

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

| | | |
|------------------------------|---|------------------------|
| CHRISTOPHER MONTGOMERY, |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | Civil Action No. _____ |
| |) | |
| CITY OF PHILADELPHIA; POLICE |) | Jury Trial Demanded |
| OFFICER DAVID KILLINGSWORTH, |) | |
| |) | |
| <i>Defendants.</i> |) | |
| |) | |

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. Nevertheless, law enforcement officers in the Commonwealth, and the City of Philadelphia in particular, routinely misapply Pennsylvania criminal statutes to punish civilians who observe, photograph or otherwise record police activity. This case involves just such a misapplication of the disorderly conduct statute by the Philadelphia Police Department to prosecute a man who used his cell phone to record an interaction between police and a youth on a public sidewalk. 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 Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391(a) in that the defendants are subject to personal jurisdiction within the Eastern District of Pennsylvania and the events that give rise to this action occurred within the Eastern District of Pennsylvania.

PARTIES

3. Plaintiff Christopher Montgomery is a resident of the City of Philadelphia in Philadelphia County in the Commonwealth of Pennsylvania.

4. Defendant City of Philadelphia is a political subdivision of the Commonwealth of Pennsylvania and manages, directs and controls the Philadelphia Police Department ("PPD"), which employs Defendant Killingsworth.

5. Defendant David Killingsworth was, at all times here mentioned, an officer with the PPD and was acting under color of state law. Defendant Killingsworth is sued in his individual capacity.

FACTUAL ALLEGATIONS

6. On the evening of January 23, 2011, Mr. Montgomery and a friend ascended from the Market-Frankford Subway station at 15th and Market Streets in Philadelphia at approximately 6:00 pm and waited there for some friends to arrive.

7. While waiting on the corner of 15th and Market Streets, Mr. Montgomery and his friend observed a verbal altercation taking place between a group of young people and an older individual at that location.

8. This altercation drew a crowd of onlookers, and the crowd moved south from 15th and Market Streets to the corner of 15th and Chestnut Streets. Some of the youths involved entered the Wendy's restaurant at that location.

9. Shortly after 6:15 pm, several police cars arrived and the officers moved down the block ahead of the crowd. Mr. Montgomery followed them down the block, as he was concerned with the size of the police response and wanted to observe their activity. The individual involved in the altercation began pointing out the youths involved to the police, who entered the Wendy's restaurant. Moments later, the police brought some young African American men out of the restaurant and placed them under arrest.

10. Upon the arrival of the police, Mr. Montgomery began using his iPhone to create a video and audio recording of the encounter between the police and the individuals they were arresting. When the police asked the crowd to step back, Mr. Montgomery complied. He continued to record the encounter while standing on a public sidewalk approximately ten to fifteen feet from the arresting officers. Mr. Montgomery wanted to film the encounter because he is a photojournalist.

11. At no time during the arrests did any officer suggest to Mr. Montgomery that he was in the way or obstructing police in any way.

12. After several of the youths were arrested, an additional young man exited the Wendy's and began arguing with one of the officers in a visibly agitated manner.

13. The officer proceeded to arrest this young man as Mr. Montgomery recorded.

14. During this arrest, Mr. Montgomery heard and recorded the officer tell the youth that he was being arrested “for being a dickhead.”

15. After that young man was secured, Defendant Killingsworth, who was one of the officers at the scene, approached Mr. Montgomery. As he neared Mr. Montgomery, Officer Killingsworth said “put that away, stop recording” and reached his hand out toward Mr. Montgomery’s phone.

16. Immediately upon reaching Mr. Montgomery, Defendant Killingsworth grabbed the hand with which Mr. Montgomery was holding his iPhone. Defendant Killingsworth then turned Mr. Montgomery, secured both his hands, walked him to his police vehicle and placed Mr. Montgomery under arrest.

17. At the police vehicle, Defendant Killingsworth took Mr. Montgomery’s iPhone from him, and placed Mr. Montgomery in handcuffs.

18. Defendant Killingsworth then transported Mr. Montgomery to the local police district.

19. Mr. Montgomery was placed in a holding cell for approximately forty-five minutes.

20. Upon information and belief, during his time in custody, Defendant Killingsworth and/or other officers of the PPD accessed Mr. Montgomery’s iPhone and deleted the video Mr. Montgomery recorded documenting the circumstances leading up to his arrest.

21. Mr. Montgomery was then released from custody and his belongings were returned, including his iPhone.

22. Upon release, Mr. Montgomery was issued a citation alleging violation of 18 Pa. Cons. Stat. § 5503(a)(4) relating to disorderly conduct.

23. At no time did Mr. Montgomery act in a fashion that provided probable cause to arrest him for disorderly conduct under § 5503.

24. At no time did Mr. Montgomery create a hazardous or physically offensive condition.

25. At no time did Mr. Montgomery recklessly create a risk of public inconvenience, annoyance or alarm.

26. Mr. Montgomery attended a hearing on his citation in Philadelphia's Community Court on February 22, 2011, where he was found guilty of disorderly conduct.

27. Upon conviction, the Court assessed Mr. Montgomery a fine of \$163.50 and 24 hours of community service.

28. Mr. Montgomery filed an appeal from his conviction on February 28, 2011.

29. As a matter of Pennsylvania law, appeals from convictions on summary offenses result in vacatur of the conviction and a trial *de novo* in the Court of Common Pleas.

30. On March 31, 2011, Mr. Montgomery appeared for his trial *de novo* in the Court of Common Pleas of Philadelphia County where he was represented by counsel and found not guilty.

31. Mr. Montgomery's recording of the police undertaking their official duties is protected by the First Amendment to the United States Constitution, and therefore cannot be the basis for any criminal citation, including disorderly conduct.

32. Mr. Montgomery's unlawful arrest was a direct result of the policies, practices, and customs of defendant City of Philadelphia ("City").

33. Prior to September 2011, PPD officers routinely instituted criminal proceedings against civilians who observed or recorded police activities.

34. Officers instituted these proceedings in order to intimidate civilians so that they do not continue to monitor and record police behavior, and in retaliation against civilians' constitutionally protected activity.

35. Supervisory police officials, up to and including Police Commissioner Charles H. Ramsey, knew that PPD officers routinely retaliated against civilians for watching and/or recording them. Those officials did nothing to halt these practices for years but instead, encouraged and directed such practices.

36. In March 2011, Commissioner Ramsey personally directed PPD detectives to “re-investigate” a February 13, 2011 incident involving Mark Fiorino, who was stopped and threatened – *but not charged* – by a Philadelphia police officer for openly carrying his licensed firearm. According to a PPD spokesperson, the Commissioner gave this order after learning that Mr. Fiorino had posted an audio recording of the February 13 incident on YouTube and the PPD had been alerted to the recording by a caller. As a result of this “re-investigation,” on April 15, 2011 – two months after the incident – a PPD detective initiated charges against Mr. Fiorino, alleging that his simultaneous possession of a licensed firearm *and an audio recorder* meant that Mr. Fiorino was trying to spark a violent police reaction. Mr. Fiorino was ultimately found not guilty of all charges.

37. In September 2011, Commissioner Ramsey issued a memorandum to “remove any confusion as to duties and responsibilities of sworn personnel when being photographed, videotaped or audibly recorded while conducting official business or while acting in an official capacity in any public place” and instructed PPD officers to allow themselves to be recorded. See, Memorandum from Charles H. Ramsey, Commissioner, Phila. Police Dep’t, to Phila. Police Dep’t personnel (Sept. 23, 2011) (attached as Exhibit A).

38. There have been numerous other incidents of PPD officers threatening to or actually arresting Philadelphians who watch or record the actions of on-duty police officers. Indeed, dozens of such incidents have been reported to the media and to Philadelphia civil rights groups.

39. For instance, on July 23, 2010, Melissa Hurling and Shakir Riley were assaulted by PPD officers when they attempted to use their cellphones to record what they considered to be a violent arrest. See, Jan Ransom, Even a Top Cop Concedes a Right to Video Arrests – but the Street Tells a Different Story, Philly.com, Sept. 3, 2011 (attached as Exhibit B; hereinafter Even a Top Cop Concedes Right to Record). According to reports, officers confronted Riley and destroyed his cellphone, along with the footage he had just recorded, while two other officers approached Hurling and, after exchanging a few words, arrested her. Riley and Hurling were charged with disorderly conduct, however the charges were later dismissed against both of them following a summary trial in March 2011. See Commonwealth of Pennsylvania v. Hurling, Docket No. MC-51-SU-0010415-2010, Mar. 10, 2011 (attached as Exhibit C); Commonwealth of Pennsylvania v. Riley, Docket No. MC-51-SU-0010571-2010, Mar. 10, 2011 (attached as Exhibit D).

40. The same article disclosed another incident that occurred on July 2, 2011. See Even a Top Concedes Right to Record, Exhibit B. There, Philadelphia resident Zanberle Sheppard was told by neighbors that PPD officers were beating her handcuffed boyfriend in an alley outside their home. Using her cellphone, she peered out a window of her home and recorded the arrest. Sheppard then ran outside into the alley where, following an altercation, the officers seized her phone. When Sheppard later received her phone back from the PPD, the battery was missing and the video was gone. Sheppard, who had no prior criminal record, was charged with disorderly conduct. Id. She was found guilty on August 22, 2011 following a summary trial and was fined. Commonwealth v. Sheppard, Docket No. MC-51-SU-0008673-2011, Aug. 22, 2011 (attached as Exhibit E).

41. More recently, a photojournalism student at Temple University was arrested on March 14, 2012. See, Angelo Fichera, After Arrest, Press Network Pushes for Dismissal of Charges, The Temple News, Mar. 26, 2012 (attached as Exhibit F); Kathy Matheson, Ian Van Kuyk, Temple Univ. Student Charged After Taking Traffic Stop Pics, The Huffington Post, Mar. 26, 2012 (attached as Exhibit G). According to reports the student, Ian Van Kuyk, was photographing a traffic stop as part of a course assignment for night photography. When Van Kuyk refused to stop photographing, PPD officers arrested him and his girlfriend, who attempted to rescue Van Kuyk's camera. Van Kuyk was charged with disorderly conduct, obstruction of justice, resisting arrest and hindering apprehension; his girlfriend was charged with obstruction and disorderly conduct. Six days after the incident, Van Kuyk's girlfriend entered an Accelerated Misdemeanor Program, agreed to 12 hours of community service and to pay a \$200 fine for her charges. Id. On November 27, 2012, Van Kuyk was found not guilty on all charges following a trial. Commonwealth of Pennsylvania v. Van Kuyk, Docket No. MC-51-CR-0010679-2012, Nov. 27, 2012 (attached as Exhibit H).

42. Further, the undersigned counsel are aware of additional instances of PPD officers retaliating against civilians attempting to record them in the performance of their official duties. Specifically:

- Alexine Fleck, was arrested on her home block for simply observing a police officer in his interactions with an apparently incapacitated man sitting on a stoop. Although she stepped back when the officer instructed her to, she would not leave the scene altogether and was therefore arrested and charged with "failure to disperse", which charges were later dismissed.

- Coulter Loeb had been observing and photographing police in Rittenhouse Square as they evicted an apparently homeless couple from the park. As the police walked the woman along the sidewalk leading to the street, Mr. Loeb followed at a distance. One of the officers directed Mr. Loeb to walk in the other direction. When Mr. Loeb refused, the officer accused Mr. Loeb of interfering with police business, then arrested him and charged him with disorderly conduct. The charges were later dismissed.

43. As the September 2011 Policy indicates, PPD officers should expect to be observed, photographed, videotaped or recorded while performing their official duties in public. Further, the Policy specifically orders that PPD officers “shall not interfere with any member of the general public or individuals temporarily detained” from photographing, videotaping or recording police personnel while they are acting in their official capacities.

44. Based on the numerous incidents identified above and the acknowledgment by the Police Commissioner of “confusion” concerning police responsibilities on these issues, at the time of plaintiff’s arrest, the custom of the officers of the Philadelphia Police Department was to regularly arrest persons who observed and documented their behavior, and the policy making officials of the Police Department and therefore the City of Philadelphia knew of this custom. At the time of plaintiff’s arrest, the policy making officials of the Police Department acted with deliberate indifference to the constitutional rights of the persons who watch or record police behavior in this City by: (a) failing to properly train, supervise and discipline PPD officers who retaliate against people who observe or record them; (b) inadequately monitoring PPD officers and their practices related to people who watch or record their activities; (c) failing to properly discipline PPD officers who initiate criminal proceedings against people who watch or record

their activities; and (d) failing to rectify the PPD's unconstitutional practice of instituting criminal proceedings against people who watch or record their actions.

45. At all times relevant to this Complaint, the conduct of Defendant Killingsworth was in willful, reckless and callous disregard of plaintiff's rights under federal law.

46. As a direct and proximate result of Defendants' actions, Plaintiff Montgomery 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; and
- e. Emotional distress.

CAUSES OF ACTION

Count I – First Amendment Retaliation (Against All Defendants)

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

48. 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.

49. Defendant Killingsworth's arrest of and attempted prosecution of Plaintiff in absence of probable cause that he had committed a crime constituted unlawful retaliation by public officials for Plaintiff's engaging in activity protected by the First Amendment to the U.S. Constitution.

50. Defendant City of Philadelphia is responsible for the violation of Plaintiff's constitutional rights because Defendant Killingsworth's actions resulted from the City's custom, pattern, practice, or policy of allowing officers to arrest individuals for their expressive conduct in videotaping police undertaking their official duties.

Count II – Malicious Prosecution (Against All Defendants)

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

52. 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. Defendant Killingsworth violated this right when he commenced and/or maintained the criminal proceeding against Plaintiff in retaliation for Plaintiff's constitutionally protected recording of Defendant Killingsworth's public activities as a law enforcement officer with the PPD and in absence of any probable cause that he had committed a crime.

53. The charges against Plaintiff Montgomery were later terminated in his favor.

54. Defendant Killingsworth 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 disorderly conduct statute or committed any other crime in the Commonwealth of Pennsylvania.

55. Defendant City of Philadelphia is responsible for the violation of Plaintiff's constitutional rights because Defendant Killingsworth's actions resulted from the City's custom, pattern,

practice, or policy of allowing officers to arrest and charge individuals in retaliation for their expressive conduct in videotaping police undertaking their official duties.

Count III – Illegal Search and Seizure (Against All Defendants)

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

57. 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 Defendant Killingsworth violated by handcuffing and arresting Plaintiff, and by searching his cell phone without probable cause or reasonable belief that Plaintiff was committing any crime.

58. Defendant City of Philadelphia is responsible for the violation of Plaintiff's constitutional rights because Defendant Killingsworth's actions resulted from the City's custom, pattern, practice, or policy of allowing officers to retaliate against individuals for their expressive conduct in videotaping police undertaking their official duties.

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

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

60. 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 Defendant Killingsworth violated when, claiming to act under proper legal authority, he unlawfully detained and then arrested Plaintiff without any probable cause or reasonable basis for believing that that Plaintiff violated Pennsylvania's disorderly

conduct statute or committed any other crime in the Commonwealth of Pennsylvania.

61. Defendant City of Philadelphia is responsible for the violation of Plaintiff's constitutional rights because Defendant Killingsworth's actions resulted from the City's custom, pattern, practice, or policy of allowing officers to retaliate against individuals for their expressive conduct in videotaping police undertaking their official duties.

PRAYER FOR RELIEF

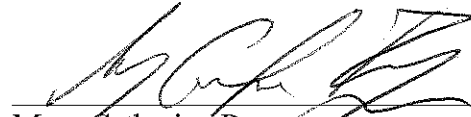
Wherefore, in light of the foregoing, Plaintiff respectfully requests that the Court:

- a. Enter a declaratory judgment that the Defendants violated Plaintiff's First Amendment right to observe police activity;
- b. Enter a declaratory judgment that the Defendants violated Plaintiff's Fourth Amendment right to be free from unreasonable seizure and malicious prosecution;
- c. Award compensatory damages against all Defendants, joint and severally, in an amount to be determined at trial;
- d. Award punitive damages against Defendant Killingsworth;
- e. Enter an award for costs, expenses, and counsel fees pursuant to 42 U.S.C. § 1988; and
- f. Enter such other relief as this honorable Court may deem just and deserving.

Plaintiff hereby demands a jury trial.

January 16, 2013.

Respectfully submitted,



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