

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**BRUCE V. MAYBERRY,** )  
 )  
 **PLAINTIFF** )  
 )  
 **v.** )  
 )  
 **SULLIVAN RIZZO, ET AL.,** )  
 )  
 **DEFENDANTS** )

**Civil No. 95-199-P-H**

**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

On these cross-motions for summary judgment the undisputed facts as established under Local Rule 19 are as follows. On July 19, 1994, a public festival oriented toward family participation was occurring in the Deering Oaks Park in Portland, Maine. A great number of children and families were present enjoying crafts, rides, carnival games and food booths. The plaintiff Bruce V. Mayberry attended the festival with his eleven-year-old son. He arrived at approximately 1:30 p.m. wearing a 9mm Glock semiautomatic pistol in plain view in a holster on his hip with a loaded clip in the gun. Two police officers approached him, stopped him for questioning about the gun and took the gun. Mayberry insisted upon wearing the weapon and threatened to return to his home in Windham and get a second weapon to wear in the park. He was thereupon escorted from the park and told not to return until the festival was over. The gun was turned over to the investigating officers' supervisor. It was not returned to Mayberry for

approximately twenty-one days while the police investigated whether the weapon had been legally purchased and whether the plaintiff had any prior criminal conviction or possessed the gun legally and while the District Attorney's Office investigated whether Mayberry's conduct could amount to "threatening display of a firearm" within the prohibition of Maine's statutes. Ultimately the gun was returned to Mayberry and he was charged with no crime.

Mayberry has brought this civil rights complaint against four Portland police officers, the chief of police and the City of Portland. His amended complaint asserts five federal causes of action: (1) that the detention and seizure of his gun violated the Second and Fourteenth Amendments; (2) that the seizure of his gun without due process or a warrant violated the Fourth, Fifth and Fourteenth Amendments; (3) that the seizure of his gun violated the Fifth and Fourteenth Amendments; (4) that the failure to return his gun earlier upon his demand violated the Fifth Amendment; (5) that the City violated the Second, Fourth, Fifth and Fourteenth Amendments by authorizing, ratifying and condoning the actions of the officers.

### **FIRST CAUSE OF ACTION**

Mayberry cannot succeed in his claim that the defendants violated his Second and Fourteenth Amendment rights in detaining and seizing his gun. The Second Amendment does not apply to actions by state or city officials. Thomas v. Members of the City Council, 730 F.2d 41, 42 (1st Cir. 1984), citing Presser v. Illinois, 116 U.S. 252, 262, 65 S. Ct. 580, 584, 29 L. Ed. 2d 615 (1886). It has never been incorporated into the Fourteenth Amendment's protection of due process. See Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 730 (9th Cir. 1992).

### **SECOND, THIRD AND FOURTH CAUSES OF ACTION**

Upon seeing Mayberry wearing a loaded weapon in a public park with families and children in attendance, the police officers were entitled to stop and question him. See Terry v. Ohio, 392 U.S. 1, 24, 88 S. Ct. 1868, 1881, 20 L. Ed. 2d 889, 907-08 (1968). They also were entitled to take custody of his weapon for their own protection and those of the people around them. Id. Police authority includes “community caretaking functions,” which here would include the removal of the weapon from a crowded public festival with children present. See State v. Pinkham, 565 A.2d 318, 319-20 (Me. 1989), citing Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706, 715 (1973). The police did not permanently keep Mayberry’s gun and their retention of it was not unreasonable under the circumstances of the necessary investigation. Consequently, Mayberry cannot recover under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (taking of property without payment of compensation) or the Fourteenth Amendment (taking of property without due process of law).

**FIFTH CAUSE OF ACTION**

Because none of the police officers' actions were improper, there also can be no liability on the City's part. In light of these rulings, I find it unnecessary to reach the qualified immunity issues that have been raised.<sup>1</sup>

I read the plaintiff's complaint as being limited to federal causes of action. To the extent any state causes of action are included, I decline to exercise supplemental jurisdiction. See 28 U.S.C. § 1367(3) and **DISMISS** any such claims without prejudice.

Summary judgment is entered for the defendants and against the plaintiff.

**SO ORDERED.**

**DATED AT PORTLAND, MAINE THIS 26TH DAY OF JANUARY, 1996.**

---

**D. BROCK HORNBY**  
**UNITED STATES DISTRICT JUDGE**

---

<sup>1</sup> I also note that it is undisputed that two of the officers, Captain Edward Googins and Officer Sullivan Rizzo, were not even involved in the incident. They are therefore entitled to summary judgment on that alternate ground.