18 cause determination. As I've said before, even if on
19 review it's determined that that is insufficient to give
20 rise to probable cause, in June of 2007 reasonable police
21 officers certainly could have disagreed as to whether
22 there was probable cause to arrest Mr. Goldberg for
23 violating the breach of peace statute. Not every person
24 who is not convicted of a violation is wrongfully
25 arrested, and it seems to me that these police officers

1 came into a situation that they reasonably believed was
2 dangerous, that they reasonably believed Mr. Goldberg had
3 caused and could have avoided causing, and that they acted
4 reasonably in charging him with a crime and leaving it to
5 the court systems to decide whether in fact he was guilty
6 of that crime. So I believe that they are protected by
7 qualified immunity in the event that there's a later
8 determination that in fact they did not have probable
9 cause to arrest him.

10 MR. GERARDE: Thank you.

11 THE COURT: All right.

12 MS. BAIRD: Thank you.

13 THE COURT: Any further articulation requested?

14 MR. GERARDE: No, Your Honor.

15 MS. BAIRD: No.

16 THE COURT: Thank you all. We'll stand in
17 recess.

18 (Whereupon the above matter was adjourned at
19 11:00 o'clock, a. m.)
20
21
22
23
24
25

HONORABLE: Stefan R. Underhill

DEPUTY CLERK B. Sbalbi/B. Yaster

RPTR/ECRO/TAPE Susan Catucci

TOTAL TIME: 1 hours minutes

DATE: 9/17/10 START TIME: 9:55 am END TIME: 10:55 am

LUNCH RECESS FROM: TO:

RECESS (if more than 1/2 hr) FROM: TO:

CIVIL NO. 3:07cv1733 (SRU)

Goldberg

R. Baird, W. Madsen, K. Paoff

Plaintiff's Counsel

vs

Town of Glastonbury, et al

T. Gerarde

Defendant's Counsel

COURTROOM MINUTES- CIVIL

- Motion hearing, Show Cause Hearing, Evidentiary Hearing, Judgment Debtor Exam, Miscellaneous Hearing

Table with columns for motion number, description, granted/denied status, and filed/docketed status. Includes rows for motions #42 and #43, oral motions, and briefs due.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES F. GOLDBERG

v

3:07cv1733 (SRU)

TOWN OF GLASTONBURY,
MICHAEL FURLONG, KENNETH
LEE, and SIMON BARRATT

JUDGMENT

This matter came on before the Honorable Stefan R. Underhill, United States District Judge as a result of the parties cross-motions for summary judgment.

The Court has reviewed all of the papers filed in conjunction with the motions and after a hearing held on September 17, 2010, the court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment.

Therefore, it is ORDERED and ADJUDGED that judgment is entered for the defendants and the case is closed.

Dated at Bridgeport, Connecticut, this 20th day of September 2010.

ROBERTA D. TABORA, CLERK

By /s/ Barbara Sbalbi
Deputy Clerk

Entered on Docket _____

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES F. GOLDBERG, : CASE NO. 3:07CV1733(SRU)
 :
 vs. :
 :
 TOWN OF GLASTONBURY, ET AL. : OCTOBER 18, 2010

NOTICE OF APPEAL

Pursuant to Rule 4(a)(1)(A) and 4(a)(4)(B)(i) of the Federal Rules of Appellate Procedure, Plaintiff James A. Goldberg, in the above-captioned case, hereby provides notice of appeal and appeals to the United States Court of Appeals for the Second Circuit from the final Judgment (doc. # 55) entered in this action on September 20, 2010, in favor of Defendants Town of Glastonbury, Michael Furlong, Kenneth Lee, and Simon Barrett; and from a September 17, 2010, oral ruling granting the Defendants' Town of Glastonbury, Michael Furlong, Kenneth Lee, and Simon Barrett Motion for Summary Judgment against the Plaintiff James A. Goldberg; and from a September 17, 2010, oral ruling denying the Plaintiff James A. Goldberg's Motion for Summary Judgment against the Defendants Town of Glastonbury, Michael Furlong, Kenneth Lee, and Simon Barrett; and from a September 17, 2010, oral ruling denying Plaintiff James A. Goldberg's September 17, 2010, oral motion to supplement the record. (doc. # 54)

A copy of the final Judgment is attached.

PLAINTIFF
JAMES A. GOLDBERG

BY: /s/ Rachel M. Baird
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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES F. GOLDBERG

v

3:07cv1733 (SRU)

TOWN OF GLASTONBURY,
MICHAEL FURLONG, KENNETH
LEE, and SIMON BARRATT

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ROBERTA D. TABORA, CLERK

By /s/ Barbara Sbalbi
Deputy Clerk

Entered on Docket _____

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES GOLDBERG,
Plaintiff,

v.

TOWN OF GLASTONBURY, MICHAEL
FURLONG, KENNETH LEE, and SIMON
BARRATT
Defendants.

No. 3:07cv1733 (SRU)

RULING ON PLAINTIFF’S MOTION FOR RECONSIDERATION

James Goldberg, the plaintiff, moves for reconsideration of my oral order denying his motion to supplement the record with audiotapes and/or transcripts of phone calls made to the Glastonbury Police Department (“GPD”) and dispatches by the GPD to its officers on the night of June 21, 2007. That oral ruling was made on September 17, 2010, at an argument where I also orally granted summary judgment for the defendants and denied Goldberg’s cross-motion for summary judgment. I assume familiarity with the facts discussed and the decision rendered at the September 17, 2010 oral argument. *See* Sept. 17, 2010 Tr. (doc. # 56).

The standard for granting motions for reconsideration is strict. Motions for reconsideration “will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Motions for reconsideration will not be granted where the party merely seeks to re-litigate an issue that has already been decided. *Id.* The three major grounds for granting a motion for reconsideration are: (1) an intervening change of controlling law, (2) the availability of new evidence, or (3) the need to correct a clear error or prevent manifest injustice. *Virgin Atl. Airways, Ltd. v. Nat’l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (citing 18

Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478).

Goldberg contends that I should reconsider my denial of his motion to supplement the record in order to prevent a manifest injustice. His motion fails for at least two reasons, however. First, a motion for reconsideration is generally inappropriate to introduce new evidence that was discoverable and could have been submitted previously in the litigation. *See Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 675 (2d Cir. 1996) (holding that district court did not abuse its discretion by refusing to receive evidence when party could “have provided the information at an earlier stage” (quotation omitted)). Goldberg had the audiotapes and/or transcripts in his possession but failed to include them in his summary judgment briefing, when they should have been submitted for the court’s consideration.

The second and more compelling reason for denying Goldberg’s motion is that the audiotapes and/or transcripts are irrelevant to his claims against the Town of Glastonbury and the arresting officers. As I explained at oral argument,

What matters is what the police officers knew. The police officers, I think it’s undisputed, did not hear the 911 call. What they heard was the dispatch sending them there. So that’s what matters in terms of the information available to them. The other thing that matters in terms of being available to them is what they were told at the scene by the manager. Again, that’s not going to — that’s not going to be disclosed by what’s in the 911 call. So, as far as I can tell, the 911 call is irrelevant. . . .

[T]he point is not what’s said in the 911 call but the fact that a 911 call results in police being dispatched to a place where there’s a man with a gun. That’s what matters, because those police officers are arriving at a place where they understand the 911 operator’s been called because there’s a man with a gun and that the restaurant has taken measures to protect the safety of its patrons and when they arrive they learn that the manager is upset and apprehensive and concerned and feels threatened.

Sept. 17, 2010 Tr. 37-38.

What was said on the 911 phone calls is not germane to the Fourth Amendment analysis.

See United States v. Colon, 250 F.3d 130, 138 (2d Cir. 2001) (holding that information learned by dispatcher but not communicated to arresting officers cannot be imputed to arresting officers for Fourth Amendment purposes). Rather, only the arresting officers' knowledge, based on what the dispatcher told them and what they observed at the scene, is relevant to Goldberg's claim. At most, the introduction of the audiotapes and/or transcripts would show that the dispatcher did not tell the arresting officers that the restaurant manager had cleared people out of the takeout area where Goldberg was sitting. That, however, is insufficient to overcome the other evidence in the record establishing arguable reasonable suspicion to perform the *Terry* stop: the 911 dispatch describing the complaint and the suspect's description, the dispatch that the caller was upset, the officers' observation of Goldberg and his weapon, and, based on the absence of patrons or employees, the appearance that the takeout area had been evacuated.

For those reasons, Goldberg's motion for reconsideration (doc. # 57) is DENIED.

It is so ordered.

Dated at Bridgeport, Connecticut, this 8th day of November 2010.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge

Senate Bill 308

By: Senators Seabaugh of the 28th, Rogers of the 21st, Smith of the 52nd, Unterman of the 45th, Mullis of the 53rd and others

AS PASSED

A BILL TO BE ENTITLED
AN ACT

1 To amend Title 16 of the Official Code of Georgia Annotated, relating to crimes and
2 offenses, so as to clarify and change provisions regarding the carrying and possession of
3 weapons; to provide for definitions; to provide for the offense of carrying a weapon without
4 a license; to prohibit carrying weapons in unauthorized locations; to change provisions
5 relating to carrying weapons within school safety zones, at school functions, or on school
6 property; to change provisions relating to carrying a pistol without a license; to change
7 provisions relating to the license to carry a pistol or revolver and the licensing exceptions;
8 to conform cross-references with definitions; to provide for a weapons carry license; to
9 amend various titles of the Official Code of Georgia Annotated so as to conform and correct
10 cross-references; to provide for effective dates and applicability; to provide for related
11 matters; to repeal conflicting laws; and for other purposes.

12 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

13 **PART I**
14 **CARRYING A WEAPON IN GEORGIA**
15 **SECTION 1-1.**

16 Title 16 of the Official Code of Georgia Annotated, relating to crimes and offenses, is
17 amended by revising Part 3 of Article 4 of Chapter 11, relating to carrying and possession
18 of firearms, by adding a new Code section to read as follows:

19 "16-11-125.1.

20 As used in this part, the term:

21 (1) 'Handgun' means a firearm of any description, loaded or unloaded, from which any
22 shot, bullet, or other missile can be discharged by an action of an explosive where the
23 length of the barrel, not including any revolving, detachable, or magazine breech, does
24 not exceed 12 inches; provided, however, that the term 'handgun' shall not include a gun
25 which discharges a single shot of .46 centimeters or less in diameter.

99 provided, however, that such licensee shall carry the weapon in compliance with the laws
 100 of this state.

101 (f) Any person with a valid hunting or fishing license on his or her person, or any person
 102 not required by law to have a hunting or fishing license, who is engaged in legal hunting,
 103 fishing, or sport shooting when the person has the permission of the owner of the land on
 104 which the activities are being conducted may have or carry on his or her person a handgun
 105 or long gun without a valid weapons carry license while hunting, fishing, or engaging in
 106 sport shooting.

107 (g) Notwithstanding Code Sections 12-3-10, 27-3-1.1, 27-3-6, and 16-12-122 through
 108 16-12-127, any person with a valid weapons carry license may carry a weapon in all parks,
 109 historic sites, or recreational areas, as such term is defined in Code Section 12-3-10,
 110 including all publicly owned buildings located in such parks, historic sites, and recreational
 111 areas, in wildlife management areas, and on public transportation; provided, however, that
 112 a person shall not carry a handgun into a place where it is prohibited by federal law.

113 (h)(1) No person shall carry a weapon without a valid weapons carry license unless he
 114 or she meets one of the exceptions to having such license as provided in subsections (a)
 115 through (g) of this Code section.

116 (2) A person commits the offense of carrying a weapon without a license when he or she
 117 violates the provisions of paragraph (1) of this subsection.

118 (i) Upon conviction of the offense of carrying weapon without a valid weapons carry
 119 license, a person shall be punished as follows:

120 (1) For the first offense, he or she shall be guilty of a misdemeanor; and

121 (2) For the second offense within five years, as measured from the dates of previous
 122 arrests for which convictions were obtained to the date of the current arrest for which a
 123 conviction is obtained, and for any subsequent offense, he or she shall be guilty of a
 124 felony and, upon conviction thereof, shall be imprisoned for not less than two years and
 125 not more than five years."

126 **SECTION 1-3.**

127 Said title is further is amended by revising Code Section 16-11-127, relating to the offense
 128 of carrying a deadly weapon to or at public gatherings and affirmative defenses, as follows:
 129 "16-11-127.

130 ~~(a) Except as provided in Code Section 16-11-127.1, a person shall be guilty of a~~
 131 ~~misdemeanor when he or she carries to or while at a public gathering any explosive~~
 132 ~~compound, firearm, or knife designed for the purpose of offense and defense.~~

133 ~~(b) For the purpose of this Code section, 'public gathering' shall include, but shall not be~~
 134 ~~limited to, athletic or sporting events, churches or church functions, political rallies or~~

135 ~~functions, publicly owned or operated buildings, or establishments at which alcoholic~~
 136 ~~beverages are sold for consumption on the premises and which derive less than 50 percent~~
 137 ~~of their total annual gross food and beverage sales from the sale of prepared meals or food.~~
 138 ~~Nothing in this Code section shall otherwise prohibit the carrying of a firearm in any other~~
 139 ~~public place by a person licensed or permitted to carry such firearm by this part.~~

140 ~~(c)(1) This Code section shall not apply to competitors participating in organized sport~~
 141 ~~shooting events.~~

142 ~~(2) Law enforcement officers, peace officers retired from state, local, or federal law~~
 143 ~~enforcement agencies, judges, magistrates, constables, solicitors-general, and district~~
 144 ~~attorneys may carry pistols in publicly owned or operated buildings; provided, however,~~
 145 ~~that a courthouse security plan adopted in accordance with paragraph (10) of~~
 146 ~~subsection (a) of Code Section 15-16-10 may prohibit the carrying of a pistol.~~

147 ~~(d) It shall be an affirmative defense to a violation of this Code section if a person notifies~~
 148 ~~a law enforcement officer or other person employed to provide security for a public~~
 149 ~~gathering of the presence of such item as soon as possible after learning of its presence and~~
 150 ~~surrenders or secures such item as directed by such law enforcement officer or other person~~
 151 ~~employed to provide security for such public gathering.~~

152 ~~(e) A person licensed or permitted to carry a firearm by this part shall be permitted to carry~~
 153 ~~such firearm, subject to the limitations of this part, in all parks, historic sites, and~~
 154 ~~recreational areas, including all publicly owned buildings located in such parks, historic~~
 155 ~~sites, and recreational areas and in wildlife management areas, notwithstanding Code~~
 156 ~~Section 12-3-10, in wildlife management areas notwithstanding Code Section 27-3-1.1 and~~
 157 ~~27-3-6, and in public transportation notwithstanding Code Sections 16-12-122 through~~
 158 ~~16-12-127; provided, however, that a person shall not carry a firearm into a place~~
 159 ~~prohibited by federal law.~~

160 ~~(f) A person licensed or permitted to carry a firearm by this part shall not consume~~
 161 ~~alcoholic beverages in a restaurant or other eating establishment while carrying a firearm.~~
 162 ~~Any person violating this subsection shall be guilty of a misdemeanor.~~

163 (a) As used in this Code section, the term:

164 (1) 'Bar' means an establishment that is devoted to the serving of alcoholic beverages for
 165 consumption by guests on the premises and in which the serving of food is only
 166 incidental to the consumption of those beverages, including, but not limited to, taverns,
 167 nightclubs, cocktail lounges, and cabarets.

168 (2) 'Courthouse' means a building occupied by judicial courts and containing rooms in
 169 which judicial proceedings are held.

170 (3) 'Government building' means:

171 (A) The building in which a government entity is housed;

172 (B) The building where a government entity meets in its official capacity; provided,
 173 however, that if such building is not a publicly owned building, such building shall be
 174 considered a government building for the purposes of this Code section only during the
 175 time such government entity is meeting at such building; or

176 (C) The portion of any building that is not a publicly owned building that is occupied
 177 by a government entity.

178 (4) 'Government entity' means an office, agency, authority, department, commission,
 179 board, body, division, instrumentality, or institution of the state or any county, municipal
 180 corporation, consolidated government, or local board of education within this state.

181 (5) 'Parking facility' means real property owned or leased by a government entity,
 182 courthouse, jail, prison, place of worship, or bar that has been designated by such
 183 government entity, courthouse, jail, prison, place of worship, or bar for the parking of
 184 motor vehicles at a government building or at such courthouse, jail, prison, place of
 185 worship, or bar.

186 (b) A person shall be guilty of carrying a weapon or long gun in an unauthorized location
 187 and punished as for a misdemeanor when he or she carries a weapon or long gun while:

188 (1) In a government building;

189 (2) In a courthouse;

190 (3) In a jail or prison;

191 (4) In a place of worship;

192 (5) In a state mental health facility as defined in Code Section 37-1-1 which admits
 193 individuals on an involuntary basis for treatment of mental illness, developmental
 194 disability, or addictive disease; provided, however, that carrying a weapon or long gun
 195 in such location in a manner in compliance with paragraph (3) of subsection (d) of this
 196 Code section shall not constitute a violation of this subsection;

197 (6) In a bar, unless the owner of the bar permits the carrying of weapons or long guns by
 198 license holders;

199 (7) On the premises of a nuclear power facility, except as provided in Code Section
 200 16-11-127.2, and the punishment provisions of Code Section 16-11-127.2 shall supersede
 201 the punishment provisions of this Code section; or

202 (8) Within 150 feet of any polling place, except as provided in subsection (i) of Code
 203 Section 21-2-413.

204 (c) Except as provided in Code Section 16-11-127.1, a license holder or person recognized
 205 under subsection (e) of Code Section 16-11-126 shall be authorized to carry a weapon as
 206 provided in Code Section 16-11-135 and in every location in this state not listed in
 207 subsection (b) of this Code section; provided, however, that private property owners or
 208 persons in legal control of property through a lease, rental agreement, licensing agreement,

209 contract, or any other agreement to control access to such property shall have the right to
 210 forbid possession of a weapon or long gun on their property, except as provided in Code
 211 Section 16-11-135. A violation of subsection (b) of this Code section shall not create or
 212 give rise to a civil action for damages.

213 (d) Subsection (b) of this Code section shall not apply:

214 (1) To the use of weapons or long guns as exhibits in a legal proceeding, provided such
 215 weapons or long guns are secured and handled as directed by the personnel providing
 216 courtroom security or the judge hearing the case;

217 (2) To a license holder who approaches security or management personnel upon arrival
 218 at a location described in subsection (b) of this Code section and notifies such security
 219 or management personnel of the presence of the weapon or long gun and explicitly
 220 follows the security or management personnel's direction for removing, securing, storing,
 221 or temporarily surrendering such weapon or long gun; and

222 (3) To a weapon or long gun possessed by a license holder which is under the possessor's
 223 control in a motor vehicle or is in a locked compartment of a motor vehicle or one which
 224 is in a locked container in or a locked firearms rack which is on a motor vehicle and such
 225 vehicle is parked in a parking facility."

226 **SECTION 1-4.**

227 Said title is further amended by revising subsections (a) and (b), paragraphs (7) and (8) of
 228 subsection (c), and subsections (f) and (g) of Code Section 16-11-127.1, relating to carrying
 229 weapons within school safety zones, at school functions, or on school property, as follows:

230 "(a) As used in this Code section, the term:

231 (1) 'School safety zone' means in; ~~or on, or within 1,000 feet of~~ any real property owned
 232 by or leased to any public or private elementary school, secondary school, or school
 233 board and used for elementary or secondary education and in; ~~or on, or within 1,000 feet~~
 234 ~~of~~ the campus of any public or private technical school, vocational school, college,
 235 university, or institution of postsecondary education.

236 (2) 'Weapon' means and includes any pistol, revolver, or any weapon designed or
 237 intended to propel a missile of any kind, or any dirk, bowie knife, switchblade knife,
 238 ballistic knife, any other knife having a blade of two or more inches, straight-edge razor,
 239 razor blade, spring stick, knuckles, whether made from metal, thermoplastic, wood, or
 240 other similar material, blackjack, any bat, club, or other bludgeon-type weapon, or any
 241 flailing instrument consisting of two or more rigid parts connected in such a manner as
 242 to allow them to swing freely, which may be known as a nun chahka, nun chuck,
 243 nunchaku, shuriken, or fighting chain, or any disc, of whatever configuration, having at
 244 least two points or pointed blades which is designed to be thrown or propelled and which