

By an Order of the Court, the following transcript has been corrected for typographical mistakes on August 14, 2009.

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1	VIRGINIA:	
2	IN THE CIRCUIT COURT OF FAIRFAX COUNTY	
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		:
4	RUDOLPH DIGIACINTO,	:
		:
5	Plaintiff,	:
		:
6		: C.A. No:
		: 2008-14054
7	vs.	:
		:
8	RECTOR & VISITORS OF GEORGE MASON	:
	UNIVERSITY,	:
9		:
		:
10	Defendants.	:
	-----	:

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The following pages constitute the proceedings held in the above-captioned matter before MICHAEL MCWEENY, held at the Fairfax County Circuit Court, 4110 Chain Bridge Road, Fairfax, Virginia, before Heidi D. Quimby, CSR, of Capital Reporting Company, a Notary Public in and for the Commonwealth of Virginia, beginning at approximately 8:25 a.m.

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1	A P P E A R A N C E S
2	On behalf of Plaintiff:
3	RUDOLPH DIGIACINTO, PRO SE
4	
5	On behalf of the Defendants:
6	DAVID DRUMMEY, ESQUIRE
7	George Mason University
8	4400 University Drive
9	Fairfax, Virginia 22030
10	(703) 993-2619
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P R O C E E D I N G S

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2 THE COURT: Good morning. Just for the
3 record, this is the case of Rudolph Digiacinto versus
4 George Mason University. That's CL 2008-14054. I
5 appreciate you all coming early so I can go ahead and
6 give you my ruling on this case. Mr. Digiacinto has
7 filed an action for declaratory judgment and injunctive
8 relief against the Rector and Visitors of George Mason
9 University, requesting the Court find that GM
10 regulation 8VAC356020 to be unconstitutional under the
11 United States and Virginia Constitution or that it is
12 otherwise invalid as applied to him and adjoined the
13 University from enforcing it as to him.

14 Now, I am to rule on these specific issues as
15 pled. The regulation in question prohibits the
16 possession or carrying of a weapon by any person other
17 than a police officer in academic buildings,
18 administrative office buildings, student/resident
19 buildings, dining facilities or while attending
20 sporting, entertainment or educational events on the
21 University property. At the hearing, both sides
22 stipulated as to all the facts alleged in the various

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1 briefs and agreed the Court may rely on them. It is
2 agreed this is a pure question of law for the
3 Court's determination.

4 The 2nd and 14th amendment of the United
5 States Constitution, Article 1, Section 13 of the
6 Virginia Constitution are indeed self-executing
7 provisions. In addition, these documents merely
8 qualify a pre-existing right to bear arms, which has
9 been recognized in Virginia since the earliest colonial
10 days. George Mason University notes the lack of
11 mention of a right to keep and bear arms in the
12 Virginia Declaration of Rights as adopted on June 12th,
13 1776. That is true; however, the history of the

14 Commonwealth demonstrates an exercise of the rights
15 from the founding of Jamestown. Mr. Digiacinto's
16 analysis and mastery of detail on this topic cannot be
17 refuted.

18 As noted by Mr. Justice Scalia,
19 however, even this right is subject to limitations. In
20 District of Columbia versus Heller, 2008 U.S. Supreme
21 Court decision, while affirming the fundamental nature
22 of the right to bear arms, he stated, "Nothing in our

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1 opinion should be taken and cast out upon the
2 longstanding prohibitions on possession of firearms by
3 felons or laws forbidding the carrying of firearms in
4 sensitive places, such as schools, government
5 buildings."

6 Indeed, in Footnote 26, he notes, "We
7 identify these presumptively lawful regulatory measures
8 only as examples. Our list does not purport to be
9 exhaustive." The regulations in the case at bar
10 clearly restricts the Constitutional right.
11 Accordingly, the strict scrutiny test must be applied
12 to determine its validity. Under that test, a
13 regulation must be deemed constitutional only if it is
14 narrowly drawn to further compelling State interest,
15 and that will be citing Jaynes versus the Commonwealth,
16 2008.

17 First, the University traditionally is not
18 open to the public. It has been described by the
19 Fourth Circuit as a special type of enclave devoted to
20 higher education. For that proposition, the Fourth
21 Circuit would be ACLU versus Mote 423 F.3d 438, 2005
22 case, yet the regulations does not prohibit -- this

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1 regulation does not prohibit universally possession of
2 weapons on the campus of George Mason University;
3 rather, it specifies discrete facilities and activities
4 which are subject to the ban. These are areas and
5 activities which would cause a gathering of students,
6 employees, invitees and community members. The
7 regulation is directed for the safety of those
8 individuals and those locations and venues. It is
9 focused rather than diffused.

10 The regulation is narrowly drawn to addressed
11 locations asserted to be sensitive places. The
12 question is, is there a compelling State interest
13 furthered by the regulation; that is, are these
14 sensitive places in which there may be a limitation of
15 right to bear arms as contemplated by Mr. Justice

16 Scalia. It's noted in *Nordyke v. King*, 563 F.3d 439.
17 Heller does not define what constitutes a sensitive
18 place, but the Supreme Court lists as examples schools,
19 government buildings, "Presumably because possessing
20 firearms in such places risks harm to great numbers of
21 defenseless people; that is, children," that the
22 buildings are important to government functioning.

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1 George Mason University notes there are 5,000
2 employees and 30,000 students enrolled, ranging from
3 age 16 to even senior citizen age. Three-hundred
4 fifty-two in the incoming Freshman class will be under
5 the age of 18 beginning this semester. Approximately
6 50,000 elementary and high school students attend
7 summer camps at the University. They use these
8 academic buildings, which are part of the regulation.
9 There also is a child development center in which
10 approximately 130 student/employee children are
11 enrolled preschool and in both the libraries and the
12 Johnson Center, they are regularly frequented by
13 children ages two to five years old.

14 High school graduations, athletic games,
15 concerts and circus performances are just a few of the
16 family activities occurring on campus. The individuals
17 who are part of this large community of interests
18 clearly are the type of individuals whose safety
19 concerns on a public university campus constitute a
20 compelling State interest. The buildings and
21 activities described in the regulations are those
22 wherein the individuals gather; therefore, are

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1 sensitive places as contemplated by Mr. Justice Scalia
2 upon George Mason University to have met their burden
3 under the strict scrutiny test, demonstrated the
4 regulation law, narrowly drawing further compelling
5 State interest.

6 I find the regulation is constitutional.
7 This leads to the alternative question, whether George
8 Mason University has the authority to promulgate this
9 regulation. Mr. Digiacinto contends that George Mason
10 University has not been given either expressed or
11 implied authority by the General Assembly to regulate
12 open carrying of firearms. Now, this is not a
13 Constitutional argument, but rather a question of
14 powers conveyed by statute. George Mason University
15 correctly cites *Azfall v. Commonwealth*, 273 Va. 226 for the
16 proposition that as a result of sovereign immunity, if
17 such a challenge, the statute violated a self-executing

18 provision of Constitution is not subject to declaratory
19 judgment, but assuming arguendo, the case is
20 distinguishable, the regulation is promulgated pursuant
21 to Virginia Code Section 23-91.29, in which the General
22 Assembly authorized The Board of Visitors to "meet all

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1 needful rules and regulations concerning the
2 University." Subject only to restriction, the same are
3 not inconsistent with the general laws of the
4 Commonwealth.

5 As noted before, the University, wherein
6 large number of individuals of widely varying ages
7 congregated, the safety concerns of the University
8 qualify as "needful" for purposes of regulation. Nor do
9 I find it's an improper delegation of power. The Virginia
10 Supreme Court found GM is, "Not primarily an
11 administrative agency, but rather an entity that makes
12 administrative decisions," citing *George Mason*
13 *University vs. Floyd*, 275 Va. 32. As such, the rules
14 and limitations and analysis are not applicable.

15 Further, the nature of the regulation is not
16 inconsistent with the general laws of the Commonwealth.
17 While openly carrying firearms is permitted under the
18 Constitution and the laws of Commonwealth, there's many
19 limitations within the Code on this right. Virginia
20 prohibits the carrying of firearms in places of worship,
21 airport terminals, parks, schools, other specific
22 locations, a restriction such as contained in this

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1 regulation is similar to those prohibitions and is in
2 accordance with the general laws of the Commonwealth.

3 Lastly, indeed, there have been two
4 intervening sessions of the General Assembly after the
5 regulation was adopted. The absence of any action by
6 that body in either 2008 or 2009 raises presumption of
7 legislative acquiescence. Citing for that proposition
8 *Wayde vs. Williams*, 206 Va. 5915. Now, this is the
9 same challenge, the regulatory scheme, not Constitution
10 alone. *Ellinger v. Commonwealth*, 102 Va. 100 (1903) is
11 the opposite. It appears the declaratory judgment
12 injunctive of relief are denied on both grounds.

13 Mr. Drummey, be requested to prepare the
14 appropriate order and I want Mr. Digiacinto to be given
15 the opportunity to attach any exceptions prior to
16 signing the order, but what I would like to do is set
17 the matter on docket for the entry of the order. That
18 doesn't mean everybody has to be here, but we need to
19 have an order by that date for entry. Would that be

20 acceptable?

21 MR. DRUMMEY: Yes, Your Honor.

22 MR. DIGIACINTO: May I speak just real

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1 quickly, because there's been a legal -- I'm sure it's
2 not going to change your opinion. The Nordyke case has
3 been vacated. It's no longer the law.

4 THE COURT: Well, I'm citing for the
5 proposition --

6 MR. DIGIACINTO: Right. I just wanted to let
7 you know that.

8 THE COURT: I was aware of that.

9 MR. DIGIACINTO: I was aware of that
10 yesterday.

11 THE COURT: Well, thank you, sir. I will
12 double-check to make sure it doesn't make any change of
13 any of my decisions before I sign the order.

14 Can we put this on August 14 for the entry of
15 order?

16 MR. DRUMMEY: That's fine, Your Honor.

17 THE COURT: Great. That would be on the
18 10:00 for the entry of order.

19 MR. DIGIACINTO: Yes, Your Honor.

20 THE COURT: Sir, can you give me any
21 information you have on the change of the decision so I
22 can review it?

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1 MR. DIGIACINTO: This is from their website,
2 Ninth Circuit website. It's very short. It's been
3 vacated. Heard in September.

4 THE COURT: I will definitely take a look at
5 it. Thank you very much. At this point, unless this
6 makes some difference, I doubt it will, my decision
7 will stand. All right.

8 THE COURT: August 14, 10:00. I'm certain
9 from your expertise, you understand the process of the
10 exceptions, but I want to make sure so that you don't
11 miss the opportunity to have any type of appeal in my
12 decision. There is no specific case that says you must
13 write out what your exception is as long as you note an
14 exception, but there was a footnote dropped in about
15 1985 that suggested that failure to do so might be a
16 waiver, so please make sure -- you don't have to put
17 down all your arguments, but list what points you
18 disagree with, even if it's just what the decision
19 finally was on your exceptions. Preserve any rights
20 you get. All right, sir.

21 (Whereupon, at 8:35 a.m., the hearing

22 was concluded.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, HEIDI D. QUIMBY, the officer before whom the
3 foregoing hearing was taken, do hereby certify that the
4 testimony of said witnesses was taken by me in
5 stenotypy and thereafter reduced to typewriting under
6 my direction; that said hearing is a true record of the
7 testimony given by said witnesses; that I am neither
8 counsel for, related to, nor employed by and of the
9 parties to the action in which this hearing was taken;
10 and, further, that I am not a relative or employee of
11 any counsel or attorney employed by the parties hereto,
12 for financially or otherwise interested in the outcome
13 of this action.

14
15 HEIDI D. QUIMBY
16 Notary Pubic in and for the
17 Commonwealth of Virginia

18
19
20 My commission expires:
21 October 31, 2012
22 Notary Registration No.: 7207260