

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

GREGORY HOWARD RIZER,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. _____
)	
KEVIN LUKART, Point Marion Police)	
Officer; BOROUGH OF POINT)	
MARION; CARL ABLES, Mayor of Point)	
Marion; and JAY STUTLER, Chief of Police)	
of Point Marion Police Department;)	
)	
<i>Defendants.</i>)	
)	

COMPLAINT

INTRODUCTION

Documenting police officers’ official duties by audio and video recording is expressive activity protected by the First Amendment to the U.S. Constitution. This conduct is essential to monitoring the interactions between police and citizens. Such protected activity cannot be criminalized under Pennsylvania’s Wiretap Act. Nevertheless, law enforcement officers in the Commonwealth routinely misapply the Wiretap Act to punish civilians who audio-record official police activity. This case involves just such a misapplication of the Wiretap Act by Borough of Point Marion police.

As a result of exercising his First Amendment right to record a police officer who was aggressively questioning his friend at the friend’s home, Plaintiff Gregory Rizer was arrested not once, but twice, for violating the Wiretap Law despite the fact that the police officer did not possess a reasonable expectation of privacy in his communications with Mr. Rizer’s friend. The

second arrest, which was ratified by the police chief, occurred only after Mr. Rizer complained to the Borough's mayor about the first arrest and revealed prior misconduct by the arresting officer. These arrests, which were not supported by probable cause, were intended to retaliate against Mr. Rizer for exercising his rights under the First Amendment to record and to petition the government for redress of grievances. As such, they violated his rights under the First and Fourth Amendments to the United States Constitution.

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. This Court has personal jurisdiction over the Defendants, who are located in the Western District of Pennsylvania.

3. 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

4. Plaintiff Gregory Howard Rizer is an adult citizen of the United States and is a resident of the Borough of Port Marion in Fayette County in the Commonwealth of

Pennsylvania. Plaintiff Rizer currently resides at 1315 Penn Street, Apt. 4, Point Marion, PA 15474.

5. Defendant Borough of Point Marion is a political subdivision of the Commonwealth of Pennsylvania existing and operating pursuant to the laws of the Commonwealth. The Borough of Point Marion, and specifically the Point Marion Police Department, 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 Charles Ables is, and at all relevant times here mentioned was, the Mayor of the Borough of Point Marion. In his capacity as the Mayor of the Borough of Point Marion, Defendant Ables is a policymaker for the Borough. He has a legal obligation to act in conformity with the U.S. Constitution and applicable federal and state laws. Defendant Ables was at all relevant times acting under color of state law. Defendant Ables is named herein in his individual capacity.

7. Defendant Jay Stutler is, and at all relevant times here mentioned was, the Police Chief of the Borough of Point Marion Police Department. In his capacity as the Police Chief of the Borough of Point Marion Police Department, Defendant Stutler is a policymaker for the Borough. He has a legal obligation to act in conformity with the U.S. Constitution and applicable federal and state laws. Defendant Stutler was at all relevant times acting under color of state law. Defendant Stutler is named herein in his individual capacity.

8. Defendant Kevin Lukart is, and at all relevant times here mentioned was, a police officer with the Borough of Point Marion Police Department. In his capacity as a police officer with the Borough of Point Marion Police Department, Defendant Lukart had a legal obligation to act in conformity with the U.S. Constitution and applicable federal and state laws. Defendant

Lukart was at all relevant times acting under color of state law. Defendant Lukart is named herein in his individual capacity.

FACTUAL ALLEGATIONS

Plaintiff Rizer Uses His Cell Phone to Record Defendant Lukart

9. On January 3, 2012, Mr. Rizer visited his friend Shannon Hughes, a quadriplegic, at his home in Point Marion.

10. At approximately 8:30 p.m. that evening, Defendant Lukart arrived at Mr. Hughes' home to question him about the whereabouts of his cousin, Donald Cooley.

11. From the moment Defendant Lukart arrived, he was aggressive and bullying in his questioning of Mr. Hughes, repeatedly telling Mr. Hughes that he did not believe his denials about Mr. Cooley's whereabouts. He frequently cursed at Mr. Hughes and repeatedly shook his finger in Mr. Hughes' face.

12. Concerned for his friend's safety, Mr. Rizer stated to Defendant Lukart that Mr. Hughes was a nice guy. Defendant Lukart cursed at Mr. Rizer and ordered him to stand back.

13. Mr. Rizer complied with Defendant Lukart's command, leaving the living room to stand in a nearby entryway approximately twelve feet behind Defendant Lukart and Mr. Hughes.

14. Because the abusive interrogation resumed, Mr. Rizer pulled out his cell phone and began recording Defendant Lukart's interactions with Mr. Hughes. Mr. Rizer recorded the conversation for several minutes until the memory card on his phone became full.

15. Once the memory card was full, the phone automatically began to play back the recording which was overheard by Defendant Lukart.

16. Defendant Lukart then asked Mr. Rizer if he had been recording the conversation.

17. Mr. Rizer admitted that he was, at which point Defendant Lukart's attention shifted to Mr. Rizer and he demanded Mr. Rizer hand over the cell phone. Defendant Lukart told Mr. Rizer that he did not have his consent to record, ordered him to wait inside and took the cell phone to his patrol car.

18. Mr. Hughes had no objection to the recording.

19. When Defendant Lukart returned, he once again began to question and threaten Mr. Hughes regarding his knowledge of his cousin's whereabouts.

20. Mr. Rizer repeatedly asked Defendant Lukart to return his cell phone, even offering to erase the video if that would facilitate the return.

21. Defendant Lukart ordered Mr. Rizer to put his hands behind his back, handcuffed him, and at around 9:30 p.m. transported Mr. Rizer to the Port Marion Police Station, where he placed Mr. Rizer in a holding cell.

22. Defendant Lukart advised Mr. Rizer that his recording of Lukart subjected him to arrest and prosecution under Pennsylvania's Wiretap Act.

23. Defendant Lukart told Mr. Rizer that he had committed a felony and would be sent to prison for ten years.

24. Mr. Rizer again offered to delete the video.

25. Ultimately, Defendant Lukart offered Mr. Rizer a deal: if Mr. Rizer wrote a statement admitting that he had recorded Lukart without his consent and in violation of the Pennsylvania Wiretap Act, Mr. Rizer would be allowed to leave the station. Mr. Rizer agreed.

26. Defendant Lukart removed Mr. Rizer's handcuffs, escorted him to an office, and provided him with a pre-printed blank statement form. Mr. Rizer wrote a statement admitting to recording Lukart but stating he did not know that such conduct was illegal.

27. After reviewing the statement, Defendant Lukart demanded Mr. Rizer rewrite his statement to include an admission that he knew the recording was against the law. At this point, Mr. Rizer asked for a lawyer.

28. Defendant Lukart denied Mr. Rizer's request for a lawyer. Instead, he placed Mr. Rizer's written statement and phone in an evidence bag. He signed and dated the bag, had Mr. Rizer initial the bag, and sealed it with a large band of orange evidence tape.

29. Defendant Lukart then placed the evidence envelope in his desk drawer and warned Mr. Rizer that he had five years to file charges for felony wiretapping and that if Mr. Rizer gave Defendant Lukart any trouble, he would do just that.

30. At approximately midnight, Defendant Lukart drove Mr. Rizer back to Mr. Hughes' residence where Defendant Lukart resumed questioning Mr. Hughes.

Mr. Rizer Reports Defendant Lukart's Misconduct and Is Arrested

31. Anxious and concerned about his encounter with Defendant Lukart, Mr. Rizer spent the next day researching Pennsylvania's Wiretapping Act and came to believe that his actions that evening did not violate the statute.

32. Mr. Rizer also researched the background of Defendant Lukart. He discovered that Lukart had been fired from at least two other police departments.

33. Mr. Rizer learned that in August of 2000, Defendant Lukart was charged with attempted indecent assault, corruption of minors, indecent exposure, open lewdness and official repression as the result of an incident with a 17-year-old girl while Lukart was employed as a police officer in with the Borough of Apollo in Armstrong County. Apollo Borough fired Lukart soon after news of the incident broke.

34. Mr. Rizer also discovered that in the fall of 2007, a WTAE news camera caught and aired footage of Defendant Lukart, then employed as a police officer with the Braddock Police Department, punching and shoving a suspect whose hands were handcuffed behind his back. Defendant Lukart was eventually fired because of that incident as well.

35. On the afternoon of January 5, 2012, Mr. Rizer and his girlfriend went to the Riverside Diner to discuss the incident with the diner's owner, Point Marion Mayor Carl Ables. Mr. Rizer reported what occurred during his encounter with Defendant Lukart and asked Defendant Ables to discuss it with Defendant Lukart.

36. Mr. Rizer also showed Defendant Ables news articles he found describing Defendant Lukart's prior misconduct and expressed concern that the Borough had failed to properly investigate Lukart prior to hiring him.

37. Defendant Ables insisted that the Borough ran a criminal background check on Defendant Lukart and had not found any criminal history.

38. Defendant Ables attempted to call Defendant Lukart in Mr. Rizer's presence multiple times, but Defendant Lukart did not pick up the phone. Defendant Ables left a message for Defendant Lukart, advising him that they needed to talk.

39. After his meeting with Defendant Ables, Mr. Rizer called Defendant Stutler several times and left messages stating he needed to talk to him about an incident with Defendant Lukart.

40. Defendant Stutler did not return Mr. Rizer's calls.

41. The very next evening, January 6, 2012, at approximately 9:30 p.m., Defendants Lukart and Stutler arrived at Mr. Rizer's home.

42. When Mr. Rizer opened the door, Defendant Lukart instructed him to step outside.

43. Defendant Lukart stated that Mr. Rizer was under arrest for “intercepting communications.”

44. Neither Defendant Lukart nor Defendant Stutler showed Mr. Rizer a warrant for his arrest.

45. Further, on information and belief, no arrest warrant had been obtained prior to Mr. Rizer’s arrest.

46. Mr. Rizer was handcuffed and placed in the police cruiser. He was driven to the Point Marion police department by Lukart and Stutler and then transported by a constable to the Fayette County Jail in Uniontown.

47. Mr. Rizer was discharged from Fayette County Jail at approximately 3 a.m. after his girlfriend paid the \$2500.00 bond.

48. Mr. Rizer was detained for approximately five and a half hours that night.

Mr. Rizer Is Charged with Violating the Wiretap Act

49. Officer Lukart charged Mr. Rizer with a felony violation of Pennsylvania’s Wiretap Act, 18 Pa. C.S. §5703(1). *See* Police Criminal Complaint, Commonwealth of Pennsylvania v. Gregory Howard Rizer, Complaint # 12IR002, at 2 (attached as Exhibit 1).

50. 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.

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

52. 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); *Commonwealth v. Henlen*, 564 A.2d 905, 907 (Pa. 1989). A police officer does not have a reasonable expectation of privacy in the performance of his official duties. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 257 (3d. Cir. 2010) (discussing *Agnew* and *Henlen*).

53. On February 22, 2012, the Fayette County District Attorney's Office withdrew all charges against Mr. Rizer.

Mr. Rizer's Cell Phone Is Returned without the SIM Card

54. On March 28, 2012, Defendant Stutler contacted Mr. Rizer regarding the return of his cell phone.

55. That evening, Mr. Rizer and his girlfriend, Tammy Johnson, went to the Point Marion Police Department to retrieve his cell phone. Defendants Stutler and Ables were present.

56. Defendant Ables handed Mr. Rizer an evidence bag that Mr. Rizer immediately observed was not the original evidence bag.

57. There were no signatures on the evidence label and it was sealed with different tape. The bag handed to him contained only his cell phone and not his written statement.

58. When questioned about the absence of the written statement in the bag, Defendants Ables and Stutler at first denied knowledge of the statement, but then asked Mr. Rizer if a folded sheet of paper lying on the desk next to the bag might be the statement in question. That paper was, in fact, Mr. Rizer's written statement.

59. In the Defendants' presence, Mr. Rizer turned on his phone and it immediately indicated a SIM card failure. With Defendants Stutler and Ables watching, Mr. Rizer took apart

his cell phone and discovered that the SIM card containing the recording of Defendant Lukart had been removed from the slot above the battery in his phone.

60. Defendants asked Mr. Rizer to sign a Return of Property Receipt form for the cell phone. Mr. Rizer signed the form but indicated that the SIM card was missing. *See* Point Marion Borough Police Department, Return of Property Receipt (attached as Exhibit 2).

61. On April 6, 2012, plaintiff's counsel sent a letter to Defendant Stutler, with copies to Defendant Ables and the District Attorney, asking for the return of the SIM card. As of the filing of this Complaint, counsel has not received a response to that letter.

62. As a direct and proximate result of Defendants' actions, Plaintiff Rizer 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 losses; and
- e. Emotional trauma, humiliation, and distress.

CAUSES OF ACTION

Count I – First Amendment Right to Be Free From Retaliation for Expressive Conduct (Against Defendants Lukart, Stutler, and Borough of Point Marion)

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

64. 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.

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

66. By virtue of his position as chief of police, Defendant Stutler's participation in and ratification of Plaintiff's arrest for recording Defendant Lukart represented the official policy of the Borough.

67. Additionally, Defendants Stutler and Lukart acted with wanton, callous and reckless disregard of Plaintiff's First Amendment rights in detaining, arresting and attempting to prosecute Plaintiff in retaliation for exercise of Plaintiff's constitutionally protected rights.

Count II – First Amendment Right to Be Free From Retaliation for Petitioning Government Officials (Against All Defendants)

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

69. Reporting misconduct by police officers to government officials is conduct that is protected by the Petition Clause of the First Amendment.

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

71. By virtue of his position as mayor, Defendant Ables' involvement in the decision to arrest Plaintiff after he reported his complaints about Officer Lukart to Defendant Ables represented the official policy of the borough.

72. By virtue of his position as chief of police, Defendant Stutler's participation in and ratification of Plaintiff's arrest after Plaintiff reported his complaints about Officer Lukart to Defendant Ables represented the official policy of the Borough.

73. Additionally, Defendants Ables, Stutler, and Lukart acted with wanton, callous and reckless disregard of Plaintiff's First Amendment rights in detaining, arresting and attempting to prosecute Plaintiff in retaliation for exercise of Plaintiff's constitutionally protected rights.

**Count III – Fourth Amendment Right to Be Free from Unreasonable Search and Seizure
(Against Defendant Lukart)**

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

75. 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 Lukart violated when he unlawfully arrested and detained Plaintiff and confiscated Plaintiff's property without any probable cause or reasonable basis for believing that Plaintiff had violated Pennsylvania's Wiretap Act or committed any other crime, and when he searched Plaintiff's cell phone and removed the SIM card without a warrant as required by the Fourth Amendment to the U.S. Constitution.

76. Defendant Lukart acted with wanton, callous and reckless disregard of Plaintiff's Fourth Amendment rights in detaining and arresting Plaintiff and confiscating Plaintiff's property without probable cause or a warrant.

Count IV – Fourth Amendment Right to Be Free from False Arrest and False Imprisonment (Against Defendants Borough of Port Marion, Stutler, and Lukart)

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

78. Defendants' actions in carrying out the arrest and detention of Plaintiff without probable cause violated Plaintiff's Fourth Amendment right to be free from false arrest.

79. By virtue of his position as chief of police, Defendant Stutler's participation in and ratification of Plaintiff's arrest represented the official policy of the Borough.

80. Additionally, Defendants Stutler and Lukart acted with wanton, callous and reckless disregard of Plaintiff's Fourth Amendment rights in detaining and arresting Plaintiff without probable cause or an arrest warrant.

Count V – Fourth Amendment Right to Be Free from Malicious Prosecution (Against Defendants Borough of Port Marion, Stutler, and Lukart)

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

82. Defendants' actions in authorizing and/or directing the filing of criminal charges against the Plaintiff without probable cause violated Plaintiff's Fourth Amendment right to be free from malicious prosecution.

83. 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 Lukart's activities as a law enforcement officer with the Borough of Point Marion Police Department.

84. By virtue of his position as chief of police, Defendant Stutler's knowledge and ratification of the criminal charge filed against Plaintiff represented the official policy of the Borough.

85. Defendants Stutler and Lukart 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.

86. Additionally, Defendants Stutler and Lukart acted with wanton, callous and reckless disregard of Plaintiff's Fourth Amendment rights in pursuing Plaintiff's prosecution 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.

Count VI – Due Process (Against All Defendants)

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

88. Enforcement of Pennsylvania's Wiretap Act to make criminal the Plaintiff's peaceful, non-interfering recording of police officers engaged in their public duties is an unconstitutional expansion of the statute in question that violates the Fourteenth Amendment right to be free from deprivation of liberty or property without due process of law. Furthermore, the warrantless seizure and destruction of Plaintiff's constitutionally protected recording without due process of law also violated the Fourteenth Amendment to the U.S. Constitution.

PRAYER FOR RELIEF

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

- a. a declaratory judgment that the Defendants applied 18 Pa. C.S. §5703(1) in an unconstitutional fashion when Officer Lukart detained and arrested Plaintiff for recording Officer Lukart;
- b. compensatory damages against all Defendants, joint and severally, in an amount to be determined at trial;
- c. punitive damages against Defendants Ables, Lukart, and Stutler, in an amount to be determined at trial, for their wanton, reckless and callous disregard of plaintiffs' constitutional rights, as described hereinabove;
- d. an award for costs, expenses, and counsel fees pursuant to 42 U.S.C. § 1988; and
- e. such other relief as this honorable Court may deem just and deserving.

July 19, 2012

Respectfully submitted,

/s/ Glen S. Downey
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