No.: 14-55873 [DC 2:11-cv-09916-SJO-SS]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles Nichols,

Plaintiff-Appellant,

v.

EDMUND G. BROWN JR., in his official capacity as Governor of California

and

KAMALA D. HARRIS, in her official capacity as Attorney General of California,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
[DC 2:11-cv-09916-SJO-SS]

APPELLANT'S OPPOSITION TO APPELLEES' MOTION FOR EXTENSION OF TIME TO FILE BRIEF AND REQUEST FOR FRAP 31-2.3 SANCTIONS

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APPELLANT'S OPPOSITION TO APPELLEES' MOTION FOR EXTENSION OF TIME TO FILE BRIEF AND REQUEST FOR SANCTIONS

Plaintiff-Appellant Nichols opposes the motion by the Appellees for an extension of time to file their answering brief and requests that sanctions be imposed on the Appellees pursuant to Federal Rule of Appellate Procedure (FRAP) 31-2.3. The motion should be denied and sanctions imposed for the following reasons:

1. CIRCUIT RULE 31-2.1(a) requires the Appellees to "observe the briefing schedule" and requires a timely filing of their answering brief. The Appellees did not observe the briefing schedule set by the ORDER dated July 22, 2016, (Dkt Entry 25). The Appellees did not file their answering brief by its due date of December 19, 2016, set by that ORDER.

2. Their motion is time-barred under CIRCUIT RULE 31-2.2(b) which states that: "The motion shall be filed at least *7 days before* the expiration of the time prescribed for filing the brief…" (italics added). Appellees filed their motion on Friday, December 16, 2016. Their brief was due on December 19, 2016, by the ORDER of this court dated July 22, 2016, (Dkt Entry 25). Their motion was not filed "at least 7 days before…" the due date of their answering brief.

3. "An extension of time may be granted only upon written motion supported by a showing of diligence and substantial need." CIRCUIT RULE 31-2.2(b). The Appellees have not *shown* that they have exercised diligence in preparing their brief.

4. The Appellees did not claim in their motion that they have a substantial need for an extension of time and there is nothing in their motion by which one can infer a substantial need for the extension of time. A showing of which is required by CIRCUIT RULE 31-2.2(b).

5. The Appellees could have filed a streamlined extension of time online pursuant to CIRCUIT RULE 31-2.2(a), not to exceed 30 days, but they chose not to do so. Their failure to do so negates any claim they might have made in exercising diligence required for a timely filed motion to be granted. A streamlined extension of time "must be made on or before the brief's due date." CIRCUIT RULE 31-2.2(a). The Appellees did not file a request by the brief's due date. Having failed to "request a streamlined extension of time online via the Appellate CM/ECF system using the "File Streamlined Request to Extend Time to File Brief" event," they are now prohibited from filing for one. CIRCUIT RULE 31-2.2(a).

6. The Declaration of Jonathan Eisenberg attached to the motion states at (2) that he is "one of the attorneys of record for Defendants-Appellees Edmund G. Brown Jr., Governor of California, and Kamala D. Harris, Attorney General of California (together, "Appellees"), in this appeal adverse to Plaintiff-Appellant Charles Nichols ("Appellant")." Mr. Eisenberg is, in fact, *the only* attorney of record for the Appellees.

7. The Certificate of Service is defective. Mr. Eisenberg certified in his Certificate of Service that Appellant Nichols is not a registered CM/ECF user.

THE REASONS GIVEN IN THE MOTION ARE WITHOUT MERIT

The Appellees untimely, meritless motion states that "Appellees have three reasons for seeking a 60-day deadline extension for the filing of the opposition brief:"

None of these three reasons show that the Appellees have exercised diligence *and* show that the Appellees have a "substantial need" for the extension of time. Neither do these reasons show that the Appellees have satisfied either prong of the conjunctive requirements of CIRCUIT RULE 31-2.2(b).

The First Reason Given by the Appellees is Without Merit

The *First* reason given by the Appellees is that they need an extension of time so that the Second Amendment constitutional question can "be treated with appropriate care."

Plaintiff-Appellant Nichols filed this case in the district court on November 30, 2011. Mr. Eisenberg has been the attorney for the Appellees throughout the district court proceedings and throughout this appeal. Mr. Eisenberg has had ***over five years*** within which to make his case that California law, which prohibits Plaintiff-Appellant Nichols from stepping even one inch outside of the doors to his home into the curtilage of his home with a loaded firearm, carried openly for the purpose of self-defense, is not violative of the Second Amendment.

The fact is that the Appellees do not care for the Second Amendment in the least. But let us entertain the fantasy that the Appellees will see the light and gain a newfound respect for the Second Amendment to which they have thus far shown only contempt. This would not be grounds for an extension of time to file their answering brief. The Appellees are free to acquiesce or to promise not to enforce the challenged prohibitions at any time before a decision is made in this appeal.

On May 16, 2015, the Solicitor General for the State of California stood before this Court during the en banc hearing of the concealed carry appeal in *Edward Peruta, et al v. County of San Diego*, et al No. 10-56971 and told this

Court that he agreed that the Second Amendment right does not change from county to county and in response to direct questioning from this Court he conceded that the Second Amendment extended beyond the curtilage of one's home but not to concealed carry, as per the *Heller* decision. http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007886 at 39:40 (last visited December 19, 2016).

The Appellees have had ***one year and seven months*** within which to come up with a good response as to why they no longer stand by that concession.

The Second Reason Given by the Appellees is Without Merit

The *Second* reason given in their motion is that Plaintiff-Appellant Nichols was given permission to file an oversize brief. What the Appellees fail to mention is that he was granted that permission on January 21, 2015, which was nearly ***two years ago*** and that his motion to file an oversized brief was accompanied by an opening brief (as required by the FRAP) on December 1, 2014, which was ***over two years ago***.

The "string cite of 35 cases, all from the 19th century" which the Appellees now claim they need more time to respond to was copied and pasted from the brief of December 1, 2014, over two years ago. Appellees have had more than enough time to review these cases, none of which is lengthy or complex. They all support Plaintiff-Appellant Nichols argument that concealed carry is not a right under the

Second Amendment and regardless of whether or not these decisions held that the Second Amendment is a private individual right, or a right limited to public defense, they held that the Second Amendment right is to *openly* carry firearms.

There is no argument in Appellant's opening brief, filed ahead of schedule on November 9, 2016, which was not raised and argued in the district court. Appellees claim that the opening brief "poses seven questions in his brief's statement of issues, and the body of the brief raises myriad other issues (e.g., Appellant's standing to pursue this case, not mentioned in the statement of issues)."

There are indeed seven questions but nowhere in the body of the brief are a "myriad of other issues" raised and certainly it does not raise a question of standing.

It was the Appellees who challenged Plaintiff-Appellant Nichols standing to bring this suit in the district court, all of which were denied by the district court. The Appellees are free to raise again on appeal all but one of those standing defenses and they certainly have not shown diligence and a substantial need for an extension of time to do so. For example, one of those "standing" defenses raised by the Appellees is that they have not personally promised to enforce the challenged laws against Mr. Nichols. Another claimed that it is hypothetical and speculative that Mr. Nichols would ever be arrested, prosecuted, fined or

imprisoned for breaking the challenged laws. The one standing defense the Appellees are precluded from bringing is that Mr. Nichols is barred from challenging California Penal Code section 25850(b). The district court held that Mr. Nichols was not barred from challenging that law and the Appellees concurred in that finding of the district court.

The attorney for the Appellees is trying to pull off the same sort of tricks he pulled in the district court. For example, he claimed that Mr. Nichols had never before carried a firearm. The magistrate judge bought that claim and the district court judge rubberstamped her report and recommendation dismissing his initial complaint. Mr. Eisenberg filed a second, untimely motion for judgment on the pleadings over the objections of Plaintiff-Appellant Nichols and without leave of the court below in violation of both the local rules and Federal Rules of Civil Procedure but the court below nonetheless overruled the objection.

Mr. Nichols then filed a video of Redondo Beach police officers enforcing PC 25850(b) on Mr. Nichols in his First Amended Complaint. The district court denied the motion to dismiss Mr. Nichols First Amended Complaint finding that Mr. Nichols does indeed have standing.

It was the vacated three judge panel *Peruta* decision which the district court relied upon in dismissing Mr. Nichols Second Amendment Open Carry claims with prejudice for lack of Article III standing. It is impossible to read the opening brief

and conclude that this dismissal with prejudice by the district court is not challenged at length.

Moreover, the Appellees fail to mention that the Argument section of Appellant Nichols opening brief is only 11,879 words long, including headings. An argument covering the seven issues raised on appeal which were all argued in the district court and which likewise appeared in his proposed oversized brief which was denied.

The Third Reason Given by the Appellees is Without Merit

The *Third* and final reason likewise does not show diligence and a substantial reason for granting the motion. Appellee Harris is sued solely in her official capacity as Attorney General for the State of California and is sued solely for declaratory and prospective injunctive relief. Her election is of no moment:

> "When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party." FRAP 43(c)(2).

The Appellees fail to explain why Appellee-Brown's appointment of Congressman Xavier Becerra, the head of the House Democratic Caucus and a former state deputy attorney general, to serve as the state's next attorney general shows diligence and a substantial need for their motion to be granted.

Mr. Becerra has spent his adult life in opposition to the Second Amendment. How does substituting one attorney general who campaigned opposing the Second

Amendment with another who likewise campaigned in opposition to the Second Amendment show diligence and a substantial need required to grant the motion?

Appellee Brown announced his appointment of Congressman Becerra on December 1, 2016. Mr. Eisenberg had plenty of time to pick up the phone and ask Congressman Becerra if his lifelong opposition to the Second Amendment has changed?

CONCLUSION

The attorney for the Appellees has shown a profound lack of diligence in preparing his answering brief and now seeks to convert his lack of diligence into a showing of diligence *and* "substantial need" not allowed by the Circuit Rule he cites in support of his motion.

Had Appellant Nichols failed to file his notice of appeal on time his appeal would have been dismissed.

Had Appellant Nichols failed to file his opening brief on time his appeal would have been dismissed for lack of prosecution and he would have been subject to the Court taking "such other action as it deems appropriate, including imposition of disciplinary and monetary sanctions on those responsible for prosecution of the appeal." FRAP 42-1.

Should the Appellees untimely, meritless motion be granted it would reward their attorney for his lack of diligence. It would say to the world there is a thumb

on the scales of justice. It would say that the rules do not apply to state officials enforcing laws which they concede are unconstitutional in one appeal, *Peruta*, but continue to enforce against Plaintiff-Appellant Nichols, an unrepresented litigant, in his appeal.

Granting the motion would severely prejudice Plaintiff-Appellant Nichols. His constitutional rights are being violated by the Appellees and they will continue to be violated by the Appellees until they are permanently enjoined from doing so.

For the foregoing reasons, the motion should be denied and sanctions should be imposed against the Appellees and their attorney for "Failure to file the brief timely or advise the Court that no brief will be filed" pursuant to FRAP 31-2.3.

Dated: December 20, 2016

Respectfully submitted,

By: s/ Charles Nichols

CHARLES NICHOLS
Plaintiff-Appellant In Pro Per

9th Circuit Case Number(s) 14-55873

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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