

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | | |
|-------------------------------------|---|------------------------|
| ELIJAH DAVID MATHENY, |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | Civil Action No. _____ |
| |) | |
| COUNTY OF ALLEGHENY |) | |
| PENNSYLVANIA, ALLEGHENY COUNTY |) | |
| DISTRICT ATTORNEY'S OFFICE, |) | |
| NICHOLAS MOLLO, University of |) | |
| Pittsburgh Police Officer and CHRIS |) | |
| AVETTA, Allegheny County Assistant |) | |
| District Attorney, |) | |
| |) | |
| <i>Defendants.</i> |) | |

VERIFIED COMPLAINT

INTRODUCTION

Documenting police officers' behavior in public by way of audio and video recording is expressive activity protected by the First Amendment to the U.S. Constitution. It is not and, under our Constitution, could not be a crime under Pennsylvania's Wiretapping statute. Nevertheless, law enforcement officers in the Commonwealth, and Allegheny County in particular, routinely misapply the Wiretapping Act to punish civilians who audiotape police activity. This case involves just such a misapplication of the Wiretapping Act by the University of Pittsburgh Police and the Allegheny County District Attorney's office to arrest and prosecute a young man who used his cell phone to record an interaction between police and one of his friends. This civil rights action seeks declaratory relief and damages.

JURISDICTION AND VENUE

1. This action to vindicate plaintiff's rights protected by the First, Fourth, and Fourteenth Amendments to the U.S. Constitution is brought under 42 U.S.C. § 1983. This Court has jurisdiction over this civil rights action under 28 U.S.C. §§ 1331 and 1343. This Court also has jurisdiction under 28 U.S.C. §§ 2201 and 2202 to declare the rights of the parties and to grant all further relief found necessary and proper.

2. Venue is proper in the Western District of Pennsylvania pursuant to 28 U.S.C. § 1391(a) in that the defendants are subject to personal jurisdiction within the Western District of Pennsylvania and the events that give rise to this action occurred within the Western District of Pennsylvania.

PARTIES

Plaintiff

3. Plaintiff Elijah Matheny is an adult citizen of the United States and is a resident of the City of Pittsburgh in Allegheny County in the Commonwealth of Pennsylvania. Plaintiff Matheny currently resides at 14 Allequippa Street, Pittsburgh, PA, 15213.

Defendants

4. Defendant County of Allegheny is a political subdivision of the Commonwealth of Pennsylvania existing and operating pursuant to the laws of the Commonwealth. The County of Allegheny, and specifically the Allegheny County District Attorney's Office, has a legal responsibility to operate according to the laws of the United States and the Commonwealth of Pennsylvania, including, but not limited to, the United States Constitution.

5. Defendant Allegheny County District Attorney's Office is the chief law enforcement office for Allegheny County, and as such has a legal responsibility to operate according to the laws of the United States and the Commonwealth of Pennsylvania, including, but not limited to, the United States Constitution.

6. Defendant Nicholas Mollo is, and at all relevant times here mentioned was, an officer with the University of Pittsburgh Police Department. In his capacity as a police officer for the University of Pittsburgh, Defendant Mollo had a legal obligation to act in conformity with the U.S. Constitution and applicable federal and state laws. Defendant Mollo is named herein in his individual capacity. Defendant Mollo is a "person" as that term is defined in 42 U.S.C. § 1983, and at all relevant times was acting under color of state law.

7. Defendant Chris Avetta is, and at all relevant times here mentioned was, an Assistant District Attorney for Allegheny County in the Commonwealth of Pennsylvania. In his capacity as an Assistant District Attorney for Allegheny County, Defendant Avetta had a legal obligation to act in conformity with the U.S. Constitution and applicable federal and state laws. Defendant Avetta is named herein in his individual capacity. Defendant Avetta is a "person" as that term is defined in 42 U.S.C. § 1983, and at all relevant times was acting under color of state law.

FACTUAL ALLEGATIONS

8. Elijah Matheny is a member of Landslide Community Farm located at 3 Allequippa Street and 14 Allequippa Street, Pittsburgh, PA, 15213.

9. Landslide Community Farm is a Hill District based farm in Pittsburgh dedicated to providing a free source of healthy food to its members and to the local community.

10. Landslide Community Farm is committed to self sustainability and to working with the concepts of permaculture, which is an agricultural system or method that seeks to integrate

human activity with natural surroundings so as to create highly efficient self-sustaining ecosystems.

11. Landslide Community Farm is sustained by the hard work of volunteers and is funded entirely by individual donations and contributions.

12. Food grown by the Community is used not just by Community members, but also by low-income residents in the surrounding communities.

13. In addition to running a self-sustaining farm, Landslide Community Farm and its members focus on providing educational programs and mutual aid to the community and its residents.

14. As a full-time member of Landslide Community Farm, Mr. Matheny provides labor for the farm and its household, including gardening, fence and wall mending, and maintenance and upkeep of Community property.

15. Mr. Matheny resides in the Community household at 14 Allequippa Street with six other Community members.

16. One of the members that lives in the Community household with Mr. Matheny is Tamisha Evonne Singletary. Ms. Singletary goes by the nickname "Vonn."

17. Because Landslide Community Farm is entirely dependant upon the contributions and donations of individuals, members of the Community often seek out discarded food and household items to help sustain members and furnish the Community household.

18. On the afternoon of April 29, 2009, Mr. Matheny and Vonn traveled by bicycle to the Oakland section of Pittsburgh in search of such household items.

19. Late April and early May is the time when classes at the University of Pittsburgh end for the spring semester and the students living in Oakland begin clearing out their dorms and

apartments and moving away for the summer. During this process, students often discard household items, many new or virtually untouched.

20. At approximately 1:00 p.m. on April 29, 2009, while riding their bikes down Oakland Avenue, Mr. Matheny and Vonn noticed a large construction dumpster in the parking lot at Bouquet Gardens, a University of Pittsburgh apartment-style dormitory. The dumpster was abutting the curb in the parking lot and adjacent to Oakland Avenue.

21. In past years, Mr. Matheny and other Community members had salvaged many items thrown away by students at Bouquet Gardens, including tea sets, glasses, plates, cleaning products, and various food items.

22. Bouquet Gardens is not enclosed by a fence, and the parking lot does not have gated or restricted access. There are no "No Trespassing" signs located on Bouquet Gardens property or in the parking lot in question.

23. Mr. Matheny and Vonn turned into the parking lot at Bouquet Gardens and parked their bicycles next to the dumpster.

24. While Vonn stood on the tarmac of the parking lot, Mr. Matheny climbed into the dumpster and began passing items to Vonn. These items included candy bars, energy bars, plates and silverware, which Vonn placed into her and Mr. Matheny's backpacks.

25. Unbeknownst to Mr. Matheny or Vonn at the time, Jeff Julian, a property manager for the University of Pittsburgh, had observed them approach and enter the dumpster, and had alerted University Police to the pair's presence.

26. At approximately 1:30 p.m., a female officer later identified as Officer McDaniel arrived on the scene and spoke with Mr. Julian. Mr Julian pointed out Vonn to Officer McDaniel.

27. Officer McDaniel approached and spoke to Vonn as she stood next to the dumpster.

28. Hearing voices, Mr. Matheny stood up in the dumpster and noticed Officer McDaniel speaking to Vonn. Mr. Matheny climbed out of the dumpster and stood next to Vonn.

29. Officer McDaniel asked the pair what they were doing in the dumpster. After responding that they were looking for food and discarded household items, Officer McDaniel requested that they produce identification.

30. At this point, Defendant Mollo and other University of Pittsburgh police officers, including Officer Kopp, arrived at the scene.

31. Mr. Matheny produced a Pennsylvania Identification Card from his backpack and handed it to the officers. Vonn informed the officers on the scene that she did not carry any identification with her, but she announced and spelled her full name for the officers upon request.

32. While Vonn and Mr. Matheny's identification was being verified, including a wants and warrants check being run through dispatch, Defendant Mollo patted Mr. Matheny down for weapons. Defendant Mollo has admitted that no weapons were found.

33. Dispatch then informed the officers on the scene that Mr. Matheny did not have any outstanding wants or warrants, but that no record could be found for Vonn. The officers then turned their focus from Mr. Matheny to Vonn.

34. Defendant Mollo informed Vonn that he intended to detain her until he could verify her identity. Defendant Mollo advised Vonn to turn around and then placed her in handcuffs. He asked her again about her identity.

35. Watching events unfold, and in full view of the officers on scene, Mr. Matheny reached into the backpack at his feet and retrieved his cell phone. From a distance of no more than five

feet, Mr. Matheny began recording the incident on his cell phone. The cell phone in question records both audio and video content.

36. At no time during the events described here did Mr. Matheny intervene or interfere with Defendant Mollo or any other officer as they attempted to question Vonn and verify her identity.

37. Mr. Matheny made two distinct recordings. The first recording, which was quickly aborted, runs approximately three (3) seconds. The second recording captures much of the encounter between Vonn and the police officers and runs approximately two (2) minutes and fifty-five (55) seconds.

38. Because different officers were speaking and attempting to verify Vonn's identity, Mr. Matheny openly pointed his camera phone at whoever was currently speaking.

39. After receiving a call from dispatch verifying Vonn's identity, Defendant Mollo removed Vonn's handcuffs.

40. After advising Vonn and Mr. Matheny that he believed they were not allowed to salvage discarded items from the Bouquet Gardens dumpster, Defendant Mollo informed them that they were free to go.

41. Immediately thereafter, however, Defendant Mollo asked Mr. Matheny if he had been using his cell phone to record the officers. Defendant Mollo also asked if the cell phone recording had an audio component. Mr. Matheny advised Defendant Mollo that he believed his cell phone recorded both the video and audio aspects of the incident.

42. Defendant Mollo then informed Mr. Matheny that he had not consented to the recording of his voice and that he was placing Mr. Matheny under arrest.

43. Defendant Mollo placed Mr. Matheny's in handcuffs. Mr. Matheny was advised that he under arrest for a felony violation of Pennsylvania's Wiretap Act, 18 Pa. C.S. §5703(1). In

addition, Mr. Matheny was initially charged with one count of the possession of an instrument of crime, 18 Pa. C.S. §907(A), for using his cell phone in the commission of the alleged felony. *See* Police Criminal Complaint, Commonwealth of Pennsylvania v. Elijah David Matheny, Docket # CR-4804-09, at 2 (attached as Exhibit 1).

44. Pennsylvania's Wiretap Act 18 Pa. C.S. §5703 states in pertinent part:

[A] person is guilty of a felony of the third degree if he:
(1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept wire, electronic or oral communication.

44. As a third-class felony, violation of the Pennsylvania Wiretap Act carries a term of imprisonment of up to seven years.

45. The Pennsylvania Supreme Court has explicitly ruled that a communication or conversation amounts to a protected oral communication under the Pennsylvania Wiretap Act *only* where the speakers possess a reasonable expectation of privacy in that conversation. *Agnew v. Dupler*, 717 A.2d 519, 523-24 (Pa. 1988); *See also, Commonwealth of Pennsylvania v. Henlen*, 564 A.2d 905, 907 (Pa. 1989) (an investigating police officer furtively taped by the suspect during an interrogation had no expectation of privacy because what occurred in the interrogation room between the two might later be used in court anyway); *Agnew*, 717 A.2d at 254 (on-duty police officers have no expectation of privacy in their conversations in the presence of other officers).

46. A reasonable expectation of privacy is recognized, the *Agnew* Court said, by the test essentially laid out in *Katz v. United States*: (1) the individual has exhibited an actual (subjective) expectation of privacy, and (2) society is prepared to recognize that this expectation is (objectively) reasonable. *Id.*

47. Defendant Mollo confiscated Mr. Matheny's cell phone (and retained it for over two months). Before being taken to the police station, Mr. Matheny gave his other personal items, including his backpack and bicycle, to Vonn.

48. Fifteen minutes after Defendant Mollo arrested Mr. Matheny, University of Pittsburgh Officers Dipaolo and Knieb arrived on the scene and transported Mr. Matheny to the University of Pittsburgh Police Station. Mr. Matheny's paperwork was processed and he was placed in a holding cell for more than four (4) hours while awaiting transport to the Allegheny County Jail.

49. While in custody, Mr. Matheny signed a voluntary consent to search form giving Defendant Mollo permission to search his cell phone. Defendant Mollo located the two videos of the incident described above.

50. While in the holding cell, Mr. Matheny heard a conversation between Defendant Mollo and an unidentified female who questioned Defendant Mollo about the legitimacy of arresting someone for recording a police officer making an arrest. Defendant Mollo responded that Mr. Matheny's actions were illegal under the Pennsylvania Wiretap Act. The woman disagreed and advised Defendant Mollo to contact the District Attorney's office to confirm his understanding of the law.

51. Defendant Mollo called the Allegheny County District Attorney's Office and spoke to Assistant District Attorney Chris Avetta. Defendant Avetta was the DA on duty and was responsible for giving immediate advice to law enforcement officers who called the office. After hearing a description of the incident from Defendant Mollo, Defendant Avetta advised Defendant Mollo that it was the Office of the District Attorney's position that Mr. Matheny's actions in taping the officers in the manner described violated the Pennsylvania Wiretap Act. *See Exhibit 1 at 7.*

52. Defendant County of Allegheny has the policy of staffing its phone lines with senior level assistant district attorneys to answer inquiries and questions from law enforcement officials, among others.

53. Upon information and belief, the Allegheny County District Attorney's Office has a policy and/or practice of advising police officers to arrest, hold, and charge people with a Pennsylvania Wiretap Act violation if they are discovered to have audio-taped law enforcement officers conducting official business.

54. Approximately four (4) hours after being placed in a holding cell at the University of Pittsburgh Police Station, Mr. Matheny was transported to the Allegheny County Jail ("ACJ"). ACJ refused to accommodate Mr. Matheny's dietary needs. After being informed that he was lactose and gluten intolerant, ACJ officials informed Mr. Matheny that his only option for a meal was a cheese sandwich on wheat bread.

55. At approximately 9:30 that evening, Mr. Matheny had his initial arraignment before a judge. Mr. Matheny was released on non-monetary condition bail at 10:30 PM and was required to report in person to Allegheny County pretrial services by 10:00 AM on April 30, 2009.

56. Following continuances requested by both Mr. Matheny and the Commonwealth, Mr. Matheny's preliminary hearing was held in City Court before Judge Ronald N. Costa, Sr. on July 14, 2009. Immediately prior to the commencement of the hearing, the Allegheny County District Attorney representing the Commonwealth informed the Court that she did not want to pursue the wiretap and criminal possession charges, and instead intended to pursue a charge of summary disorderly conduct.

57. After Defendant Mollo testified, the Commonwealth asked the Court to amend the charges and include a count against Mr. Matheny for defiant trespass. On cross examination,

however, Defendant Mollo testified that there were no “no trespassing” signs in the Bouquet Gardens parking lot. *See* Transcript of Preliminary Hearing, Commonwealth v. Elijah David Matheny, Doc. # CR-0004804-09, at 5, 8 (attached as Exhibit 2).

58. Defendant Mollo also testified that there were at least six (6) other persons present at the time Mr. Matheny made the recording with his cell phone and that he witnessed Mr. Matheny pull his cell phone from his backpack and begin pointing it at the various officers on the scene as they questioned Vonn. When confronted with his probable-cause affidavit stating “we [Defendant Mollo and Officer McDaniel] were uncertain at this time if he [Mr. Matheny] was recording us...,” Defendant Mollo admitted that it had crossed his mind in watching Mr. Matheny point his cell phone at them that he might, in fact, be recording the incident. *See* Exhibit 2 at 6-8.

59. Defendant Mollo further testified that, as an experienced police officer, he was well aware at the time the events unfolded that he might later be asked, compelled, or required to testify as to the contents of his conversations with Mr. Matheny, Vonn, and the other officers at the scene. *See* Exhibit 2 at 8.

60. At the conclusion of the preliminary hearing, Magistrate Judge Costa dismissed the remaining charges of disorderly conduct and defiant trespass against Mr. Matheny. *See* Exhibit 2 at 9. *See also* AOPC-501A-99, Commonwealth form outlining disposition of charges, at 1 (attached as Exhibit 3).

61. As a direct and proximate result of Defendants’ actions, Plaintiff Matheny suffered the following injuries and damages:

- a. Violation of his rights under the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, to be free

- from criminal prosecution or to be retaliated against for engaging in constitutionally protected expressive activity;
- b. Violation of his rights under the Fourth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, to be free from malicious prosecution, false arrest, and false imprisonment;
 - c. Loss of his physical liberty and deprivation of personal property;
 - d. Monetary loss, including the purchase of a new cell phone to replace the cell phone confiscated by the Commonwealth of Pennsylvania; and
 - e. Emotional trauma, humiliation, and distress.

CAUSES OF ACTION

Count I – First Amendment Retaliation (Against All Defendants)

60. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though set forth at length herein.

61. Observing and recording public police activities, without interfering with those duties, is a legitimate means of gathering information for public dissemination and is therefore expressive conduct protected by the First Amendment to the United States Constitution.

62. Defendants' arrest of and attempted prosecution of Plaintiff constituted unlawful retaliation by public officials for Plaintiff's engaging in activity protected by the First Amendment to the U.S. Constitution.

63. Defendant Allegheny County District Attorney's Office and County of Allegheny are responsible for this constitutional violation because it is the policy, practice and custom of the office to advise law enforcement officials that persons engaging in constitutionally protected expressive conduct can be subject to arrest and prosecution under Pennsylvania's Wiretap Act.

Count II – Malicious Prosecution (Against All Defendants)

64. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though set forth at length herein.

65. Plaintiff has a clearly established right under the Fourth and Fourteenth Amendments to the U.S. Constitution to be free from unreasonable seizure of his person and unreasonable searches of his property, a right Defendants violated by handcuffing and arresting Plaintiff without probable cause or reasonable belief that Plaintiff was committing any crime.

66. Furthermore, Defendants actively participated in the commencement and/or maintenance of the criminal proceeding against Plaintiff in retaliation for Plaintiff's constitutionally protected recording of Defendant Mollo's public activities as a law enforcement officer with the University of Pittsburgh Police.

67. Defendants pursued this prosecution of the Plaintiff with malice in retaliation for Plaintiff engaging in constitutionally-protected activity, and without any probable cause or reasonable basis for believing that Plaintiff violated Pennsylvania's Wiretap Act or committed any other crime in the Commonwealth of Pennsylvania.

68. Defendant Allegheny County District Attorney's Office and County of Allegheny are responsible for this constitutional violation because it is the policy, practice and custom of the office to arrest and prosecute persons under Pennsylvania's Wiretap Act who are engaging in constitutionally protected expressive conduct even though no probable cause existed under the Pennsylvania Wiretap Act or any other state statute.

Count III – False Arrest and False Imprisonment (Against All Defendants)

69. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though set forth at length herein.

70. Plaintiff has a clearly established right under the Fourth and Fourteenth Amendments to the U.S. Constitution to be free from unreasonable seizure of his person and unreasonable searches of his property, a right Defendants violated when, claiming to act under proper legal authority, they unlawfully detained and then arrested Plaintiff without any probable cause or reasonable basis for believing that that Plaintiff violated Pennsylvania's Wiretap Act or committed any other crime in the Commonwealth of Pennsylvania.

71. Defendants pursued this prosecution of the Plaintiff in retaliation for Plaintiff engaging in constitutionally-protected activity, and without any probable cause or reasonable basis for believing that Plaintiff violated Pennsylvania's Wiretap Act or committed any other crime in the Commonwealth of Pennsylvania.

72. Defendant Allegheny County District Attorney's Office and County of Allegheny are responsible for this constitutional violation because it is the policy, practice and custom of the office to arrest, prosecute, and imprison persons under Pennsylvania's Wiretap Act who are engaging in constitutionally protected expressive conduct even though no probable cause existed under the Pennsylvania Wiretap Act or any other state statute.

PRAYER FOR RELIEF

Wherefore, in light of the foregoing, Plaintiff respectfully requests the following:

- a. Enter a declaratory judgment that the Defendants applied 18 Pa. C.S. §5703(1) in an unconstitutional fashion when Officer Mollo detained and arrested Plaintiff for recording Officer Mollo engaged in his public duties;
- b. Enter a declaratory judgment that the Allegheny County District Attorney's Office and the County of Allegheny's policy of applying 18 Pa. C.S. §5703(1) to

the recording of public interactions by law enforcement officials violates the First Amendment.

- c. Award compensatory damages against all Defendants, joint and severally, in an amount to be determined at trial;
- d. Enter an award for costs, expenses, and counsel fees pursuant to 42 U.S.C. § 1988; and
- e. Enter such other relief as this honorable Court may deem just and deserving.

August 13, 2009

Respectfully submitted,

/s/ Sara J. Rose

Sara J. Rose
PA ID No.: 204936

/s/ Witold J. Walczak

Witold J. Walczak
PA ID No.: 62976

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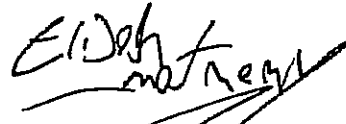
Counsel for Plaintiff

VERIFICATION

I hereby swear and affirm on this twenty-fourth day of July 2009 that the facts contained in the foregoing Complaint are true and correct to the best of my knowledge, information, and belief.

These statements are made subject to the penalties provided for under "Unsworn Falsification to Authorities," 18 Pa. Cons. Stat. Ann. § 4904.

July 24, 2009

A handwritten signature in black ink, appearing to read "Elijah Matheny", written over a horizontal line.

Elijah David Matheny