IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al.,	)	Case No. 04-7041
	)	
Appellants,	)	
	)	
v.	)	
	)	
DISTRICT OF COLUMBIA, et al.,	)	
	)	
Appellees.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE AND IN REPLY TO OPPOSITION TO MOTION TO ISSUE BRIEFING SCHEDULE AND SET ORAL ARGUMENT ON THE MERITS

Defendants-appellees' attempts to distance themselves from their specific, documented threats to prosecute the Parker appellants are utterly unpersuasive. In light of these threats, there is simply not the slightest doubt that defendants-appellees will prosecute the Parker appellants who proceed, as intended, to possess functional firearms inside their District of Columbia homes. Among the less persuasive arguments, defendants-appellees suggest that their attorneys did not actually represent them in the District Court, that the defendant-appellee Mayor's Spokesperson did not speak for the Mayor or the city, that statements by a party opponent in a major daily newspaper are hearsay, and that their comments in a newspaper interview about the Parker appellants' intent to violate the law did not relate specifically to the Parker appellants.

Indeed, defendants-appellees actually go so far as to misquote the record, omitting words from the transcript of proceedings in an attempt to change, ex post facto, their litigating position in the District Court. But in attempting to re-characterize their legal position in the District Court, defendants-appellees actually confirm, yet again, in their most recent filing with this

Court, their specific intent to prosecute Parker appellants who act on their intent to engage in conduct prohibited by the challenged statutes.

There is simply no undoing the credible threats of prosecution leveled at the Parker appellants. The defendants-appellees cannot explain away the fact that their attorney, in response to a direct and unambiguous question by the District Court, confirmed that the Parker appellants would, specifically, in fact, be prosecuted were they to act on their intent to violate the law. While that is all that is required under Seegars, there is more. The defendants-appellees cannot explain away the fact that in a newspaper article about the Parker appellants' intent to violate the law, the defendants-appellees clearly committed themselves to zealous enforcement of the challenged statutes. Such statements would constitute a "credible threat" of prosecution even in the absence of the subsequent, direct threat issued in open court.

And, of course, defendants-appellees' statement of disputed material facts responding to Parker appellants' motion for summary judgment did not challenge the assertion that the challenged laws are actively enforced. Nor do defendants-appellees offer an explanation as to why, having considered the standing matter so intently, and having heard and evaluated defendants-appellees' in-court statements, the District Court proceeded to issue a decision on the merits.

Plainly, the Parker appellants will be prosecuted if they were to violate the law. Parker appellants are therefore entitled to a determination in federal court, before they are prosecuted, whether they are correct in their assertion that the laws are unconstitutional.

I. DEFENDANTS-APPELLEES ADMITTED IN OPEN COURT THEIR INTENT TO PROSECUTE THE PARKER APPELLANTS WERE THE PARKER APPELLANTS TO ACT ON THEIR INTENT TO VIOLATE THE LAW.

Confronted by their counsel's words on the record in open court, defendants-appellees misquote the transcript, omitting the very words Parker appellants emphasized in their motion (see Pl.-Appellants' Mot. to Set Br. Sched., at 7).

A true and correct copy of the relevant portion of the transcript was submitted as Exhibit B to the Parker appellants' motion. That transcript records the following exchange:

> MS. MULLEN: . . . what plaintiffs have alleged here is abstract.
>
> THE COURT: Why is it abstract? The city is not going to essentially grant immunity to these people. If they go out and take steps to possess firearms, they'll be prosecuted, I assume. They're not going to get a free ride because they're a plaintiff in this case, are they?
>
> MS. MULLEN: No, and I think that Your Honor is correct, but I don't think the fact that if, in fact, they break the law and we would enforce the law that they're breaking, that that necessarily confers automatic standing on them in this case. . .

(T., p. 8, l. 17 - p. 9, l. 3 (emphasis added).)

The underlined words – "the fact" – are omitted from defendants-appellees' quotation of this passage on page 3 of their brief, although they did italicize the words "if, in fact," which follow. In this version of the transcript, defendants-appellees excise some (but not nearly all) of the problematic words, then argue: "Far from issuing specific and personal threats of prosecution, [counsel] couched her language in the conditional tense: *if* they break a law, the District would normally enforce it." (Def.-Appellees' Mot. for Sum. Aff. at 3 (emphasis original).)

This argument hardly helps defendants-appellees. In essence, the defendants-appellees claim their threat is not specific because Parker appellants have not yet broken the law. Only "if

they break the law" could Parker appellants reasonably expect to be prosecuted. According to defendants-appellees' logic, because the Parker appellants have not yet violated the law, they face no threat of prosecution, and therefore have no standing to challenge the constitutionality of the statutes.

Defendants-appellees apparently misunderstand the concept of a pre-enforcement challenge. An intent to violate the law, not an actual violation, is the first element of standing in a pre-enforcement challenge: "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," as stated by the Supreme Court and confirmed again in Seegars v. Ashcroft, No. 04-5016 (slip op. at 5) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)). Of course a prosecution is "conditional" upon the violation of the law; a prosecution inherently must follow, not precede, a violation. But if laws could only be challenged by their violation, within the context of a criminal prosecution, there would be no Declaratory Judgment Act.

Indeed, in Seegars, this Court specifically rejected the notion that a plaintiff's intent to violate the law had to be unconditional:

> Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.

Seegars, slip op. at 6 (quoting Mobil Oil Corp. v. Attorney General of Virginia, 940 F.2d 73, 75 (4th Cir. 1991)). The Seegars Court accepted the sincerity of plaintiffs' intent to violate the law, thus satisfying this important first element of pre-enforcement standing. Seegars, slip op. at 13.

What the Seegars plaintiffs lacked was any specific assurance that their violation of the law would result in their prosecution. They lacked specific statements such as the defendants-appellees' latest assertion about the Parker appellants that "[i]f they break the law, the District would normally enforce it." (Def.-Appellees' Mot. for Sum. Aff. at 3.) If that is not the very definition of a credible threat of prosecution, it is difficult to imagine what more would suffice. It certainly appears the defendants-appellees have once again threatened the Parker appellants with prosecution should they violate the law.

But even if the defendants-appellees could take back their words, and the second portion of their counsel's statement were ambiguous (which it is not), defendants-appellees are still left with the first part of their counsel's response. The District Court asked if Parker appellants were immune from prosecution. Counsel for defendants-appellees answered, "No." The District Court relayed its assumption that the Parker appellants would be prosecuted. Counsel for defendants-appellees answered, "I think that Your Honor is correct." This plainly establishes a specific and credible threat of prosecution.

Apart from avoiding the plain language and meaning of the transcript, defendants-appellees imply their counsel below was unauthorized to speak on their behalf. They repeatedly refer to their attorney as "civil" counsel (Def.-Appellees' Mot. for Sum. Aff. at 2, 3), and emphasize that she is "not a prosecutor." (Def.-Appellees' Mot. for Sum. Aff. at 2.) The implication is that this "Senior Counsel" from the Office of the Attorney General (formerly Office of the Corporation Counsel) who filed pleadings and argued the matter in District Court was somehow not fully authorized to speak for the defendants-appellees during oral argument, at least not when responding to the District Court's direct questions on the issue of standing.

But that is not the law. Like any other litigants, the District of Columbia and its Mayor are bound by the admissions of their counsel – at least within the context of the litigation in which these admissions are made.[1]

II. DEFENDANTS-APPELLEES' STATEMENTS ON THE FRONT PAGE OF THE DAILY NEWSPAPER MAY BE CONSIDERED BY THE COURT.

Defendants-appellees employ a number of arguments, none very persuasive, to explain why a number of thinly-veiled threats of prosecution leveled at Parker appellants in a front page newspaper article should be disregarded. Just as Ms. Mullen was only "civil" counsel when she represented the defendants-appellees' position on standing in the District Court, the Mayor's official spokesperson "is not a police official or a prosecutor." (Def.-Appellees' Mot. for Sum. Aff., at 2.)

The Mayor is a defendant-appellee in this lawsuit, because, as the chief executive of the defendant-appellee District of Columbia, he is the individual responsible for perpetuating the unconstitutional practices at issue. If the Mayor did not enforce these laws, he would not have been named as a defendant, and likely there would have been no cause to bring this action. At no time has the Mayor suggested that he is not a proper defendant in this case (or, for that matter, in the Seegars lawsuit). His official spokesman, therefore, speaks on behalf of a party to this litigation. FRE 801(d)(2)(C), (D). Since defendants-appellees do not discuss the comments by the Deputy Mayor for Public Safety and Justice, they presumably do not dispute that she is a proper representative of the Mayor and the city.

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[1] "A party is bound by the admissions and stipulations of his counsel absent a showing of manifest injustice." Popham v. City of Kennesaw, 820 F.2d 1570, 1577 n. 2 (11th Cir. 1987), cert. denied, 484 U.S. 1024 (1988).

The statements are not hearsay. They are plainly statements of a party opponent, and would be admissible in District Court under FRE 801(d)(2)(C) and (D). The newspaper article itself fairly comes under the residual exception of FRE 807. In any event, courts routinely take judicial notice of matter contained in articles, journals, and the like.[2]

Defendants-appellees' assertion that the newspaper article was not part of the record on appeal is not entirely correct. The article was cited by Parker appellants in their Memorandum of Points and Authorities in Opposition To Motion To Enlarge Time, filed April 14, 2003, at p. 4. In any event, this matter was concluded in the District Court almost a year before this Court's decision in Seegars. Because Parker appellants were charged with the task of explaining, on appeal, how their case may or may not be impacted by the decision in Seegars, it would be inappropriate to impede their doing so by refusing consideration of useful, relevant, and wholly admissible statements of the opposing parties published in a daily newspaper.

Addressing the substance of their various statements about their intent to prosecute firearms violations, defendants-appellees claim they were discussing "people" only in a generalized sense, and "stating a general policy that the District intends to enforce its weapons laws." (Motion and Opp., 2/13/05, p. 2.) But this characterization of the statements entirely ignores their context. The city's "general policy" was not front page news on the morning of

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[2]Federal Rule of Evidence 201(b) provides that a court may take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Federal courts may take notice of the contents of newspaper articles. See, e.g., Ritter v. Hughes Aircraft Co., 58 F.3d 454, 458-59 (9th Cir. 1995) (district court properly took judicial notice of newspaper article detailing widespread layoffs, which would be generally known in the area and capable of sufficiently accurate and ready determination).

February 13, 2003. The Parker appellants' lawsuit, filed two days earlier, was. It was this lawsuit, and the desires of these six individuals to possess proscribed firearms, that prompted the interview between the newspaper and the defendants-appellees' representatives.

CONCLUSION

The question before the Court is whether there exists a credible threat of prosecution of these plaintiffs-appellants, not whether the District of Columbia and its Mayor consent to federal court review of a potentially unconstitutional statute. A governmental defendant cannot render the Declaratory Judgment Act a nullity by self-servingly disclaiming, in every case, an intent to prosecute a particular plaintiff. Seegars certainly did not announce the end of all pre-enforcement constitutional challenges, thereby enabling the government to coerce citizens into foregoing activity that may be constitutionally protected and avoiding federal court review of its statutes. Seegars only clarified that the mere generalized enforcement of a law, without more, does not constitute a credible threat against a specific individual.

But there is much "more" in the instant case. There is simply no getting around the direct, specific vows of prosecution leveled against the Parker appellants in open court, the defendants-appellees' concessions in their summary judgment papers, and the strong and suggestive language employed against the Parker appellants on the front page of a local newspaper.

The District Court was correct in reaching the merits of this dispute following an assessment of in-court statements as part of a searching inquiry into the standing issue. This Honorable Court should do no less. The motion for summary affirmance on alternate grounds should be denied, and the case should proceed forthwith on the merits.

Dated: March 3, 2005

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this, the 3rd day of March, 2005, I served a true and correct copy of the foregoing Memorandum of Points and Authorities in Opposition to Motion for Summary Affirmance and in Reply to Opposition to Motion to Issue Briefing Schedule and Set Oral Argument on the Merits on the following by **personal, hand delivery** :

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 3rd day of March, 2005.

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