

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG**

ELECTRONICALLY FILED Apr 09 2018 U.S. DISTRICT COURT Northern District of WV
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JOHN W. OREM,
SHER OREM, individuals,

Plaintiffs,

vs.

Civil Action No. 3:18-cv-50 (Groh)

MATTHEW D. GILLMORE, individually,
JOHN DOE, individually,

Defendant.

COMPLAINT

This complaint, brought pursuant to 42 U.S.C. Section 1983, the Fourth Amendment to the United States Constitution, arises out of the defendant's commission of an unreasonable search and seizure against the Plaintiff at his home on or about August 2, 2016 in Berkeley County, West Virginia, within the Northern District of West Virginia.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. 1331 and 1343.

PARTIES

1. The Plaintiffs, John W. Orem and Sher Orem, are husband and wife and were at all times relevant hereto residents of Berkeley County, West Virginia.
2. Defendant Matthew D. Gillmore was at all times relevant hereto a trooper with the West Virginia State Police and was at all times relevant hereto acting under the color of law, having an address of 409 Industrial Boulevard, Kearneysville, West Virginia 24530.

3. Defendant John Doe is upon information and belief, an employee of the West Virginia State Police, identity currently unknown.

FACTS

4. On the morning of August 2, 2016, Sher Orem called 911 due to her husband, John Orem, being found unresponsive in the main bathroom of their residence in Berkeley County, West Virginia. There is no way of knowing what specifically caused Mr. Orem's unconsciousness and collapse to the floor. The collapse was likely caused by a reaction of medications combined with high blood pressure and flu-like symptoms which Mr. Orem had been suffering. It was not caused by illegal drug use.

5. At that time, Mr. Orem was the Republican nominee for Sheriff of Berkeley County and was actively engaged in campaigning for the general election. Mr. Orem is a former police officer, and owns a number of local businesses in the Berkeley County area.

6. One of Mr. Orem's opponents in the election was a retired Captain of the Berkeley County Sheriff's Department, D. Scott Richmond. Upon information and belief, on August 2, 2016, Mr. Richmond's wife was employed by the West Virginia State Police as the dispatcher at the Martinsburg, West Virginia State Police detachment. She had worked at the Martinsburg detachment of the West Virginia State Police for over 20 years.

7. Following the arrival of emergency medical services at the Orem home, two state police troopers, including Defendant Gillmore, arrived at the home. They had been called to the home by one of the EMS workers, who speculated that the collapse could have been related to the ingestion of opioids. Following their arrival at the residence, Defendant Gillmore went out the front door onto the porch of the Orem home and was observed making a phone call and

having a discussion. When Gillmore returned inside, he entered the Orem home with the intention of searching for evidence of the use of illegal drugs.

8. The reason the EMS workers suspected opiates may be involved in the collapse is because the EMS workers were told that Mr. Orem had recently started taking prescription Percocet, which is a legal prescription opiate. Therefore, they suspected that Mr. Orem may have overdosed on opiates. The suspicion was not based on the presence of anything illegal at the scene. The EMS personnel administered Narcan. Mr. Orem became conscious a few minutes later. This occurred on the floor of Mr. Orem's bathroom, half inside the bathroom, and half outside the bathroom.

9. Within minutes of the administration of Narcan, Mr. Orem was conscious, coherent and able to walk on his own from the bathroom.

10. Only after Mr. Orem was completely recovered did Trooper Gillmore begin to search the Orem home for illegal drugs. There was no medical emergency at that point. Trooper Gillmore was not assisting with the medical treatment of Mr. Orem in any way. He was performing a Fourth Amendment search for contraband. Necessary medical treatment for opioid overdose is the same regardless of the specific opioid administered; i.e., airway management, cardiorespiratory support, and further medical intervention as indicated by the individual's condition following Narcan administration. There is no evidence that Mr. Orem was in further immediate medical danger once he regained consciousness.

11. Trooper Gillmore did not have a search warrant. Trooper Gillmore never requested consent to search from the residents of the home. Consent to search was never given to Trooper Gillmore by a resident of the home. Nor did Trooper Gillmore have probable cause to

believe a crime had been committed. The only information Gillmore had was knowledge that Narcan had been administered to Mr. Orem, and that Mr. Orem was the Republican nominee for Sheriff of Berkeley County.

12. Trooper Gillmore walked into the bathroom of the Orem home for the purposes of searching for contraband.

13. Plaintiff Sher Orem was present and objecting to Defendant Gillmore's entry and search of the bathroom.

14. In defiance of Sher Orem's objections, Trooper Gillmore forcibly closed the door to the bathroom, locking himself inside the bathroom so that he could search. At this time, John Orem was in the living room, and was conscious and speaking with EMS personnel. There was no legal reason for Gillmore to be in the bathroom.

15. Trooper Gillmore proceeded to search through the bathroom. In the cabinet Defendant Gillmore found a spoon, which he believed was related to heroin use. However, in general, it is not possible to visually identify white residue in a spoon with a reasonable degree of medical or scientific certainty in order to form probable cause to make an arrest.

16. Trooper Gillmore placed Mr. Orem under arrest for possession of heroin - even before the EMS workers could get Mr. Orem to sign a document acknowledging that he was refusing transportation to the hospital. Instead, Defendant Gillmore signed the refusal of transport document.

17. Trooper Gillmore did not question, nor did he attempt to question, any witness prior to arresting Mr. Orem. He chose not to seek an arrest warrant prior to arresting Mr. Orem. Trooper Gillmore had no probable cause to believe that Mr. Orem had ever been in possession of

heroin prior to arresting him on August 2, 2016. Trooper Gillmore did not observe Mr. Orem in possession of heroin on August 2, 2016. Trooper Gillmore did not conduct any field test of the spoon prior to arresting Mr. Orem. Trooper Gillmore did not obtain any laboratory testing of the spoon for heroin prior to arresting Mr. Orem - even though he could have. Mr. Orem was never subsequently convicted of possession of heroin. Mr. Orem was never in possession of heroin.

18. Mr. Orem was then taken to the West Virginia State Police detachment by Defendant Gillmore. Prior to Mr. Orem being arraigned by a magistrate, an employee of the West Virginia State Police detachment leaked news of Mr. Orem's arrest to the local media. Reporters with cameras were present at the Berkeley County Magistrate Court as Defendant Gillmore walked Mr. Orem into the court for his arraignment. Moreover, a photograph of Mr. Orem in custody inside the West Virginia State Police detachment began to immediately circulate on social media. Due to Mr. Orem's status as the Republican nominee for Berkeley County Sheriff, the national media soon picked up the story of his arrest. The photograph of Mr. Orem in handcuffs, shackled, inside the State Police detachment could have only been taken by an employee of the West Virginia State Police because it is a photograph of the surveillance camera monitor. It was not taken from a position a member of the public could have viewed.

19. Both Mr. Orem's defense attorney, as well as the Prosecuting Attorney of Berkeley County, West Virginia, concluded that the search and seizure of the spoon from the Orem bathroom was an unconstitutional violation of the Fourth Amendment. At the joint request of both the State and Mr. Orem, the criminal charge against him was dismissed. The charge was later expunged.

20. In response to the dismissal, Defendant Gillmore took the unprecedented action of attempting to defy the State of West Virginia, and sending a letter directly to the Magistrate, objecting to the dismissal of criminal charges. In the letter, Defendant Gillmore attempts to argue the legality of his actions. The State responded to Gillmore's letter, by filing an official response with the Magistrate Court, stating that "Cpl. Gillmore does not have standing to object in this matter" and that the "Prosecutor's Office has an ethical duty to review the evidence and apply said evidence to constitutional restrictions."

21. Although the criminal charge was dismissed, Mr. Orem's reputation suffered irreparable damage, and he lost the election. His businesses were irreparably damaged and suffered great economic losses. Mr. Orem furthermore suffered great mental distress, as well as a substantial amount of attorneys' fees, due to the actions of Defendant Gillmore.

COUNT ONE - UNREASONABLE SEARCH AND SEIZURE

IN VIOLATION OF THE FOURTH AMENDMENT - BATHROOM SEARCH

22. Plaintiffs incorporate by reference all of the previous paragraphs.

23. On August 2, 2016, the defendant police officer, Matthew Gillmore, under color of law, entered into a private bathroom belonging to the plaintiffs for the purposes of searching the bathroom and seizing any suspected evidence of possession or use of illegal drugs inside the bathroom.

24. It is undisputed that Defendant Gillmore searched the bathroom belonging to the plaintiffs, and seized items inside which he believed to be indicative of heroin possession.

25. It is undisputed that Defendant Gillmore did not seek, nor did he obtain, a search warrant for the bathroom, or for the Orem residence.

26 Defendant Gillmore did not obtain consent to enter and search the bathroom. Defendant Gillmore testified that he did not have the consent of Mr. Orem, nor Mrs. Orem, to search the bathroom. *See* Pretrial Hearing Transcript at page 73. To the contrary, resident Sher Orem was present and objecting to Defendant Gillmore's entry and search of the bathroom in her residence. Defendant Gillmore defied her objections and forcibly shut Sher Orem out of her own bathroom while he conducted the search. *See Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006) (when a physically present co-occupant denies consent, even if another co-occupant gives consent, a warrantless entry and search is unreasonable).

27. Exigent Circumstances could not have provided a constitutional basis for the bathroom search. Defendant Gillmore, as well as Chief of EMS personnel Winebrenner testified that there was no immediate or compelling need for Defendant Gillmore's assistance for the protection of human life and that any emergency which may have existed previously had ended by the time that Defendant Gillmore searched the bathroom. *See* Pretrial Transcript at 65-67.

28 The Plain View Exception to the warrant requirement could not have provided a constitutional basis for the bathroom search. Assuming that Defendant Gillmore was legally inside Mr. Orem's residence in order to assist the emergency medical technicians, Defendant Gillmore testified that he did not see any incriminating evidence from his vantage point. *See* Pretrial Transcript at 61, 73. He did not find any evidence upon which he based Mr. Orem's arrest, until after he forcefully closed himself in the bathroom and began opening cabinets.

29. Both John and Sher Orem suffered damages from the violation of their Fourth Amendment rights, for which they are entitled to recover.

COUNT TWO - UNREASONABLE SEARCH AND SEIZURE IN VIOLATION
OF THE FOURTH AMENDMENT - FALSE ARREST

30. Plaintiffs incorporate by reference all of the previous paragraphs.

31. On August 2, 2016, Defendant Gillmore arrested John W. Orem for the misdemeanor crime of “possession of heroin” prior to the cessation of medical treatment being rendered by emergency medical services workers.

32. Defendant Gillmore seized and arrested Mr. Orem without a warrant, and without probable cause.

33. Mr. Orem had suffered a medical emergency and had committed no crime.

34. At the time of Mr. Orem’s medical emergency, the facts and circumstances within Defendant Gillmore’s knowledge were not sufficient to warrant a reasonably prudent person to believe in the circumstances shown that Mr. Orem had committed a crime. *See Caldarola v. Calabrese*, 298 F.3d 156 (2d Cir. 2002). Therefore there was no probable cause present at the time of the arrest. Although in criminal cases the question of whether a police officer had probable cause to make an arrest is a question for the court to decide, there is substantial authority that in § 1983 cases this issue should be submitted to the jury upon proper instructions defining probable cause. *Thacker v. City of Columbus*, 328 F.3d 244 (6th Cir. 2003); *Montgomery v. De Simone*, 159 F.3d 120 (3d Cir. 1998); *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir. 1984); *Weyant v. Okst*, 101 F.3d 845 (2d Cir. 1996).

35. It was not until Defendant Gillmore knowingly committed an unconstitutional search and seizure of the plaintiffs’ bathroom, as described and alleged in Count One above, that Defendant Gillmore obtained items which he alleged was evidence to form the basis of probable

cause to make a warrantless arrest of Mr. Orem. Where evidence was seized pursuant to an illegal search, probable cause should be analyzed in the absence of the illegally-seized items, in order to determine whether probable cause existed. *See U.S. v. Gillenwaters*, 890 F.2d 679 (4th Cir. 1989) (officers entering a home for a medical emergency of the home's occupant were entitled to seize items in plain view for determination of probable cause, but not items seized elsewhere in the house following an illegal search). Without the spoon seized following the search of the bathroom, according to Defendant Gillmore's own testimony, there was no probable cause to make a warrantless arrest. Gillmore's only knowledge was that a medical emergency existed, and that Mr. Orem had been administered Narcan. And of course, that Mr. Orem was a political candidate.

36 Even assuming the search and seizure of the items in the bathroom were legal, the arrest of Mr. Orem at that point was still lacking probable cause. Although a spoon was found in the cabinet, at that time Defendant Gillmore had no way of knowing heroin was on the spoon. Indeed, heroin was not on the spoon, according to later lab testing. Defendant Gillmore did not field test the spoon for heroin. Upon information and belief, no field test was performed whatsoever. No evidence exists that a field test was ever performed. Upon information and belief, Defendant Gillmore's statement that a field test was later performed at the detachment, which tested positive, was an intentional false representation to the court. Moreover, the spoon was not found in any relevant relation to Mr. Orem. It was found in a cabinet following a search of the bathroom. It was not found, for instance, out in the open, as if recently having been used by somebody taking illegal drugs.

37. Any objectively reasonable officer would have sent the seized evidence for actual laboratory testing prior to making an arrest. There was no immediate reason to make a warrantless arrest of Mr. Orem during the aftermath of his medical emergency. The only possible reason Defendant Gillmore made an immediate arrest of Mr. Orem was for political reasons - so that he could influence the election for Sheriff of Berkeley County prior to election day. This is evidenced by the fact that Mr. Orem was photographed sitting in custody inside the West Virginia State Police barracks and distributed on social media, even prior to his arraignment. This is further evidenced by the fact that the local media was tipped off prior to the arraignment, so that Mr. Orem would be photographed by the media entering the Magistrate Court in State Police custody. But for Mr. Orem's political candidacy, which rivaled a State Police employee's husband's candidacy, he would not have been arrested on August 2, 2016.

38. The mere knowledge that Mr. Orem had been given Narcan cannot alone form a basis for probable cause. Even a forensic pathologist cannot deduce merely from Mr. Orem's response following administration of Narcan what opioid substance, if any, was actually responsible for his loss of consciousness. Nor can a forensic pathologist, much less a police officer, offer an opinion as to what opioid drug an individual may have taken, or whether it was a prescribed medication or a non-prescribed street drug containing heroin or other illicit materials. *See Affidavit of Jack Daniel, III, M.D.*

39. Plaintiff John Orem suffered damages for which he is entitled to recover.

COUNT THREE - VIOLATION OF THE RIGHT TO PRIVACY
UNDER THE FOURTEENTH AMENDMENT

40. The previous paragraphs are hereby incorporated by reference as though fully restated herein.

41. The Fourteenth Amendment has been recognized to protect an individual's right to privacy with regard to avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *accord Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir.1994) (“Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over.”); *quoted by W. Va. Dep't of Health & Human Res. v. E.H.*, 236 W.Va. 279, 778 S.E.2d 728, 734 (W.Va., 2015); *see also Walls v. City of Petersburg*, 895 F.2d 188 (C.A.4 (Va.), 1990) (Fourth Circuit opinion recognizing a constitutional right to privacy where an individual has a reasonable expectation of privacy).

42. Upon information and belief, Defendant Gillmore and Defendant John Doe took a photo of the plaintiff handcuffed and shackled inside the West Virginia State Police detachment on August 2, 2016, and uploaded the photo to social media. The individual also included words on the photo prior to uploading it, turning the photo into a “meme.” The words stated, “As your new Sheriff, I want to actively participate in all aspects . . . ,” which quoted a prior political statement made by Mr. Orem, in a mocking way. The photo showed Mr. Orem handcuffed and shackled to a detainee bench inside the detachment, appearing to be wearing pajamas. The photo

was posted to social media within the first fifteen minutes of Mr. Orem's arrival to the West Virginia State Police detachment.

43. The photo posted online was not taken as part of any routine booking process. It was not a mugshot. It was not a public record. It was a candid and embarrassing photo taken from the monitor from the surveillance camera inside the detachment. Taking the photo of the monitor also prevented Mr. Orem from observing the identity of the individual responsible for taking the photo. The plaintiff was still wearing his pajamas, since he was arrested inside his home and Defendant Gillmore refused him the opportunity to get dressed prior to being arrested and transported.

44. Defendant Gillmore was active on social media on all relevant dates, and was also Facebook "friends" with opposing candidate D. Scott Richmond, the husband of the detachment dispatcher, who was engaged in attacking Mr. Orem on social media during the campaign.

45. Upon information and belief, Defendant Gillmore, and Defendant John Doe notified the media and told them about Mr. Orem's medical emergency, as well as the allegations surrounding his arrest. Gillmore provided the media with a copy of the Criminal Complaint he drafted containing personal medical information, as well as false information, about Mr. Orem.

46. Defendant Gillmore then delayed Mr. Orem's arraignment in order to give time for the media to arrive at the Magistrate Court of Berkeley County in time to be able to photograph Mr. Orem being "perp-walked" into the courthouse. Indeed, the Herald-Mail newspaper published an article almost immediately, on August 2, 2016, showing a photograph of Mr. Orem being walked into the magistrate court with his hands handcuffed behind his back, with a state police cruiser in the background, and Defendant Gillmore walking Mr. Orem into the

courthouse. Defendant Gillmore was quoted numerous times in the article, and made sure that he was prominently displayed by the media walking Mr. Orem into court.

47. Mr. Orem had committed no crime at that time, but merely had suffered a medical emergency. He had a Fourteenth Amendment right not to have information and the circumstances surrounding his medical emergency to be published to social media, as well as print and television media.

48. The media reports, including the Herald-Mail article, contained Mr. Orem's private information, including that he had suffered two medical emergencies in the past two days; that Mr. Orem was found unresponsive on the bathroom floor of his home; that he had been administered Narcan by EMS workers in his home; that there was allegedly a plastic baggy, a cotton ball and a metal spoon in his bathroom; and that Mr. Orem refused to provide a blood sample upon being arrested.

49. Then, as to be expected, the information quickly was picked up by the national media, making Mr. Orem's personal and private information national news. The media attention had a devastating effect on Mr. Orem's life, including destroying his political campaign.

50. Mr. Orem and his lawyers worked very quickly, and aggressively, to resolve the criminal charge prior to the election date. However, Defendant Gillmore took actions to delay the criminal proceedings so as to prevent Mr. Orem from clearing his name prior to the election.

51. Defendant Gillmore represented to prosecutors that he could not attend court because he was taking a pre-planned trip to Disney World with his family, which was made the subject of a motion to continue Mr. Orem's pretrial hearing. However, upon information and belief, Defendant Gillmore's trip to Disney World had already taken place at the time the

representation was made. Upon information and belief, Gillmore made an intentional false representation to the Court for the purposes of influencing a political election.

52. Defendant Gillmore also took the unprecedented step of directly writing a letter to the presiding magistrate pleading with him to not order the dismissal of Mr. Orem's charge following a joint motion to dismiss filed by both the State of West Virginia, and Mr. Orem's attorneys. The State of West Virginia asked the magistrate to ignore the letter.

53. John Orem had a reasonable expectation of privacy in the details, nature and information surrounding the medical emergencies he suffered on August 1 and 2, 2016, as well as the ensuing medical treatment provided by emergency medical services. He also had a reasonable expectation of privacy in not being photographed by West Virginia State Police employees, and turned into an internet "meme" on social media within 15 minutes of a warrantless arrest. This occurred even prior to being presented to a magistrate for arraignment.

54. Defendant Trooper Gillmore, as well as Defendant John Doe violated that expectation of privacy when they acted to misuse their responsibilities and positions of authority and public trust in order to harm Mr. Orem through social media, as well as traditional media, by disclosing personal protected and confidential information, and by taking an unofficial and anonymous photograph of Mr. Orem for the sole purpose of embarrassing him and affecting an election.

55. Plaintiff John Orem suffered damages for which he is entitled to recover.

PRAYER

WHEREFORE, based on the above stated facts, the Plaintiff respectfully requests that this Honorable Court award:

1. Damages against the Defendants in an amount to be determined at trial which will fairly and reasonably compensate the Plaintiff for:

- a. Past, present and future medical expenses;
- b. Past, present and future pain and suffering;
- c. Loss of enjoyment of life;
- d. Psychological and emotional distress;
- e. Any other compensatory damages to be proven at trial;
- f. Punitive damages against the individual Defendants in an amount to be determined at trial;
- g. Reasonable attorney fees and costs;
- h. Any other relief that this Court deems is just and fair;
- i. All other damages provided by law;
- j. Injunctive relief requiring appropriate training, supervision and discipline in order to remedy all constitutional deprivations which the Plaintiff suffered;
- k. Declaratory judgment relief establishing the Defendants' above-described conduct violates the Plaintiff's clearly established constitutional rights.

PLAINTIFF DEMANDS A TRIAL BY JURY

JOHN W. OREM
SHER OREM
By Counsel

/s John H. Bryan
John H. Bryan (WV Bar No. 10259)
JOHN H. BRYAN, ATTORNEYS AT LAW
611 Main Street
P.O. Box 366
Union, WV 24983
(304) 772-4999
Fax: (304) 772-4998
jhb@johnbryanlaw.com

for the Plaintiff