

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL WERNETH, SR. : CIVIL ACTION
v. :
NORTHAMPTON TOWNSHIP, et al. : NO. 99-5408

MEMORANDUM AND ORDER

BECHTLE, J.

November , 2000

Presently before the court are defendants Northampton Township (the "Township"), et al.'s Motion for Summary Judgment, plaintiff Michael Werneth, Sr.'s ("Werneth") Opposition thereto and Werneth's Motion to Produce Evidence. For the reasons stated below, the motion for summary judgment will be granted in part and denied in part. The motion to produce evidence will be granted.

I. BACKGROUND

Plaintiff Michael Werneth, Sr. filed suit under 28 U.S.C. § 1983 and Pennsylvania law alleging violation of his constitutional rights by defendants Northampton Township and police officers Charles J. Pinkerton and William P. Klein, two of the Township's employees. (Defs.' Mot. for Summ. J. Ex. A.) The suit arises out of an incident that occurred just after midnight on November 2, 1997 and led to Werneth's arrest and trial on charges of possession of an illegal substance. Werneth alleges that he was searched, arrested and charged without probable cause.

On the night in question, Werneth claims that he was

walking home from his job at the Mill Race Inn and was approached by someone in a dark-colored pick-up near the intersection of Holland and Morning Glory roads. (Pl.'s Mem. of Law in Opp'n ("Pl.'s Opp'n") at unnumbered p. 7.) According to Werneth, the driver asked him who he was in a derogatory manner and, when Werneth decided to ignore him, threatened to shoot Werneth if he did not disclose his name. Id. Unbeknownst to Werneth, the driver was Officer Pinkerton, who was off-duty at the time and claims that he stopped Werneth to question him because he appeared to be coming from an abandoned house in an area where burglaries had recently been reported. (Defs.' Mot. for Summ. J. Ex. D at 4-5.)

Werneth continued to walk away from the pick-up, down Holland Road, and called 911 to report what he believed to be someone threatening him. (Pl.'s Opp'n at unnumbered p. 7.) The pick-up drove off in the direction of the police station, away from Holland Shopping Center. Id. After the initial call to 911, the pick-up passed Werneth again, prompting him to make a second 911 call. Id. Officer Pinkerton drove a short distance to a convenience store, where he phoned the police station to inform them of what he believed to be a prowler in the Holland Road area. (Defs.' Mot. for Summ. J. Ex. D at 6.) Upon receiving the reports from Werneth and the report from Officer Pinkerton, Officer Klein proceeded to the area of Holland Road, where Werneth approached his patrol car. Id. Ex. D at 30-31. Meanwhile, Officer Pinkerton had returned to the area. Id. Ex. D

at 7. Werneth pointed out the pick-up to Officer Klein, who immediately recognized the driver and told Werneth that it was Officer Pinkerton. Id. at unnumbered p. 1; Pl.'s Opp'n at unnumbered p. 8. Officer Pinkerton exited the pick-up and approached Werneth and Officer Klein.¹ (Pl.'s Opp'n at unnumbered p. 8.)

Officer Klein inquired as to what Werneth was doing out at that time of night and Werneth responded that he was coming home from work. (Defs.' Mot. for Summ. J. at unnumbered p. 2; Pl.'s Opp'n at unnumbered p. 8.) During the course of this conversation, more police units arrived on scene. (Defs.' Mot. for Summ. J. Ex. D at 27.) The parties' versions of what occurred next differ drastically.

Werneth asserts that Officers Klein and Pinkerton laughed at him, accused him of being a drug addict and commanded him to empty his pockets. (Pl.'s Opp'n at unnumbered p. 9.) Werneth claims that he emptied a crumpled ten dollar bill from his pocket and that officers Klein and Pinkerton searched his clothes and person. Id. Then, according to Werneth, Officer Klein said that the officers would "cut [him] a break" if Werneth gave them information regarding his brother's alleged involvement in recent burglaries. Id.

¹ Werneth claims that Officer Pinkerton was wearing a plain t-shirt when the pick-up first approached him, but that by this time he was wearing his uniform shirt. (Pl.'s Opp'n at unnumbered p. 8.) Officer Pinkerton claims to have been in full uniform when he first approached Werneth in his pick-up. (Defs.' Mot. for Summ. J. Ex. D at 4.)

Werneth states that he was ordered into Officer Klein's patrol car and asked where his home was. Id. Werneth claims that he was driven in the direction of the police station, past Werneth's home, and that Officer Klein then turned the car back toward Werneth's home. Id. at unnumbered pp. 9-10. Werneth claims Officer Klein told him that if he came forward, he would "cut him a break." Id. at unnumbered pp. 9-10. Werneth then left the patrol car and entered his home. Id.

Defendants state that while questioning Werneth Officer Pinkerton noticed the outline of a small pipe in Werneth's left front jean pocket. (Defs.' Mot. for Summ. J. at unnumbered p. 2.) Defendants assert that Werneth produced the pipe when asked about it. Id. Officer Klein stated that he asked Werneth "if he had anything else . . . that he shouldn't have," to which Werneth responded by producing a small bag of marijuana.² Id. Ex. D. at 28. Defendants state that Werneth was not arrested at that point, and was only spoken to as a complainant. Id. Ex. D at 29. Six weeks later, Werneth was arrested and charged with possession of a controlled substance and illegal paraphernalia. (Compl. ¶ 13.)

A Motion to Suppress in Werneth's criminal case was held before Judge Isaac S. Garb of the Court of Common Pleas,

² In his deposition, Werneth indicates that no pipe or marijuana was taken from his person or otherwise produced at the scene. (Werneth Dep. at 101-106, 113-114.) However, the Complaint alleges that marijuana and illegal paraphernalia were "planted" on his person. (Compl. ¶ 14.)

Bucks County. (Defs.' Mot. for Summ. J. at unnumbered p. 5 & Ex. D.) Judge Garb denied Werneth's Motion to Suppress the pipe and marijuana, holding that because Werneth was not in custody, there was no "stop" and therefore no "search." Id. Ex. D. at 38-39. Thus, according to Judge Garb, "there was nothing to suppress." Id. However, Werneth was acquitted of all charges at trial. (Compl. ¶ 15; Werneth Dep. at 113.)

II. STANDARD OF REVIEW

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

Wernerth's complaint contains the following counts against Defendants: I) false arrest; II) malicious prosecution; III) malicious abuse of process; IV) failure to train and supervise and V) unlawful search and seizure. Wernerth does not indicate whether Counts I, II and III are based on state or federal law. For purposes of this Memorandum and Order, the court will assume that Counts I and II are based on both state and federal law.³

Defendants argue that: Pinkerton and Klein are entitled to qualified immunity; Wernerth's Fourth Amendment claim is moot under the doctrine of collateral estoppel; there was no false arrest as a matter of law; Wernerth's state law claims are barred by the Pennsylvania Political Subdivision Tort Claims Act ("Tort Claims Act"), 42 Pa. Cons. Stat. Ann. § 8541, et seq.; there is no evidence creating a genuine issue of material fact as to the Township's liability; and that Wernerth's malicious prosecution claim fails as a matter of law because there was probable cause to bring charges against Wernerth. The court will first address Wernerth's federal claims, and then discuss his state law claims.

³ Count III (malicious abuse of process) makes no reference to any particular state or federal constitutional provision or statute, asserting only that Defendants, through their actions, "attempted to coerce and or threaten Plaintiff into relinquishing rights that he had or be arrested." (Compl. ¶ 4.) Because a malicious prosecution claim under § 1983 appears to encompass claims of malicious abuse of process, the court will assume that Count III is based on state law. To the extent that it might be a federal claim, it is encompassed by the cause of action in Count II.

A. Municipal Liability

In a § 1983 action, a municipality cannot be liable for the misconduct of its employees under the doctrine of respondeat superior. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). The purpose of this rule is to distinguish the acts of the municipality from the acts of its employees, and "thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." Pembaur v. City of Cincinnati, 475 U.S. 469, 479-80 (1986) (footnote omitted). Liability may be shown either "by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity."⁴ Id.; see Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996) (stating that Supreme Court has "created a two-path track to municipal liability under § 1983, depending on whether the allegation is based on municipal policy or custom").

Werneth offers no evidence of a policy or custom on the part of the Township leading to unconstitutional conduct by its police officers. Rather, Werneth sets forth only conclusory allegations of such a policy or custom leading to unlawful searches and seizures by the Township's employees. Thus, summary

7. A plaintiff establishes a government "policy" if he proves that a "'decision maker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citation omitted).

judgment in favor of the Township on all of Werneth's federal claims is appropriate. Monell, 436 U.S. at 691. Accordingly, the court will grant Defendants' motion as to Counts I, II, IV and V to the extent that they assert federal causes of action against the Township.

B. Collateral Estoppel as to Werneth's Fourth Amendment Claims

Defendants argue that Werneth's claim of illegal search and seizure in Count V of the Complaint is moot in light of Judge Garb's decision to deny Werneth's motion to suppress. They claim that collateral estoppel bars Werneth from re-litigating his claim of an unconstitutional search. (Def.' Mot. for Summ. J. at unnumbered p. 6.)

A defendant in a § 1983 case may invoke collateral estoppel based upon state criminal proceedings. Allen v. McCurry, 449 U.S. 90, 103-04 (1980); Todt v. Rubentstein, Civ. No. 81-2640, 1986 U.S. Dist. LEXIS 20770, *18 (E.D. Pa. Sept. 5, 1986). Under 28 U.S.C. § 1738, federal courts are obligated to afford state court judgments the same preclusive effect as would the state court rendering the judgment. Allen, 449 U.S. at 95-97. Accordingly, Pennsylvania law determines the preclusive effect to be given Judge Garb's denial of Werneth's motion to suppress.

Under Pennsylvania law, a party is barred from re-litigating an issue decided against him in a prior case when:

- (1) he was a party to the prior litigation;
- (2) he had a full and fair opportunity to litigate the issue

in question in the prior proceeding; (3) the issue decided in the prior proceeding was the same as that raised in the subsequent action; (4) the decision in the prior proceeding was essential to the judgment rendered; and (5) a final judgment was rendered on the merits.

Shelton v. Macey, 883 F. Supp. 1047, 1049 (E.D. Pa. 1995)

(citations omitted). In Pennsylvania, a trial court judgment is final unless and until it is reversed. Linnen v. Armainis, 991 F.2d 1102, 1107 (3d Cir. 1993).

There can be no dispute that Werneth was a party to the proceedings before Judge Garb. Werneth was represented by counsel at the suppression hearing who conducted thorough cross-examinations of Officers Klein and Pinkerton. (Defs.' Mot. for Summ. J. Ex. D at 10-23 & 30-35.) Additionally, Werneth offered evidence at the suppression hearing. Id. Ex. D at 35-36. Thus, he had a full and fair opportunity to challenge the alleged search. The issue at the suppression hearing -- whether the officers searched Werneth in violation of the Fourth Amendment -- is identical to the issue before the court in the instant case. Judge Garb's determination that no Fourth Amendment search had occurred was essential to the judgment denying Werneth's motion to suppress. See id. Ex. D at 39 (denying motion to suppress). Because Judge Garb entered an order denying the motion to suppress, the fifth and final requirement, that final judgment have been entered, is also satisfied. Although Werneth was acquitted of the drug possession charges at trial, he neither asserts nor offers evidence that Judge Garb's decision to admit

the marijuana and pipe was subsequently reversed or otherwise altered. Thus, Werneth's claim based on an alleged illegal search is barred by the doctrine of collateral estoppel. Accordingly, Defendants are entitled to summary judgement on Count V of Werneth's Complaint.

Defendants' motion is ambiguous as to whether Defendants seek to invoke collateral estoppel as a defense to Counts I and II of Werneth's Complaint, which assert causes of action for false arrest and malicious prosecution.⁵ Further, the Complaint does not indicate whether these counts are based on federal or state law, or both.⁶

The court notes that to the extent that Counts I and II are based on federal law,⁷ they are not barred by collateral

⁵ Part IV(2) of Defendants' motion is entitled "Mootness of Fourth Amendment Claims." (Def's.' Mot. for Summ. J. at unnumbered p. 6.) However, the first paragraph of that section refers to "Plaintiff's Fourth Amendment claim regarding the alleged illegal search and seizure," and Defendants only ask for summary judgment on Count V (Unlawful Search and Seizure). Id. at unnumbered pp. 6-7. Compounding this confusion is Defendants' statement that "[i]f Plaintiffs believed that police searched the vehicle without consent and that their arrest was unlawful (as they must believe by filing this civil action), they could have raised those issues during the state proceedings." Id. at unnumbered p. 6. There was no vehicular search in this case.

⁶ Plaintiff states, at the beginning of his Complaint, that "[t]his is an action under 42 U.S.C. § 1983 for violations of the Fourth and Fourteenth Amendments of the United States Constitution and other applicable state and federal law." (Compl. at 1.)

⁷ To the extent that these claims arise under federal law, they must be based on the Fourth rather than the Fourteenth Amendment. See Gallo v. City of Philadelphia, 161 F.3d 217, 221 (3d Cir. 1998) (noting that malicious prosecution claims should

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estoppel. Judge Garb's decision only related to the suppression of evidence challenged on the ground that an unlawful search had been conducted. (Defs.' Mot. for Summ. J. & Ex. D. at 38-39.) His judgment denying the motion to suppress was based on his conclusion that no search occurred, rather than that there was probable cause to search Werneth. Id. Thus, the issue critical to a determination of Counts I and II in this case - whether there was probable cause to arrest and prosecute Werneth - was not the same issue decided by Judge Garb nor was it essential to Judge Garb's decision.

C. Werneth's Claims of False Arrest and Malicious Prosecution

Under the Fourth Amendment, a police officer may not arrest and incarcerate a person except upon probable cause. Luthe v. City of Cape May, 49 F. Supp. 2d. 380, 388 (D.N.J. 1999). "The proper inquiry in a [§] 1983 claim based on false arrest or misuse of the criminal process is not whether the person arrested in fact committed the offense, but whether the arresting officers had probable cause to believe the person arrested had committed the offense." Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988). The outcome of the prosecution of the state court charges is irrelevant. Kis v. County of Schuylkill, 866 F. Supp. 1462, 1469 (E.D. Pa. 1994) (citing Roa v. City of Bethlehem, 782 F. Supp. 1008, 1015 (E.D.

⁷(...continued)

be based on explicit constitutional text rather than generalized notion of substantive due process).

Pa. 1991)).

The issue of whether there was probable cause to arrest should usually be determined by the jury, but where there is no genuine issue of material fact and credibility conflicts are absent, summary judgment may be appropriate. Sharrar v. Felsing, 128 F.3d 810, 818 (3d Cir. 1997). "The question is for the jury only if there is sufficient evidence whereby a jury could reasonably find that the police officers did not have probable cause to arrest." Id.

To prevail on a § 1983 malicious prosecution claim, a plaintiff must prove the elements of malicious prosecution as defined by the common law of the forum state, which in this case is Pennsylvania. Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 791 (3d Cir. 2000) (citing Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996)); Telepo v. Palmer Township, 40 F. Supp. 2d 596, 610 (E.D. Pa. 1999). Accordingly, Werneth must demonstrate that: (1) the defendants initiated a criminal proceeding; (2) which ended in the plaintiff's favor; (3) which was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the criminal defendant to justice.⁸ Merkle, 211 F.3d at 791. Because prosecution without probable cause is not a constitutional tort in and of itself, the

⁸ Malice is defined as "either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." Lee v. Mihalich, 847 F.2d 66, 69-70 (3d Cir. 1988) (citing Simpson v. Montgomery Ward & Co., 46 A.2d 674, 678 (Pa. 1946) and Ruffner v. Hooks, 2 Pa. Super. Ct. 278, 282 (1896)).

plaintiff must also "show some deprivation of liberty consistent with the concept of a 'seizure.'" Gallo, 161 F.3d at 222 (internal quotations and citations omitted).

To prevail on Counts I and II, Werneth must establish that Officers Pinkerton and Klein lacked probable cause to arrest and institute charges against him. There is a genuine issue of material fact as to whether Werneth produced the pipe and marijuana voluntarily, whether it was planted on him, or whether it was even produced at the scene. There is evidence that Werneth was in possession of this evidence on the night in question. Specifically, Defendants' offer the testimony of Officers Klein and Pinkerton from the suppression hearing as well as an affidavit of probable cause completed by Officer Klein as to these asserted facts. (Defs.' Mot. for Summ. J. Exs. C & D.) However, in his deposition and in a number of submissions to the court, including his response to the instant motion, Werneth attests that the marijuana and pipe were either planted on him or were never on his person at all. (Werneth Dep. at 102-106 & 113-114; Pl.'s Opp'n at unnumbered p. 9; Compl. ¶ 14.) There is obviously a credibility conflict between the testimony of Officers Pinkerton and Klein on the one hand and Werneth on the other. If Werneth voluntarily handed over the marijuana and pipe to the officers, the court would likely find that probable cause existed to arrest and prosecute Werneth. However, if it is demonstrated that this evidence was planted on Werneth or was never on his person, the court would likely find that there was

no probable cause to arrest or charge Werneth and that Officers Klein and Pinkerton were not entitled to qualified immunity because they arrested and charged Werneth knowing that probable cause was lacking.

Without a determination of the critical facts surrounding Werneth's arrest and prosecution, the court is unable to address the legal issues of probable cause and qualified immunity.⁹ Because resolution of a genuine issue of material fact is for the jury, Defendants' Motion for Summary Judgment will be denied as to the causes of action against Officers Klein and Pinkerton in Counts I and II to the extent that they are based on federal law. Also, because Werneth's state law causes of action for false imprisonment and malicious prosecution are basically identical to their federal counterparts regarding the element of probable cause, Defendants are not entitled to summary judgment on Counts I and II to the extent that they sound in state law on the grounds that probable cause existed to arrest and charge Werneth.¹⁰

⁹ Governmental officials performing discretionary functions are generally shielded from liability for civil damages where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3d Cir. 1997). Officers who reasonably but mistakenly conclude that their conduct comports with the Fourth Amendment's requirements are entitled to immunity. Sharrar, 128 F.3d at 826 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

¹⁰ Under Pennsylvania law, there is no longer a distinction between false arrest and malicious prosecution,
(continued...)

D. Immunity from Suit on Werneth's State Law Claims of False Arrest, Malicious Prosecution and Malicious Abuse of Process

Defendants argue, however, that even if probable cause was lacking, Pennsylvania law affords them immunity from suit on Counts I, II and III to the extent that they assert state law intentional tort causes of action.

Pennsylvania's Political Subdivision Tort Claims Act provides that a local agency is immune from suit based on state law tort causes of action, unless the plaintiff can establish that the allegedly wrongful act falls into one of eight exceptions.¹¹ 42 Pa. Cons. Stat. Ann. § 8541, et seq. A municipal employee has immunity from suit to the same extent as the municipality, unless the employee's tortious conduct was intentional. Id. § 8550; Hill v. Borough of Swarthmore, 4 F. Supp. 2d 395, 397 (E.D. Pa. 1998). Accordingly, a municipal employee remains personally liable for willful misconduct. See Illiano v. Clay Township, 892 F. Supp. 117, 121 (E.D. Pa. 1995)

¹⁰(...continued)
although they still must be distinguished for pleading purposes. 29 P.L.E., Malicious Prosecution § 26. With regard to Count III, lack of probable cause is not an element of a malicious abuse of process claim in Pennsylvania. Shiner v. Moriarty, 706 A.2d 1228, 1236 (Pa. Super. Ct. 1998).

¹¹ The statute states that:

Except as provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa. Cons. Stat. Ann. § 8541.

(stating that employee remains personally liable for intentional torts) (citations omitted); Simmons v. Township of Moon, 601 A.2d 425, 429-30 (Pa. Commw. Ct. 1991) (noting that allegations against county detectives must rise to level of official misconduct to remove grant of immunity).

1. Northampton Township

The Township is immune from suit on Werneth's state law causes of action. None of the exceptions to immunity are relevant here.¹² Thus, summary judgment will also be granted in the Township's favor on Counts I, II and III to the extent that they assert causes of action under state law.

2. Officers Pinkerton and Klein

However, contrary to the Defendants' assertions, Officers Pinkerton and Klein are not immune from suit under the Tort Claims Act. Werneth alleges that the officers "planted" evidence on him for the purpose of coercing him into making "false statements and accusations" and arresting and charging him with drug possession when he refused to do so. (Compl. ¶ 14.) These are allegations of willful misconduct, and are therefore sufficient to remove the grant of immunity from suit under the

¹² To qualify as an exception to immunity, the plaintiff must show (1) that the damages would be recoverable under a common law cause of action or statute if the injury were caused by a person without a defense under §§ 8541 & 8546, and (2) the injury was caused by the negligence of the local government or its agent with regard to motor vehicles, care of personal property, maintenance of real property or trees, traffic controls, operation of utility services, sidewalks, or animals. 42 Pa. Cons. Stat. Ann. § 8542.

Tort Claims Act. See Simmons, 601 A.2d at 427 & 429-30 (noting that plaintiff must allege willful misconduct to remove official's immunity from claim of, inter alia, false arrest). Thus, Officers Pinkerton and Klein are not immune from suit on Werneth's state causes of action for false arrest, malicious prosecution or malicious abuse of process. Accordingly, Defendants' motion will be denied as to Counts I, II and III to the extent that they assert state law causes of action against Officers Klein and Pinkerton.

E. Motion to Produce Evidence

Werneth requests an Order directing Bucks County's 911 Emergency Dispatch to produce a copy of the 911 call made by Werneth shortly after midnight on November 2, 1997. Werneth asserts that this tape plays a critical role in this litigation.

Although Werneth's motion is untimely,¹³ in view of the court's ruling and because the information sought could be important in the development of the factual record at a later point in this case, the court will grant the motion. Because Werneth seeks this discovery from a non-party, discovery can be had through the issuance of subpoenas pursuant to Federal Rule of Civil Procedure 45. Werneth will be given fifteen (15) days to issue and serve a subpoena duces tecum on the Bucks County 911 Emergency Dispatch, or other person or appropriate entity, directing that copies of any recordings of Werneth's calls on

¹³ The discovery deadline in this case was June 30, 2000.

November 2, 1997 be produced. Failure to issue and serve a subpoena within fifteen days will preclude discovery of the 911 tapes.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment will be: granted in favor of the Township on all counts; granted in favor of Officers Pinkerton and Klein on Counts IV and V; and denied as to the remaining Counts. The Motion to Produce Evidence will be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL WERNETH, SR. : CIVIL ACTION
v. :
NORTHAMPTON TOWNSHIP, et al. : NO. 99-5408

ORDER

AND NOW, TO WIT, this day of November, 2000, upon consideration of defendants Northampton Township, et al.'s Motion for Summary Judgment; plaintiff Michael Werneth, Sr.'s Opposition thereto and plaintiff Michael Werneth, Sr.'s Motion to Produce Evidence, IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED to the extent that it requests summary judgment in favor of defendant Northampton Township on all counts and to the extent that it seeks summary judgment on Counts IV and V in favor of Officers Charles J. Pinkerton and William P. Klein. Said motion is DENIED in all other respects. Judgment is entered in favor of defendant Northampton Township on all counts and in favor of defendants Officers Charles J. Pinkerton and William P. Klein on Counts IV and V.

IT IS FURTHER ORDERED that plaintiff Michael Werneth, Sr.'s Motion to Produce Evidence is GRANTED. Werneth has fifteen (15) days from the date of this Order to issue and serve upon the Bucks County 911 Emergency Dispatch, or other person or appropriate entity, a subpoena duces tecum directing that copies of any recordings of Werneth's 911 calls on November 2, 1997 be produced. Failure to issue and serve a subpoena within fifteen days will preclude discovery of the 911 tapes.

LOUIS C. BECHTLE, J.