

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

U.S. DISTRICT COURT
EASTERN DISTRICT-WI
FILED

STEVEN AVERY,
Plaintiff,

2011 NOV 30 P 2:22

v.

JON W. SANFILIPPO
CLERK

11-C-1093

Case No. _____

KENNETH KRATZ, IN HIS OFFICIAL AND
INDIVIDUAL CAPACITY;
JOHN DEDERING, IN HIS OFFICIAL AND
INDIVIDUAL CAPACITY;
WILLIAM TYSON, IN HIS OFFICIAL AND
INDIVIDUAL CAPACITY;
DANIEL KUCHARSKI, IN HIS OFFICIAL AND
INDIVIDUAL CAPACITY;
CALUMET COUNTY, WI, IN ITS OFFICIAL
AND INDIVIDUAL CAPACITY,
Defendants.

COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

Plaintiff, Steven Avery, a state prisoner, *pro se*, for his complaint against defendants: Kenneth Kratz; John Dederling; William Tyson; Daniel Kucharski; and Calumet County, WI, brings a civil rights action for damages and declaratory relief under 42 U.S. C. § 1983. This complaint alleges that the plaintiff's rights under the 4th Amendment of the United States Constitution to be free from unreasonable search and seizure were violated by those acting under color or state law.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(3) and (4). The matters in controversy arise under 42 U.S.C. § 1983.

(a) Venue properly lies in this District pursuant to 28 U.S.C. Section 1391(b)(2), because the events giving rise to this cause of action occurred in Calumet County, Wisconsin

and Manitowoc County, Wisconsin, which are located within the Eastern District of Wisconsin.

I. PLACE OF CONFINEMENT

2. Plaintiff is currently confined at:

Wisconsin Secure Program Facility

1100 Morrison Dr.

P.O. Box 9900

Boscobel, WI 53805

3. The claim stated herein is the result of actions of those acting under color of state law and not as a result of a condition of confinement. There is a grievance procedure in the Calumet County jail that plaintiff was located at however there was no filing of a grievance with the jail as the claim does not relate to the jail or conditions of confinement.

4. Plaintiff has filed no other lawsuits dealing with the same facts involved in this action.

II. PARTIES

5. Plaintiff Steven Avery DOC #122987, SSN # (last four digits) 6920, was at all times relevant hereto, a pretrial detainee in the custody of the Calumet County Sheriff. At the time of the events relevant hereto, plaintiff was incarcerated in the Calumet County jail.

6. Defendant Kenneth Kratz was at all relevant times herein the District Attorney for the Calumet County District Attorney's office located at: 206 Court St., Chilton, WI, 53014-1127. He was also the lead prosecutor in the criminal case against the plaintiff. He is sued individually.

7. Defendant John Dederling was at all relevant times herein an investigator for Calumet County Sheriff's Department located at: 206 Court St., Chilton, WI, 53014. He is sued individually.

8. Defendant William Tyson, was at all relevant times herein a Sergeant with the Calumet County Sheriff's Department located at: 206 Court St., Chilton, WI, 53014. He is sued individually.

9. Defendant Daniel Kucharski was at all relevant times herein an officer for the Manitowoc County Sheriff's Department located at: 206 Court St., Chilton, WI, 53014. He is sued individually.

10. Defendant the County of Calumet, Wisconsin runs the Calumet County Sheriff's Department which was run by policy a maker/administrator, at all relevant times herein and is located at 206 Court St., Chilton, WI, 53014. The Calumet County Sheriff's Department has the responsibilities of setting policy and custom, supervising, and instructing its officers in acting under color of state law. In the present case, the County of Calumet, by its policy or custom, either allowed or was deliberately indifferent to its officers executing illegal searches and seizures. It is sued individually.

III. PREVIOUS LAWSUITS

11. Plaintiff has not begun other lawsuits in state or federal court relating to the facts involved in this action.

12. Plaintiff has not begun other lawsuits in state or federal court relating to his imprisonment. Plaintiff had pursued appeal and is currently awaiting an answer from the Wisconsin Supreme Court.

IV. STATEMENT OF CLAIM

13. On November 9th, 2005 defendant Dederling presented an "AFFIDAVIT FOR SEARCH WARRANT" to defendant Kratz of the Calumet County District Attorney's office. Defendant Kratz notarized the document.

14. Defendant Dederling then obtained a “SEARCH WARRANT” from Calumet County Circuit Court judge Thomas Gritton for a “Wood cabinet/book case” from the bedroom of the plaintiff.

15. On December 11th, 2005 defendant Tyson submitted a “RETURN OF SEARCH WARRANT” for four items taken from the plaintiff.

**COUNT ONE: THE PLAINTIFF WAS DENIED HIS RIGHTS TO
BE FREE FROM UNREASONABLE SEARCH AND SEIZURE**

LEGAL THEORY

16. Plaintiff contends that his 4th Amendment rights were violated when 1) a defective warrant was executed to obtain his property; and 2) the seizure expanded beyond the warrants legal parameters.

17. The warrant is defective because probable cause was not established in the affidavit. Only point # 7 of the affidavit relates to the evidence sought to be obtained. However, there was no actual reason for the book case to be taken. How this was actual evidence in the present case is clearly not established. The Supreme Court defines probable cause to search as “a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Instead of showing probable cause, the language reflects that of a fishing expedition. This is a practice expressly forbidden by the 4th Amendment. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Defendant’s Kratz and Dederling should have been aware of this issue and corrected it.

18. Further, the warrant is defective because there is no indication that the affidavit was ever seen by the issuing judge. The affidavit is witnessed by the actual prosecutor in the case, defendant Kratz. **Wis. Stat. § 968.23** actually gives an example of an affidavit for a warrant. At the bottom of the example the legislature took the time to put in the text “..., Judge of the ... Court.” Clearly the legislature saw that the United States Constitution requires that a neutral

magistrate be accountably placed between the State and a defendant. Without a way of knowing that the judge was actually involved in the process of establishing probable cause the procedure should be invalidated and the warrant found to be illegal. Defendants Kratz and Dederling should have been aware of this issue and corrected it. It is noteworthy that this was a continual practice in Calumet County as all of the warrants issued in the plaintiff's criminal case had affidavits sworn out before defendant Kratz.

19. Lastly, writs are required to have a seal of the court, pursuant to **Wis. Stat. § 753.04**, and public documents not under seal are not self-authenticating, pursuant to **Wis. Stat. § 909.02(2)**; in turn, those public documents under seal are self-authenticating. **Wis. Stat. § 909.02(1)**. Because the warrant lacks a seal it is not a valid warrant.

20. As to illegal expansion of the warrant, even if the warrant were legal the executing officers went outside the parameters of the warrant by seizing: 4 paperback books, a handset for cordless telephone, and an AC power cord. See Exhibit 3. The particularity requirement of the 4th Amendment "prevents the seizure of one thing under a warrant describing another." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1972)). Defendants Tyson and Kucharski violated the plaintiff's rights when they seized these items while acting under color of state law.

21. Defendant the County of Calumet was responsible, through its policy maker/administrator, for setting the policies and/or customs inside the municipality, oversight and training of its personnel, and is responsible for the violations herein as much as the County, through its agency(s), have neglected to check the work its officers and be sure that they were properly trained or were acting within the legal boundaries of plaintiff's rights as well as applicable law. In the plaintiff's criminal case there were several search warrants issued, none of which contains

a seal by the court as required under Wis. Stat. § 753.04. And all of the affidavits for these warrants were notarized by the prosecutor, defendant Kratz, and not by the issuing judge. This shows by negative inference that the policy or custom of the County was to *not* ensure that warrants were properly obtained from the Court before executing them.

RELIEF REQUESTED

22. WHEREFORE, plaintiff respectfully requests judgment in his favor with an order declaring that the defendants have acted in violation of the United States Constitution and violated his rights. Plaintiff further requests a judgment in his favor for nominal damages in an amount not less than \$1 for every item illegally taken, jointly and severally against defendants. Plaintiff additionally requests punitive damages in the sum of \$150,000 or what amount the Court may deem just and proper, jointly and severally against defendants. Finally, plaintiff requests any attorney fees and court costs that may accrue and any other such relief as it may appear plaintiff is entitled.

I declare under penalty of perjury that the foregoing is true and correct.

Complaint signed this November day of 28, 2011.

Steven Avery # 122987
Steven Avery – Prisoner ID #122987