

STATE OF INDIANA)
)
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
SS:
CAUSE NO. 49D12-0603-PL-008381

JONATHAN C. HOUGHTON,)
)
Plaintiff,)
)
vs.)
)
CITY OF INDIANAPOLIS, MARION COUNTY,)
INDIANAPOLIS POLICE DEPARTMENT,)
MARION COUNTY SHERIFF'S DEPARTMENT,)
INDIANAPOLIS METROPOLITAN POLICE)
DEPARTMENT, MICHAEL T. SPEARS, and)
FRANK ANDERSON,)
)
Defendants.)

DEFENDANTS' MOTION TO DISMISS

Defendants City of Indianapolis, Marion County, Indianapolis Police Department, Marion County Sheriff's Department, Indianapolis Metropolitan Police Department, Michael T. Spears, and Frank Anderson (collectively "Defendants"), by counsel, respectfully move to dismiss Plaintiff's Complaint pursuant to Indiana Trial Rule 12(B)(6). In support of this Motion, Defendants state:

1. On March 1, 2005, Plaintiff filed his Complaint.
2. Plaintiff seems to make three claims in his Complaint.
 - a. That the Indianapolis Police Department ("IPD") created procedures for returning stolen firearms that were not approved by the Indiana General Assembly;
 - b. That Plaintiff has the right to keep and bear arms under the Indiana and United States Constitutions; and
 - c. That Defendants did not follow Indiana Code § 35-47-3-2(b).

3. IPD is not required to seek approval from the General Assembly for all of its procedures. Plaintiff has not alleged that Defendants violated his right to keep and bear arms. Finally, Indiana Code § 35-47-3-2(b) does not apply to Plaintiff and his firearm. Therefore, Plaintiff has failed to state a claim upon which relief may be granted, and his Complaint must be dismissed.

IPD need not seek approval from the Indiana General Assembly for its procedures.

4. Plaintiff seems to assert that IPD General Order 30.03 is invalid because it was not approved by the Indianapolis Marion County City-County Council or the Indiana General Assembly.

5. IPD is not required to seek approval from the Indiana General Assembly for its procedures.

6. Indiana Code 35-47-11-2 states “a unit may not regulate in any manner the ownership, possession, sale, transfer, or transportation of firearms.” However, IPD is not a “unit.”¹ Further, IPD is not attempting to regulate the ownership, possession, sale, transfer, or transportation of firearms. Rather, IPD wants to ensure that the firearm is returned to its rightful owner. IPD’s policy simply requires that the owner or owner’s agent provide documentation of identity and ownership. (See Complaint). It does not regulate the ownership, possession, sale, transfer, or transportation of firearms. Rather, IPD’s policy is a means of complying with state and federal gun regulations.

7. The Indiana General Assembly need not approve IPD’s policies. Plaintiff has failed to state a claim upon which relief may be granted, and his Complaint must be dismissed.

¹ Indiana Code § 36-1-2-23 defines “unit” as “county, municipality, or township.”

Plaintiff has not alleged that Defendants denied him the right to keep and bear arms.

8. In paragraphs three through five (3-5) of his Complaint, Plaintiff discusses his Constitutional right to bear arms.

9. Defendants have never denied or attempted to deny Plaintiff the right to keep or bear arms, and Plaintiff does not make this allegation.

10. Defendants have never denied or revoked Plaintiff's gun permit, and Plaintiff does not make this allegation.

11. Plaintiff has failed to state a claim, and his Complaint must be dismissed.

Indiana Code § 35-47-3-2(b) does not apply to Plaintiff and his firearm.

12. Indiana Code § 35-47-3-1 states "All firearms confiscated pursuant to statute shall, upon conviction of the person for the offense for which the confiscation was made, be disposed of in accordance with this chapter."

13. Indiana Code § 35-47-3-2(a) states "This section applies only to firearms which are not required to be registered in the National Firearms Registration and Transfer Record."

The statute upon which Plaintiff relies is included within this section of the Indiana Code.

Therefore, Indiana Code § 35-47-3-2(b) applies only if Plaintiff's firearm is not required to be registered in the National Firearms Registration and Transfer Record ("NFRTR").

14. The NFRTR is created in 26 U.S.C. § 5841(a). The NFRTR is a "central registry of all firearms in the United States which are not in the possession or under the control of the United States" maintained by the Secretary of the Internal Revenue Service. Each manufacturer, importer, and maker of firearms is required to register each firearm he manufactures, imports, or makes. When a firearm is transferred to another person, that firearm shall be registered to the transferee by the transferor. 26 U.S.C. § 5841(b).

15. According to the Complaint, Plaintiff's firearm was stolen and later recovered by police. (Complaint ¶ 11). Plaintiff makes no allegation that his firearm was confiscated "pursuant to statute," as required for application of Indiana Code § 35-47-3 *et seq* to this case. Therefore, Indiana Code § 35-47-3-2(b) does not apply here. Plaintiff does not state a claim, and his Complaint must be dismissed.

16. Further, according to the Complaint, Plaintiff's firearm is a "Norinco .45 ACP 1911-style semiautomatic pistol." Plaintiff's firearm is required to be registered in the NFRTR, and Plaintiff does not allege that he was not required to register his firearm in the NFRTR. Indiana Code § 35-47-3-2(b) does not apply to him, and he fails to state a claim in his Complaint.

17. Plaintiff does not allege that his firearm was not returned to him *at all*. Rather, he alleges that his firearm was not returned "at once." Since § 35-47-3-2(b) does not apply to Plaintiff, he has failed to state a claim, and his Complaint must be dismissed.

Plaintiff's Complaint must be dismissed because his claim is not ripe.

18. Additionally, Plaintiff has failed to state a claim pursuant to the ripeness doctrine. Plaintiff has made no allegation that Defendants have refused to return his firearm.

19. "Ripeness relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities, and are capable of being adjudicated on an adequately developed record." *Indiana Dept. of Environmental Management v. Chemical Waste Management*, 643 N.E.2d 331, 336 (Ind. 1994).

20. Plaintiff's Complaint is based on abstract possibilities, not on actual facts. Defendants have not refused to return Plaintiff's firearm. Rather, according to the Complaint, Defendants, by counsel, have engaged in discussions with Plaintiff about returning his firearm. (Complaint ¶ 14). The Complaint asserts that Defendants are willing to return the firearm, but

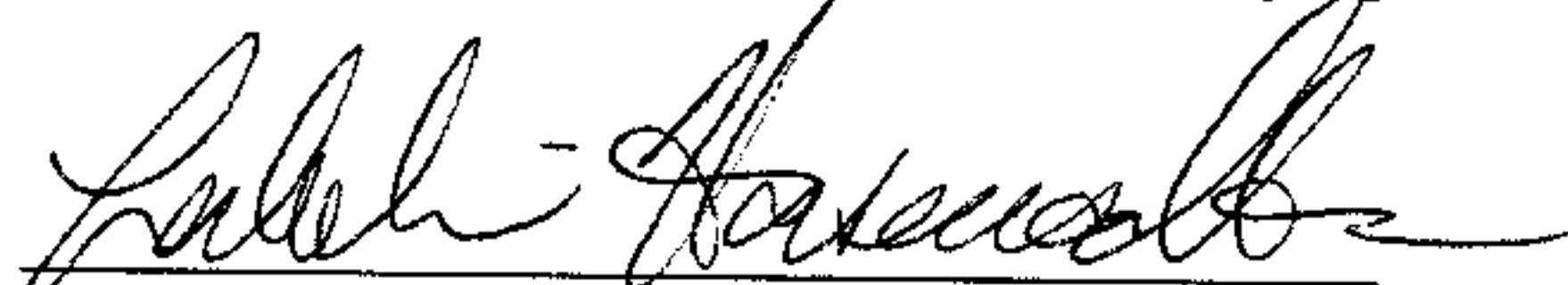
must follow certain written procedures. (Complaint ¶¶ 28-29). Defendants, by counsel, represented to Plaintiff's counsel that returning a firearm "usually takes weeks." (Complaint ¶ 31). Defendants have not refused to return Plaintiff's firearm, and Plaintiff does not allege so.

21. Plaintiff fails to state a claim because his allegations are not ripe. Therefore, his Complaint must be dismissed.

WHEREFORE, Defendants respectfully request the Court dismiss Plaintiff's Complaint pursuant to Trial Rule 12(B)(6) because it fails to state a claim.

Respectfully Submitted,

OFFICE OF CORPORATION COUNSEL



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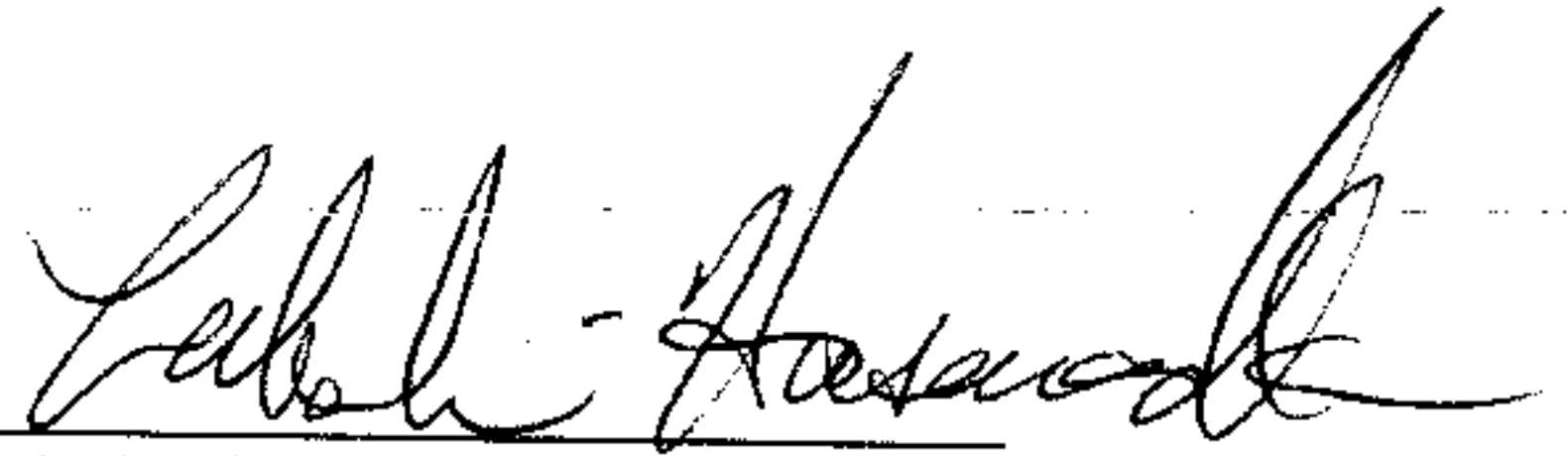
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Attorney for Defendants

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon all counsel listed below, by United States mail, first-class, postage prepaid on April 20, 2006.

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