

STEVEN AVERY,
Plaintiff,

v.

MARK WIEGERT, IN HIS OFFICIAL AND
INDIVIDUAL CAPACITY;
KENNETH KRATZ, IN HIS OFFICIAL AND
INDIVIDUAL CAPACITY;
WENDY BALDWIN, IN HER OFFICIAL AND
INDIVIDUAL CAPACITY;
LYNN ZIGMUNT, IN HER OFFICIAL AND
INDIVIDUAL CAPACITY;
PATRICK WILLIS, IN HIS OFFICIAL CAPACITY;
CALUMET COUNTY, WI, IN ITS OFFICIAL
AND INDIVIDUAL CAPACITY;
MANITOWOC COUNTY, WI, IN ITS OFFICIAL
AND INDIVIDUAL CAPACITY,
Defendants.

2012 JAN 18 P 3:51
JON A. SANFILIPPO
CLERK
12-C-0052
Case No. _____

COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §§ 1983, 1985, AND 1986

Plaintiff, Steven Avery, a state prisoner, *pro se*, for his complaint against defendants: Mark Wiegert, Kenneth Kratz, Wendy Baldwin, Lynn Zigmunt, Patrick Willis, Calumet County, WI and, Manitowoc County, WI, brings a civil rights action for damages, declaratory relief, and injunctive relief under 42 U.S.C. §§ 1983, 1985, and 1986. This complaint alleges that the plaintiff's rights under the 1st, 4th, and 14th Amendments of the United States Constitution including but not limited to freedom from unreasonable search and seizure, privacy, privacy in association, equal protection, and due process 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, 1985, and 1986.

- (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, Winnebago 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 Mark Wiegert 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.

7. 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.

8. Defendant Wendy Baldwin was at all relevant times herein an officer with the Calumet County Sheriff's Department located at: 206 Court St., Chilton, WI, 53014. She is sued individually.

9. Defendant Lynn Zigmunt was at all relevant times herein the Clerk of Court for Manitowoc County located at: 1010 Eighth Street, Manitowoc, WI, 54221-2000. She is sued individually.

10. Defendant Patrick Willis was at all relevant times herein a Judge in Manitowoc County, WI, Circuit Court, Branch One, located at: 1010 Eighth Street, Manitowoc, WI, 54221-2000. He is sued individually.

11. 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.

12. Defendant the County of Manitowoc, Wisconsin runs the Manitowoc County Court House which was run by policy a maker/administrator, at all relevant times herein and is located at: 1010 Eighth Street, Manitowoc, WI, 54221-2000. Manitowoc County has the responsibilities of setting policy and custom, supervising, and instructing its employees in acting under color of state law. In the present case, the County of Manitowoc, by its policy or custom, either allowed

or was deliberately indifferent to its knowledge of officers executing illegal searches and seizures. It is sued individually.

III. PREVIOUS LAWSUITS

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

14. Plaintiff has not begun other lawsuits in state or federal court relating to his imprisonment.

IV. STATEMENT OF CLAIM

15. On October 6th, 2006 defendant Wiegert presented an “AFFIDAVIT FOR SEARCH WARRANT” (Exhibit 1) to defendant Kratz of the Calumet County District Attorney’s office. Defendant Kratz notarized the document.

16. Defendant Baldwin then obtained a “SEARCH WARRANT” (Exhibit 2) from Manitowoc County Circuit Court judge Patrick Willis for “Any and all digital images stored in the internal memory drive” from a “Kodak Easyshare 2730 digital camera, serial #KCKEP51101866.” The warrant required to return any evidence that was found in the camera to the Court “within forty-eight hours of service...”

17. On October 13th, 2006, seven days later, defendant Wiegert submitted a “RETURN OF OFFICER” (Exhibit 3) for the Kodak Easyshare noted in the affidavit and warrant.

**COUNT ONE: THE PLAINTIFF WAS DENIED HIS RIGHTS TO
BE FREE FROM UNREASONABLE SEARCH AND SEIZURE BY
THOSE ACTING UNDER THE COLOR OF STATE LAW**

LEGAL THEORY

18. Plaintiff contends that his rights were violated when a defective and expired warrant was executed to obtain his property. Plaintiff asserts that the warrant was defective because 1) probable cause was not established in the affidavit; 2) the warrant had expired; 3) the warrant

was open ended and general; and 4) the warrant did not have a seal of the court. Further, plaintiff contends that his rights were violated by the taking and maintaining of his camera beyond any reasonable period of time, as the camera was to be searched but not seized.

19. The affidavit does not establish a basis to believe that the camera had evidence of a crime contained within. The affiant notes that a witness, Jodi Stachowski, had shared that she had been in possession of a camera that the plaintiff owned. But the affidavit also notes that she hadn't seen anything in the camera that would reasonably infer that evidence of a crime was contained in the memory of the camera. The affiant instead asks the Court to consider his conclusory belief that there could be evidence of a crime in this camera. The affiant based his belief on the fact that he had conferred with a Special Agent who suggested that it is "not unusual" for pictures of a crime being committed to be stored by a perpetrator.

20. In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), the United States Supreme Court decided that "Based on the conclusory statement of the police investigator that other similarly obscene materials would be found at the store, the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. *Roaden v. Kentucky*, 413 U.S. 496, 502 (1973); *Stanford v. Texas*, [379 U.S. 476] at 485 [1965]; *Marcus v. Search Warrant*, [367 U.S. 717], at 732 [1961]." *Id.* at 325.

21. To help establish that a sexual assault had occurred, defendant Wiegert attached an amended complaint. Here it is presented that Brendan Dassey stated he and the plaintiff sexually assaulted Teresa Halbach. However, there is no evidence in the attached Amended Criminal Complaint that Dassey ever mentioned a key piece of the puzzle, namely: whether there were pictures taken during or after the alleged rape, murder, and mutilation of Teresa Halbach's body.

The mere fact that someone has shared that a sexual assault occurred doesn't establish the reasonable probability that a picture had been taken in the process, much less on a particular camera.

22. 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 that the camera has evidence inside it, the language in the affidavit 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). There was no indication from any source, other than a State Special Agent, who wasn't even assigned to this case, that there was a reasonable probability of evidence of a crime in this camera. Law enforcement was abusing official process to fish for evidence. Defendants Kratz, Willis, and Wiegert should have been aware of this issue and corrected it.

23. 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** 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 was invalid and the warrant is illegal. The Seventh Circuit stated in *United States v. Stefonek*, 179 F.3d 1030 (CA7 1999), “The police or other law enforcement officer who is seeking the warrant must submit *to the judicial officer* a precise description of what is sought to be seized...” *Id.* at 1033. (Emphasis added).

24. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court recognized that the pre-search proceeding was *ex parte* and that a defendant could challenge the information placed before the court. *Id.* at 169. In the present case there is no record that defendant Wiegert was sworn before the Court in presenting his evidence in pursuit of the warrant. Holding an evidentiary proceeding with the actual prosecutor doesn't meet the mandates of the Constitution. See *Coolidge*, 403 U.S. at 450, 454-55; *Johnson v. United States*, 333 U.S. 10 (1948); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967). Defendants Kratz, Willis, and Wiegert 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.

25. Plaintiff points out that the warrant was issued on October 6th, 2006 but the return shows that the warrant had already expired. The return reflects a date of the "13th day of October 2006" in which defendant Wiegert informed the Court that he had in his possession the camera. The return does not reflect that any of the stored pictures had even been viewed. Indeed, defendant Wiegert stated, referring to the camera, that "the same now in my possession subject to the direction of the court."

26. But retention of the camera, or even pictures that weren't evidence for that matter, was not directed by the court in the warrant. The warrant directed that it "allow a duplicate copy of the internal memory be made to review and analyze all digital images recovered." This was to be done inside of the forty-eight hours that the warrant was issued. The warrant was expired and the camera should have been returned whether or not the "digital images" were recovered.

27. Further, the warrant expressly points to the authority of the Court in the above quoted command where it was stated "...to be dealt with *according to law*." (Emphasis added).

Defendant Willis violated the plaintiff's rights when he did not deal with the illegal seizure "according to law."

28. Additionally, this was a general warrant. This warrant offered no indication as to how evidence was to be separated from non-evidence. See *United States v. Klein*, 565 F.2d 183, 188 (CA1 1977). The warrant was open ended and left discretion to the officer(s) to consider what was to be evidence. The 4th Amendment requires that a warrant be as particular as possible. See *United States v. Kow*, 58 F.3d 423, 427 (CA5 1995) ("Generic classification in a warrant are acceptable only when amore precise description is not possible." *United States v. Cardwell*, 680 F.2d 75, 78 (CA9 1982) (quoting *United States v. Bright*, 680 F.2d 804, 812 (CA5 1980))). And nothing should be left to the officer's discretion. *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963), see also *United States v. Savaco*, 761 F.2d 292, 298-99 (CA6), cert denied, 474 U.S. 852 (1985) (The particularity requirement eliminates the "danger of unlimited discretion in the executing officer's determination of what is subject to seizure ..."). Also, "A warrant limiting a search to evidence of the violation of a certain statute may be overbroad because officers executing a warrant should not be left to interpret a statute." 36 Geo. L.J. Ann. Rev. Crim. Proc. (2007), at 31-32. See *Rickert v. Sweeny*, 813F.2d 907, 909 (CA8 1987) (warrant insufficiently particular because it authorized seizure of business records showing violation of general conspiracy and tax evasion statutes).

29. 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.

30. Defendant Lynn Zigmunt was responsible for the violation stated herein in that she was aware that the officers went outside the scope of the warrant and did nothing about it. Further, she should have noted that the return was dated seven days past the issuing date of the warrant, making the execution of the warrant illegal since the warrant had expired. Her awareness is evident in that she stamped the warrant and warrant's return.

31. Defendant the County of Manitowoc 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 Clerk of Court and be sure that she were properly trained or were acting within the legal boundaries of plaintiff's rights as well as applicable law. In particular, the Clerk handled many of the warrants in the plaintiff's criminal case and did nothing concerning the lack of a seal or the fact that the Court had not seen the affidavits.

32. 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.

33. Further, Calumet County actually withheld the plaintiff's property by storing it, despite the fact that the warrant didn't authorize retention of the camera.

**COUNT TWO: THE PLAINTIFF WAS DENIED HIS RIGHT TO
PRIVACY**

LEGAL THEORY

34. Plaintiff contends that his rights were violated when a defective warrant was executed to obtain his property. A person has a right of "freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). This freedom is protected by the First Amendment, which imposes limitation on government. The Fifth Amendment also "reflects the Constitution's concern for ... '... the right of each individual "to a private enclave where he may lead a private life.'"" *Tehan v. Shott*, 382 U.S. 406, 416 (1966).

35. The taking and viewing of the personal photographs invaded the privacy of the plaintiff.

RELIEF REQUESTED

36. 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 also requests that the Court issue an injunction ordering that the defendants return all items illegally seized and destroy all digital copies of pictures or other data obtained through this illegal seizure. Plaintiff further requests a judgment in his favor for nominal damages in an amount not less than \$1 for every picture viewed and nominal damages in an amount not less than \$1 for the taking and retaining of his camera, and \$1 for every day that the camera was illegally held, jointly and severally against defendants. Plaintiff additionally requests punitive damages in the sum of \$50,000 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 17 day of January, 2012.

Steven Avery
Steven Avery – Prisoner ID #122987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STEVEN AVERY,
Plaintiff,

v.

Case No. **12-C-0052**

KENNETH KRATZ, ET AL.,
Defendants.

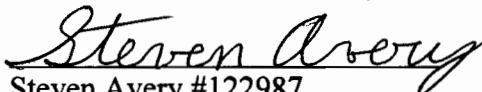
DECLARATION OF AUTHENTICITY OF DOCUMENTS AND STATEMENT

I, Steven Avery, declare that:

1. I am the *pro se* plaintiff in the above-entitled matter.
2. I hereby certify that all exhibits presented with my complaint for the above-entitled matter are all true and accurate representations of the original documents as I have received them.
3. I declare that the events presented in my complaint for the above-entitled matter are true and accurate.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing statements are true and correct.

Date: 1-17-2012



Steven Avery #122987
Wisconsin Secure Program Facility
P.O. Box 9900
1100 Morrison Dr.
Boscobel, WI 53805