

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No.

97 - 11743 MLW

Michael Elbery,
 plaintiff

Daniel Sklut

James Carlin

Stephen Faucher

Carl Hanson

Chester Johnson

James Hurley

Wayne Sampson

Robert McGinley

COMPLAINT - Amended

The Town of Shrewsbury,
 defendants

The plaintiff, Michael Elbery, complaining of the defendants respectfully alleges:

Introduction

This is a complaint against eight members of the Shrewsbury Police Department for violating numerous constitutional rights of the plaintiff, Michael Elbery. The defendants in conspiracy violated the plaintiff's constitutional rights by falsely arresting , imprisoning and maliciously prosecuting the plaintiff for the sole purpose of injuring the plaintiff by insuring that the plaintiff was in prison when the appeal of an attempted mayhem conviction was being heard by the Massachusetts Appeals Court. In addition the Shrewsbury Police illegally searched the plaintiff's leased property and illegally seized his belongings, stealing and damaging other property items. The Shrewsbury Police defendants have been on an ongoing conspiracy to cover-up these criminal acts.

Jurisdiction

1. This action is brought pursuant to 42 U.S.C. s. 1983 and the Fourth and Fourteenth Amendments to the U.S. Constitution. Jurisdiction is founded on 28 U.S.C. s. 1331 and s. 1343 and the aforementioned constitutional and statutory provisions..Plaintiff further invokes the pendant jurisdiction of this Court to hear and decide claims arising out of state law sounding in tort.

Parties

2. The plaintiff is Michael Elbery, bom in the United States of America, who resides

at 168 Fairfield St., Needham, Mass.

3. The defendant's Lieutenant Daniel Sklut, Sergaent James Carlin, Sergaent Stephen Faucher, Sergaent Carl Hanson, Sergaent James Hurley, Sergaent Chester Johnson, Lieutenant Wayne Sampson were at all times relevant to the allegations of this complaint employed as police officers by the Town of Shrewsbury, (hereinafter defendant officers)

4. The defendant Robert McGinley,. (hereinafter the chief), was at all times relevant to this complaint Chief of Police of the Town of Shrewsbury and its chief policymaker. He is responsible for the practices , conduct and policies of the Shrewsbury Police Department and all its members including adequate hiring, testing, training, instructing, supervising , controlling, investigation, and disciplining of its officer members.

5. At all times relevant to this complaint the defendant officers and chief were acting under the color of law, that is , under the color of the statutes, ordinances, regulations; policies, customs, and usages of the State of Massachusetts and the Town of Shrewsbury.

6. The defendant officers and chief are being sued in their official and individual and supervisory capacity.

7. The defendant Town of Shrewsbury was at all times relevant to this complaint a municipal corporation duly established under the laws of the Commonwealth of Massachusetts.

Statement of Facts

8. The plaintiff was arrested on 9-29-92 for assault and mayhem, on 1-20-93 there was no probable cause found on these charges, by Judge Milton Raphelson.

9. The plaintiff was indicted and convicted of attempted mayhem on 7-2-93, the prosecution alleging a thumb being the weapon, in Worcester Superior Court, Judge Daniel Toomey presiding.

10. The plaintiff was sentenced to 10 years in a Massachusetts State Prison and released pending appeal on 7-14-93.

11.The alleged victim of the alleged attempted mayhem was off-duty Westboro police

officer Tom King, .the supposed criminal incident resulting in the plaintiff's conviction occurred at the Winner's Circle Bar and on Shrewsbury St., Worcester, Mass. where both King and the plaintiff as well as King's friends were present.

12. The plaintiff had been arrested on over a dozen criminal charges from 1985-1992 by the Shrewsbury and Worcester Police all resulting in dismissals and not guilties as the arrests were meritless and false, no civil suits were undertaken by this plaintiff.

13. The plaintiff was a barroom owner in Worcester from 1983 through 1992 and was an outspoken critic of the police, Worcester License Commission, and Worcester D.A.'s office.

14. Various Worcester police officers were committed to putting the plaintiff out of business as they had threatened on numerous occasions to theplalntiff, their method was to convict on a felony.

15. The plaintiff rented a garage style storage unit from E-Z Mini Storage Inc., (E-Z) located on Route 9, Shrewsbury , Mass.

16. On the evening of 8-4-94 there was an arson fire at one of four buildings at E-Z, in which building the plaintiff's unit was located, causing damage to multiple storage units rented by various E-Z customers, fire damage amounted to over \$2,000,000.

17. The plaintiff had stored in his unit various personal items including a gun collection and car prior to and on August 4-5, 1994.

18. The plaintiff's pad lock was cut on the plaintiff's storage unit door at some time prior to his arrest on 8-5-94.

19. There was no fire in the plaintiff's unit, number 341, nor was there any fire damage to the plaintiff's items inside the unit, this being one of the few units not destroyed in C building at E-Z on August 4-5, 1994.

20. The plaintiff was arrested by the defendant officers at 5:00 p.m. on 8-5-94 on 5 violations of Mass. C.269 s. 10h ^possession of firearms) and 1 violation of Mass. c.269 s.10A (carrying of firearms).

21. The arrest by said defendant's was made in violation of Massachusetts law as the plaintiff was licensed by Massachusetts law to possess guns and there was per Massachusetts law no carrying of firearms by the plaintiff.

22. On or about March 1995 the Worcester D.A.'s office extended through the plaintiff's then attorney wishes that the plaintiff agree to a dismissal on all charges of August 5, 1994.

23. The arrest by said defendant was made without probable cause and maliciously for the sole purpose of imprisoning the plaintiff and insuring that the plaintiff was imprisoned during the review of his appeal on the attempted mayhem conviction before the Massachusetts Appeals Court.

24. The appeal of the plaintiff's 7-2-93 conviction was decided against the plaintiff (affirmed) on 1-20-95. A meritorious motion for a new trial has been produced by the pro se plaintiff.

25. On April 3, 1995 the plaintiff went to trial on said gun charges at Worcester District Court and was found not guilty on all charges by Judge Zide.

26. Not only did the plaintiff have a license to possess firearms in Massachusetts on 8-5-94 but the Shrewsbury Police issued the license and were well aware the plaintiff possessed such.

27. The prosecution, police or representatives of the District Attorney's Office did not appear at the trial on 4-3-95, unbelievably but true, there was not one word spoken by the prosecution at trial.

Count I

False Arrest, Continuation of False Arrest, False Imprisonment, Violation of the Fourth and Fourteenth Amendment of the U.S. Constitution.

28. The plaintiff incorporates paragraphs 1 through 27 of this complaint as though fully set forth herein.

29. The defendant officers acting in bad faith, with malice towards the plaintiff with no probable cause falsely arrested the plaintiff on &un charges knowing that

the plaintiff was not in violation of any Massachusetts laws, the officer defendants maintained and continued the false arrest against the plaintiff.

30. Upon arresting the plaintiff, as above, the defendant officers falsely and unlawfully imprisoned the plaintiff and he remained in prison until 7-24-95.

31. The plaintiff remained in a 7'x4' jail cell for 3 days at the Shrewsbury Police Station, and in order to publicize the arrest and humiliate the plaintiff the officer defendant's positioned a photographer from the Worcester T&G in the woods behind the police station in order to photograph the plaintiff exiting the back door of the police station after being locked up in said jail cell 3 days in hot August weather.

32. The chief was a participant in this false arrest having full knowledge of the false arrest and imprisonment from its initiation and took no action to prevent, intercede or stop the false arrest and imprisonment of the plaintiff.

33. Said false arrest and false and continued imprisonment was in violation of the plaintiff's rights to be free of an unreasonable and illegal seizure and arrest except with probable cause via the Fourth Amendment of the U.S. Constitution and deprivation of liberty without Due Process via the Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. s. 1983.

34. As a result of the above named defendant's tort and Constitutional violations enumerated in items 28-33 the plaintiff was injured and the plaintiff seeks damages for severe emotional distress and mental anguish, continued severe emotional distress and mental anguish, embarrassment and humiliation, injury to character and reputation, outrage, indignity, humiliation, personal insult, loss of ability to earn a living, future loss of ability to earn a living, interruption of business, inability to plan for the future, loss of society with his wife resulting in divorce, loss of freedom, incarceration, injury sustained while in prison, unfit conditions of confinement, insufficient and improper food during imprisonment, discomfort, pain and suffering. The plaintiff also seeks punitive damages for constitutional violations.

Count II

Malicious Prosecution, Violation of the Fourth and the Fourteenth Amendment of the U. S. Constitution.

35. The plaintiff incorporates paragraphs 1-34 of this complaint as though fully set forth herein

36. The defendant officers and chief initiated and continued the prosecution of the plaintiff with no probable cause and with malice resulting in the plaintiff being found not guilty on all charges, the outcome being legally and finally determined in the plaintiff's favor.

37. The prosecution of these false charges were initiated and continued by the named defendants in 36, above, maliciously with no probable cause and in conspiracy with the Worcester D.A.'s office.

38. The named defendants in item 36 in conspiracy with the Worcester D.A.'s office knew they were acting contrary to Massachusetts law by prosecuting, maintaining and continuing the prosecution against the plaintiff but did so in order to harm the plaintiff and insure that the plaintiff was imprisoned during the Mass. Appeals Court review of the plaintiff's 7-2-93 conviction for attempted mayhem.

39. Said actions in items 35-38 violated the plaintiff's right to be free from unreasonable seizure under the Fourth Amendment of the U.S. Constitution and deprived the plaintiff of liberty without Due Process in violation of the Fourteenth Amendment all under 42 U.S.C. s. 1983.

40. The above named defendant's tort and Constitution violations enumerated in items 35-39 caused the plaintiff to be injured and the plaintiff seeks damages as listed in item 34 and in addition the plaintiff seeks damages for out of pocket expenses for attorneys fees of \$9,500 and related legal expenses of \$1,000.

Count III

Intentional Infliction of Emotional Distress

41. The plaintiff incorporates paragraphs 1-40 as though fully set forth here.

42. As a direct result of the defendants' acts as itemized in this complaint , the chief and officer defendants in agreement and in conspiracy with each other caused the plaintiff to suffer severe emotional distress, extreme pain and suffering, and mental anguish and embarrassment of such severity and nature that no reasonable person could or should be expected to endure and the above defendants knew or should known that their extreme and outrageous conduct would cause such severe suffering.

Count IV

Conversion of Plaintiff's Possessions- Violation of the Fourteenth Amendment, Deprivation of Property Without Due Process under 42 U.S.C. s. 1983.

43. The defendant officers and chief confiscated all the plaintiff's guns , gun magazines, and related accessories from the plaintiff's storage unit.

44. The above defendants towed the plaintiff's car from the plaintiff's storage unit for no legal purpose and decided to steal.the car because it was involved in a crime.

45. The plaintiff did get returned the car to his family after approximately six weeks of storage by the defendants, this after continued demand by the plaintiff.

46. Upon return in May 95 of the plaintiff's gun collection and related gun items to the plaintiff's family the plaintiff determined that.21 collector item gun magazines were stolen by the officer defendants.

47. The defendant officers stole these valuable and now rare gun magazines as they were never inventoried via police search documentation or returned to the plaintiff.

48. Said action, items 43-47, is a violation of the Fourteenth Amendment, deprivation of property without Due Process, and illegal seizure via the Fourth Amendment of the U.S. Constitution.

a. In the alternative the actions itemized in 43-47 constitute conversion under state common law.

49. Said action and violations of the Constitution or tort in items 43-48a injured the plaintiff and the plaintiff seeks damages of \$650 for the towing and storage charges he had to pay to get rightful return of his car from the defendants and \$2,000 for theft of the plaintiff's gun magazines. In addition the plaintiff seeks \$500 for damage caused by the defendants to the plaintiff's car upholstery and driver's side door.

Count V

Conspiracy to Perjure and Procure Perjury in Order to - Conspire to Cover-up Malicious Prosecution and Illegal Search and Seizure - In Violation of Due Process of the Fourteenth Amendment of the U.S. Constitution all Under 42 U.S. s. 1983.

50. The plaintiff incorporates paragraphs 1-49 of this complaint as though fully set forth herein.

51. The officer defendants and chief participated in and swore out an affidavit in support of a search warrant for the plaintiff's storage unit on 8-5-94.

52. The above defendants were issued a search warrant on 8-5-94 based on their sworn statement that the guns could be seen in clear and obvious view from outside the storage unit.

53. It being humanly impossible to see the guns, as described in 51, as the guns were located in the car which had black tinted windows and in turn the guns were in boxes wrapped in black plastic, the defendants knowingly conspired to lie to obtain the search warrant.

54. The above defendants knowing they would be caught in their lie, as in items 50-53, the named defendants changed their story at the search warrant suppression hearing of 10-21-94 testifying that the plaintiff asked them and gave them permission to enter the plaintiff's storage unit, this is conspiracy by the defendants to perjure and procure perjury.

55. The conspiracy to perjure and procure perjury by the officer defendants and chief was done in order to cover-up the malicious prosecution and cover-up the illegal search and seizure of the plaintiff and his property.

56. The named defendants in items 50-55 further maintained the charges against the plaintiff knowing the plaintiff to be innocent of all charges of 8-5-94, continuing their cover-ups described in item 50-55, malicious prosecution and illegal search and seizure,

57. The above wrongful and criminal actions by the defendants in items 50-57 are not only the tort of conspiracy by the defendants against the plaintiff but a violation of Substantive (arbitrary and outrageous government actions) and Procedural Due Process and in addition a deprivation of the plaintiff's Due Process right to have access to the courts all under the Fourteenth Amendment and 42 U.S.C. S. 1983.

58. Said action in items 50-57 caused injury to the plaintiff and the plaintiff seeks damages as enumerated in item 34 and punitive damages.

Count VI

Malicious Abuse of Process

59. The plaintiff incorporates paragraphs 1-58 of this complaint as though fully set forth herein.

60. The defendants arrested the plaintiff without probable cause and with malice for the sole purpose of hurting and injuring the plaintiff and insuring that the plaintiff was behind bars during the Massachusetts Appeals Court review of the plaintiff's appeal on the conviction of 7-2-93.

61. The defendants used the false arrest and malicious prosecution, .process, to accomplish an unlawful and ulterior purpose for which process was not designed or intended.

62. Such actions by the defendants constitute a malicious abuse of process.

63. The plaintiff was injured by the defendant's malicious abuse of process and seeks damages as in item 34.

Count VII

Conspiracy to Violate the Plaintiff's Constitution Rights

64. The defendant's as specifically indicated in counts I,II,IV,V, of this complaint conspired and did deprive the plaintiff of his constitutional rights in further violation of Due Process of the Fourteenth Amendment of the U.S. Constitution all under 42 U.S.C. s.1983.

65. Said conspiracy as in item 64 injured the plaintiff and the plaintiff seeks damages as in item 34 and seeks punitive damages.

Count VIII

Supervisory Liability of Police Chief Robert McGinley and the Officer Defendants under 42 U.S.C. s. 1983 - In the Alternative Negligence.

66. The Chief of the Shrewsbury Police Dept., Robert McGinley, is liable in his supervisory capacity under 42 U.S.C. s.1983 for the violations complained of in this suit as:

a. he had knowledge of the wrongful actions and participated actively in them,

b^ he failed to take any action to investigate, intervene, or otherwise alleviate the wrongful police conduct complained of in this suit,

c. the chief sanctioned, approved and ratified as chief policymaker of the Shrewsbury Police Dept. for the Town of Shrewsbury the violations in this complaint,

d. The chief failed to properly supervise, instruct, train, control or discipline the members of the Shrewsbury Police Dept. and in particular the defendant officers complained of in this action so as to prevent the violations as described in this suit, if for some unexplained reason the chief did not know of the violations in this complaint he should have,

e. As a result of a-d above, the chief, in his supervisory capacity, caused the violations as stated in this complaint by making the described violations in this complaint by members of the Shrewsbury Police Department to be official policy, as the chief allowed this behavior complained of to be the custom, policy, and practice of the Shrewsbury Police Dept. and the Town of Shrewsbury, the chief being the official policy maker of the Shrewsbury Police Dept.

67. In the alternative the chief is liable for negligence as described in items 66a-d under state tort laws.

68. The defendant officers, each, are all liable in their supervisory capacity as:

a. they are all ranking members of the Shrewsbury Police Dept. as they comprise a majority of the ranking members of the Shrewsbury Police Dept.

b. the defendant officers wrongful behavior as itemized via this complaint constitutes custom and practice of the Shrewsbury Police Dept. as such behavior is widespread and represents policy of the Shrewsbury Police Department.

c. the officer defendants not only knowingly violated the plaintiff's rights, as in this suit, but failed to intervene, investigate or otherwise alleviate wrongful actions towards the plaintiff as itemized in this complaint, their actions collectively constitute supervisory authority and policy of the Shrewsbury Police Dept.

69. In the alternative the defendant officers in their supervisory capacity are liable for negligence as a result of the activities complained of herein under state tort laws.

70. The plaintiff was injured by the chief and defendant officers in their supervisory capacity and seeks damages as in item 34 and in addition punitive damages as allowed via 42 U.S.C. s. 1983.

Count IX

Municipal Liability of the Town of Shrewsbury under 42 U.S. s. 1983.

71. The Town of Shrewsbury allowed the Shrewsbury Police Dept. to be run and controlled by the defendant Chief Robert McGinley as its chief policymaker , McGinley's decisions, edicts, and acts were allowed by the Town of Shrewsbury to be official policy, practice, and custom of the Shrewsbury Police Dept. The Town of Shrewsbury is liable for the violations complained of herein as these violations were caused by the policies of the Town via its chief policymaker the Chief of Police, McGinley.

72. The defendant officers conduct in this claim, all being supervisory in nature and representing widespread and persistent custom represent official policy of the Town of Shrewsbury. This policy of the town of Shrewsbury caused the violations enumerated herein under 42 U.S. s.1983.

73. The Town of Shrewsbury is liable under 42 U.S. s.1983 as it implemented and sanctioned and adopted as official policy via custom and usage the actions complained of in this action including the failure to train , supervise , instruct, hire, control , and discipline the Shrewsbury Police Dept. members. This policy of the Town caused the violations complained of in this complaint.

74. The plaintiff being injured as a result of the Town of Shrewsbury's official policy as enumerated in this complaint are liable under 42 U.S.C. s. 1983 and the plaintiff seeks damages against the town of Shrewsbury as itemized in item 34 of this complaint. _____

Count X

A Continuation of a Series of Related Violations of the Plaintiff's Constitutional
Rights - Constituting One Episode

75. The violations per this complaint of the plaintiff's rights under the U.S. Constitution , 42 U.S.C. s. 1983 and common law tort are part of a series of continuing violations of the plaintiff's rights under the Constitution, Federal law and common law by the Shrewsbury Police in conjunction with the Worcester Police, the Worcester District Attorney's office and the Worcester County Court.

76. There is at this time one other complaint in Federal Court related to this conspiracy in 75 above and the plaintiff asks for a joinder of these two cases, (see U.S. -Mass. Dist. C.A. no. 97-11047-PBS).

77. The plaintiff asks for an injunction against the groups in items 75 from future groundless arrests, based on finger-pointing, say-so, and revenge by these groups, of the plaintiff.

78. The plaintiff is involved in several other civil suits in the Massachusetts Courts and is experiencing prejudice in the Massachusetts Courts due to this complaint and related civil actions and the plaintiff's pending motion for new trial resulting from the attempted mayhem conviction

79- The motion for new trial is grounded on ineffective assistance of counsel has compounded the prejudice to the plaintiff in the Massachusetts Courts.

80. Since the plaintiff is being deprived of the right to use the Massachusetts Courts without harassment and is experiencing unfair prejudice the plaintiff asks the Federal Court to oversee all the plaintiff's cases in the Massachusetts Courts or in the alternative take jurisdiction of all of the plaintiff's cases that are now pending and future cases.

Wherefore,

Plaintiff, demands judgement against the defendants
jointly and severally:

- | | |
|--|-------------|
| 1. Compensatory damages of | \$3,000,000 |
| 2. Punitive damages for Constitution violations in counts
I, II, IV, V, VII, VIII | \$3,000,000 |
| 3. Out of pocket legal expenses | \$10,500 |
| 4. Stolen property and automobile damages | \$3,150 |
| 5. Costs of this action | \$1,000 |
| 6. Other relief as this Court deems just, proper and equitable | |

7. Order to the Town of Shrewsbury to institute adequate hiring of proper personnel as police and in addition proper training, testing, disciplining, termination and supervision of the existing police in Shrewsbury in order to insure that the Shrewsbury Police are controlled by the people and that no other citizen will be targeted by the Shrewsbury Police who act as if the United States of America is officially a police state and the U.S. Constitution is superfluous.
8. An injunction as itemized in item 77 and a solution to the injustice suffered by the plaintiff in the Massachusetts Courts as in items 78-80.

PLAINTIFF, ELBERY , HERE DEMANDS A JURY TRIAL ON ALL ISSUES.

,pro se
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