

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION**

JAMES E. EVANS,

Plaintiff,

v.

MUHLENBERG COUNTY, KENTUCKY;
and MICHAEL A. DRAKE, in his individual
capacity,

Defendants.

Case No. _____

Electronically Filed

**VERIFIED COMPLAINT
WITH DEMAND FOR JURY TRIAL**

I. Preliminary Statement

1. This 42 U.S.C. § 1983 action asserts violations of Plaintiff's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution, and under Kentucky law, based upon his being arrested, incarcerated, and criminally prosecuted (unsuccessfully) for engaging in constitutionally protected online speech. Specifically, Plaintiff uses online social media to engage in constitutionally protected speech, which includes periodically sharing on his Facebook page portions of song lyrics that he enjoys or finds interesting. On one occasion, Plaintiff posted a portion of the lyrics from a song entitled *Class Dismissed (A Hate Primer)* by the band Exodus. Though the posted lyrics described violent, school-related images, they did not communicate a threat of harm to any person or school. Moreover, Plaintiff did not subjectively intend to communicate a threat by posting these lyrics *nor* could the post have been reasonably construed as a true threat given all of the relevant circumstances. Nevertheless, Defendant Mike Drake swore out a materially false and misleading affidavit in support of an arrest warrant

alleging that Plaintiff committed a criminal offense. But for the material misrepresentations and omissions contained in Defendant Drake's affidavit, no arrest warrant would have issued because probable cause did not exist to establish that Plaintiff committed any criminal offense. As a result of Defendant Drake's materially false and misleading affidavit, a warrant issued for Plaintiff's arrest. Plaintiff was thereafter arrested on the warrant, charged with the felony offense of Terroristic Threatening in the First Degree, and incarcerated for several days before he was eventually released and the charge against him dismissed.

Plaintiff now timely submits this action seeking compensatory and punitive damages to vindicate violations of his rights under the Fourth and Fourteenth Amendments to the United States Constitution, and under Kentucky law.

II. Jurisdiction and Venue

2. The Court has jurisdiction over this action under 28 U.S.C. § 1331, which provides for original district court jurisdiction over cases presenting federal questions. The Court also has jurisdiction over Plaintiff's state law claim under 28 U.S.C. § 1367(a), because the state law claim is so related to the federal claims that it forms part of the same case or controversy for Article III purposes.

3. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the Plaintiff and all of the Defendants reside in Muhlenberg County, Kentucky, and the events that gave rise to this complaint transpired there.

III. Parties

4. Plaintiff James E. Evans is an adult citizen of Kentucky, residing in Muhlenberg County, Kentucky.

5. Defendant Muhlenberg County, Kentucky, is a local governmental entity organized under Kentucky law. The Muhlenberg County Police Department is an agency of Muhlenberg County, Kentucky.

6. Defendant Michael A. Drake is an individual who resides in Muhlenberg County, Kentucky. He is employed by the Muhlenberg County Police Department — an agency of Muhlenberg County, Kentucky.

IV. Factual Allegations

7. At all relevant times, each Defendant acted under color of state law.

8. Muhlenberg County, Kentucky, is a local governmental entity organized under Kentucky law.

9. On or about August 24, 2014, Plaintiff Evans posted on his Facebook page a portion of the lyrics from a 2010 song by the heavy metal rock band Exodus (“Plaintiff’s Facebook Post”). The lyrics Plaintiff posted were from a song entitled *Class Dismissed (A Hate Primer)*.

10. Plaintiff’s Facebook Post consisted of the following lyrics in this grammatical format:

Student bodies lying dead in the halls
A blood splattered treatise of hate
Class dismissed is my hypothesis
Gun fire ends the debate
All I ever wanted was a little affection
But no one ever gave it to me
My hate primer’s the result of my rejection
You’ll die for it, and I’ll die for thee

11. Plaintiff did not include any additional text, graphics or other content that accompanied the song lyrics in his Facebook Post.

12. Prior to August 24, 2014, Plaintiff had periodically posted portions of other songs' lyrics on his Facebook page, and Plaintiff frequently posted those lyrics unaccompanied by any additional text, graphics or other content.

13. Plaintiff posted song lyrics on his Facebook page as a way of sharing lyrics from songs that he enjoys or finds interesting with individuals who viewed his Facebook page.

14. Plaintiff did not subjectively intend to communicate a threat by posting the song lyrics to his Facebook page on or about August 24, 2014.

15. At the time of Plaintiff's Facebook Post, Plaintiff's Facebook page was viewable by third parties irrespective of whether (or not) they were Plaintiff's Facebook "friends."

16. On August 24, 2014, Officers from the Greenville Police Department, Central City Police Department, Muhlenberg County Sheriff's Office, Kentucky State Police, Powderly Police Department and Muhlenberg County Police Department collectively communicated with each other via text messaging ("group text") about Plaintiff's Facebook Post.

17. Law enforcement officers participating in the group text launched an investigation into Plaintiff's Facebook Post.

18. Defendant Drake sent text messages to (and received text messages from) the other law enforcement officers on the group text about the investigation into Plaintiff's Facebook Post.

19. Kentucky State Police Trooper Jerry Knight participated in the August 24, 2014 group text about Plaintiff's Facebook Post.

20. Specifically, Trooper Knight sent a text message on August 24, 2014 to the law enforcement officers included on the group text (including Defendant Drake) correctly noting that Plaintiff's Facebook Post consisted of "song lyrics."

21. Chief Darren Harvey of the Greenville Police Department also participated on the group text about Plaintiff's Facebook Post. On August 24, 2014, Chief Harvey sent a text message to the others on the group text (including Defendant Drake) that "That's a song lyric from the group Exodus called class dismissed. We still are gonna call him in and talk to him."

22. *After* establishing that Plaintiff's Facebook Post consisted of song lyrics *and* that Plaintiff had previously posted lyrics from other songs on his Facebook page, officers from the Greenville Police Department and the Kentucky State Police went to the Greenville Park Apartments on August 24, 2014 to interview Plaintiff about Plaintiff's Facebook Post.

23. Upon arriving at the Greenville Park Apartments, however, the responding officers learned that Plaintiff did not live in Greenville but, instead, lived in Central City.

24. Multiple officers from the Central City Police Department then took over the investigation by going to Plaintiff's apartment in Central City where they located him and questioned him about the Facebook Post.

25. Plaintiff fully cooperated with the Central City Police Department investigation by voluntarily answering their questions.

26. During that interview — which was recorded on video by one of the responding officers — one of the Central City Police officers acknowledged his awareness that Plaintiff's Facebook Post consisted of a portion of the lyrics from a song *and* that Plaintiff had previously posted lyrics from other songs on his Facebook page.

27. After conducting their interview of Plaintiff, the Central City Police officers left without arresting or otherwise charging Plaintiff with any criminal offense. Moreover, one of the officers explicitly stated, "I'm not trying to tell you what to do. *You have the right to freedom of speech. I'm not trying to infringe on that.*" (Emphasis added).

28. Upon information and belief, a Central City Police Department officer returned to Plaintiff's residence on August 25, 2014, while Plaintiff was at work. The officer interviewed Plaintiff's wife about whether (or not) Plaintiff possessed any weapons. She cooperated with the investigation by voluntarily answering the officer's questions, and she indicated that Plaintiff did not possess any weapons.

29. When considered in context of all of the information gleaned through the investigation, no reasonable officer could have concluded that Plaintiff's Facebook Post constituted a true threat or that Plaintiff intended to communicate a threat or otherwise incite others to violence.

30. Despite the fact that Plaintiff did not intend to communicate a threat and that no reasonable person could have construed it as such in light of the relevant information, Defendant Drake submitted a Criminal Complaint/Affidavit, under oath, in support of an arrest warrant for Plaintiff on August 25, 2014. [*See attached Plaintiff's Exhibit 1.*]

31. Defendant Drake's affidavit stated, in its entirety:

The Affiant, Officer Mike Drake, states that on 8/24/2014 in MUHLENBERG County, Kentucky, the above named defendant unlawfully: committed the offense of Terroristic Threatening, to-wit: by threatening to kill students and or staff at school.

32. Defendant Drake's affidavit did not provide any details about the alleged crime, such as:

a. The specific language used to communicate the alleged threat;

- b. Whether the alleged threat specified a particular school, building, vehicle, or event;
- c. Whether the alleged threat included a threat to use a weapon of mass destruction; or
- d. The manner in which the alleged threat was communicated.

33. Defendant Drake also knowingly failed to include in his affidavit *any* information that he learned from the multi-agency investigation into the matter, such as:

- a. The alleged threat consisted solely of song lyrics;
- b. The lyrics were from a song written and recorded by a heavy metal band;
- c. The alleged threat was communicated via a Facebook post;
- c. Plaintiff had previously posted lyrics from other songs on Facebook;
- d. Officers located and interviewed Plaintiff about the Facebook post;
- e. Plaintiff fully cooperated with the investigation;
- f. Plaintiff was an adult who did not work for any school; or
- g. Plaintiff denied intending to threaten anyone by posting the lyrics online.

34. By stating, under oath, that Plaintiff “threaten[ed] to kill students and or staff at school,” Defendant Drake knowingly and intentionally made a material misstatement of fact in his affidavit supporting the arrest warrant.

35. Defendant Drake knowingly and intentionally omitted relevant and material information from his affidavit that, had it been included, would have established that probable cause did not exist to arrest Plaintiff for any alleged criminal wrongdoing.

36. Because of Defendant Drake’s materially false and misleading affidavit, an arrest warrant issued on August 25, 2014, for Plaintiff’s arrest for the felony offense of Terroristic

Threatening in the First Degree, a class C felony punishable by five (5) to ten (10) years in prison.

37. Kentucky Revised Statute (KRS) 508.075 codifies the criminal offense of Terroristic Threatening in the First Degree. That statute provides:

(1) A person is guilty of terroristic threatening in the first degree when he or she:

(a) Intentionally makes false statements that he or she or another person has placed a weapon of mass destruction on:

1. The real property or any building of any public or private elementary or secondary school, vocational school, or institution of postsecondary education;

2. A school bus or other vehicle owned, operated, or leased by a school;

3. The real property or any building public or private that is the site of an official school-sanctioned function; or

4. The real property or any building owned or leased by a government agency; or

(b) Intentionally and without lawful authority, places a counterfeit weapon of mass destruction at any location or on any object specified in paragraph (a) of this subsection.

(2) A counterfeit weapon of mass destruction is placed with lawful authority if it is placed, with the written permission of the chief officer of the school or other institution, as a part of an official training exercise and is placed by a public servant, as defined in KRS 522.010.

(3) A person is not guilty of commission of an offense under this section if he or she, innocently and believing the information to be true, communicates a threat made by another person to school personnel, a peace officer, a law enforcement agency, a public agency involved in emergency response, or a public safety answering point and identifies the person from whom the threat was communicated, if known.

38. On August 26, 2014, Plaintiff was arrested pursuant to the warrant obtained by Defendant Drake and Plaintiff did not attempt to flee, resist arrest, or otherwise disobey commands.

39. Plaintiff remained in custody on the arrest warrant until his arraignment in Muhlenberg District Court on August 27, 2014 — the day after his arrest. Plaintiff was then arraigned on the sole count of Terroristic Threatening in the First Degree to which he entered a plea of not guilty.

40. At his arraignment, the Muhlenberg District Court set Plaintiff's bond at \$1,000.00.

41. Due to the bond set by the District Court, Plaintiff remained in custody for another seven (7) days awaiting his scheduled preliminary hearing on September 3, 2014.

42. At his next court date, Plaintiff was represented by appointed counsel. Pursuant to an agreement with the prosecution, Plaintiff was released on his own recognizance and a new court date scheduled for October 1, 2014.

43. Prior to Plaintiff's next scheduled court appearance, successor counsel entered their appearances on Plaintiff's behalf.

44. The criminal prosecution against Plaintiff ultimately ended with the sole charge against Plaintiff being dismissed.

45. During the criminal prosecution, Plaintiff did not stipulate or otherwise admit that probable cause existed for his arrest or prosecution.

46. During the criminal prosecution, the Muhlenberg District Court did not conduct a probable cause hearing or otherwise enter a finding of probable cause, and no grand jury returned an indictment against Plaintiff in connection with his August 24, 2014 Facebook post.

V. Claims for Relief

First Cause of Action — Fourth Amendment: Unlawful Seizure (Individual Capacity Defendant Drake)

47. Plaintiff re-alleges and incorporates each and every allegation above.

48. At the time Defendant Drake sought (and obtained) a warrant for Plaintiff's arrest, the facts and circumstances were insufficient to establish probable cause to believe that Plaintiff had committed a criminal offense.

49. At the time Defendant Drake sought (and obtained) a warrant for Plaintiff's arrest, no officer of reasonable competence would have concluded that probable cause existed to believe that Plaintiff had committed a criminal offense.

50. Defendant Drake obtained the warrant for Plaintiff's arrest by knowingly and deliberately, or with a reckless disregard for the truth, making a false statement in the affidavit that was material or necessary to the finding of probable cause.

51. Defendant Drake obtained the warrant for Plaintiff's arrest by knowingly and deliberately, or with a reckless disregard for the truth, omitting information in the affidavit that created a falsehood that was material or necessary to the finding of probable cause.

52. By procuring a warrant for Plaintiff's arrest by means of a materially false a misleading affidavit, Defendant Drake acted maliciously, with callous disregard for, or with reckless indifference to Plaintiff's federally protected right to be free from unlawful seizure.

53. Defendant Drake acting under color of state law, violated Plaintiff's clearly established right to be free from an unlawful seizure under the Fourth Amendment, as applied to the states by operation of the Fourteenth Amendment.

Second Cause of Action — Fourth Amendment: Malicious Prosecution
(Individual Capacity Defendant Drake)

54. Plaintiff re-alleges and incorporates each and every allegation above.

55. In seeking (and obtaining) a warrant for Plaintiff's arrest, Defendant Drake made, influenced, or participated in the decision to prosecute Plaintiff for a criminal offense.

56. Defendant Drake obtained the warrant for Plaintiff's arrest by knowingly and deliberately, or with a reckless disregard for the truth, making a false statement (and by omitting relevant, material information that created a falsehood) in the affidavit that was material or necessary to the finding of probable cause.

57. After formal criminal proceedings were initiated against Plaintiff, the facts and circumstances were insufficient to justify Plaintiff's continued detention because they failed to establish probable cause to believe that Plaintiff had committed a criminal offense.

58. As a consequence of the legal proceedings initiated by Defendant Drake, Plaintiff suffered a deprivation of his liberty by being incarcerated until his eventual release from custody on September 3, 2014.

59. Plaintiff suffered further deprivations of his liberty as a consequence of the legal proceedings initiated by Defendant Drake, in that the legal proceedings continued even after his release from custody which required him to appear before the court on October 27, 2014 and to abide by the conditions of his release pending resolution of the prosecution.

60. The criminal prosecution against Plaintiff ended in dismissal without Plaintiff admitting, stipulating or otherwise conceding that probable cause existed to initiate the prosecution, and without the court so ruling.

61. By procuring a warrant for Plaintiff's arrest by means of a materially false a misleading affidavit, Defendant Drake acted maliciously, with callous disregard for, or with reckless indifference to Plaintiff's federally protected right under the Fourth Amendment.

62. Defendant Drake, acting under color of state law, violated Plaintiff's clearly established rights under the Fourth Amendment, as applied to the states by operation of the

Fourteenth Amendment, by initiating legal proceedings against Plaintiff without the requisite probable cause to do so.

**Third Cause of Action — Fourth Amendment: *Monell* Liability
(Defendant Muhlenberg County, Kentucky)**

63. Plaintiff re-alleges and incorporates each and every allegation above.

64. The Muhlenberg County Police Department is an agency of Defendant Muhlenberg County, Kentucky.

65. Defendant Muhlenberg County, Kentucky, has granted Defendant Drake, in his official capacity with the Muhlenberg County Police Department, final decision-making authority over the manner in which the Muhlenberg County Police Department conducts investigations into alleged criminal activity and the circumstances under which it will seek warrants pursuant to such investigations.

66. Despite there being no probable cause to believe that Plaintiff committed any criminal offense, Defendant Drake sought a warrant for Plaintiff's arrest by means of a materially false and misleading affidavit because Plaintiff's Facebook Post contained imagery concerning school-related violence.

67. By choosing to seek a warrant for Plaintiff's arrest due to the school-related content of Plaintiff's Facebook Post, Defendant Drake's decision represented an official policy of Defendant Muhlenberg County, Kentucky.

68. Defendant Muhlenberg County, Kentucky, acting under color of law and through the conduct of Defendant Drake who possessed final decision-making authority for the County, violated Plaintiff's clearly established rights under the Fourth Amendment, as applied to the states by operation of the Fourteenth Amendment.

Fourth Cause of Action — State Law: Malicious Prosecution
(Individual Capacity Defendant Drake)

69. Plaintiff re-alleges and incorporates each and every allegation above.

70. In seeking (and obtaining) a warrant for Plaintiff's arrest, Defendant Drake made, influenced, participated in or instituted legal proceedings against Plaintiff for a criminal offense.

71. Defendant Drake obtained the warrant for Plaintiff's arrest by knowingly and deliberately, or with a reckless disregard for the truth, making a false statement (and by omitting relevant, material information that created a falsehood) in the affidavit that was material or necessary to the finding of probable cause.

72. After formal criminal proceedings were initiated against Plaintiff, the facts and circumstances were insufficient to justify Plaintiff's continued detention because they failed to establish probable cause to believe that Plaintiff had committed a criminal offense.

73. As a consequence of the legal proceedings initiated by Defendant Drake, Plaintiff suffered a deprivation of his liberty by being incarcerated until his eventual release from custody on September 3, 2014.

74. Plaintiff suffered further deprivations of his liberty as a consequence of the legal proceedings initiated by Defendant Drake, in that the legal proceedings continued even after his release from custody which required him to appear before the court on October 27, 2014 and to abide by the conditions of his release pending resolution of the prosecution.

75. The criminal prosecution against Plaintiff ended in dismissal without Plaintiff admitting, stipulating or otherwise conceding that probable cause existed to initiate the prosecution, and without the court so ruling.

76. By procuring a warrant for Plaintiff's arrest by means of a materially false and misleading affidavit, Defendant Drake acted maliciously, with callous disregard for, or with reckless indifference to Plaintiff's clearly established right under Kentucky law.

77. Defendant Drake, acting under color of state law, violated Plaintiff's clearly established rights under Kentucky law by initiating legal proceedings against Plaintiff without the requisite probable cause to do so.

VI. Request for Relief

WHEREFORE, Plaintiff respectfully requests:

A. Judgment finding that the Defendants violated Plaintiff's rights under the United States Constitution and Kentucky law;

B. Judgment for damages, including punitive damages, in an amount to be proven by the evidence;

C. Costs and reasonable attorneys' fees pursuant to 42 U.S.C. 1988;

D. A trial by jury on all claims so triable; and

E. Any and all other relief to which he may be entitled.

Respectfully submitted,

s/ Brenda Popplewell
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- and -

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Attorneys for Plaintiff

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I make the following declaration under penalties of perjury:

I verify that I have read the complaint in this case and that the facts alleged in it are true, to the best of my knowledge, information and belief.

James E. Evans

James E. Evans

4-28-15

Date

State of Kentucky

County of Muhlenberg

Acknowledged by, sworn to, and subscribed to before me by James E. Evans on this the 28th day of April, 2015.

Mather Veddleton (Cameal)

Notary Public

My Commission Expires 11-2016

Notary Number 478439