IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02802-REB-MEH

JEREMY C. MYERS,

Plaintiff,

v.

BRIAN KOOPMAN, Detective in the Loveland, Colorado Police department, in his individual capacity;
CITY OF LOVELAND, Colorado, a municipality;

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS BRIAN KOOPMAN AND CITY OF LOVELAND'SMOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (DOCKET #128, FILED 03/11/2011)

COMES NOW Plaintiff, by and through his attorney, Randall R. Meyers, and respectfully request this Court deny Defendants Brian Koopman, and City of Loveland's Motion to Dismiss Plaintiff's Amended Complaint (the Loveland Defendants) (CM/ECF Docket # 128, filed 03/11/2011). For his Response, Plaintiff states as follows:

I. INTRODUCTION

Plaintiffs' Amended Complaint, when read in its entirety, pleads with adequate specificity the existence of constitutional violations and that Plaintiff's constitutional rights have been violated. Defendants' Motion misstates what is fact and conclusion.

The complaint, as amended, addresses the Court's previous concerns. The City of Loveland is adequately before the Court within the complaint and malice is adequately pled to establish a claim. For those reasons set forth below, the motion is without merit and should be denied.

II. ARGUMENT

A. THE CITY OF LOVELAND IS A PROPER DEFENDANT AS NAMED IN THE AMENDED COMPLAINT.

Monell v. Dept. of Soc. Servs, 436 U.S. 658 (1978), cited by Defendants in their motion, is a case about responsibility. *Pembaur v. City of Cincinnati* 475 U.S. 469, 106 S.Ct. 1292. What *Pembaur* tells us is that municipal liability attaches for actions taken pursuant to official municipal policy or custom "where the decision-maker possesses final authority to establish municipal policy with respect to the action taken". This is true under *Pembaur* whether the act complained of is a recurring act or a single one, contrary to Defendants' assertion. The *Pembaur* opinion further establishes a "chain" of responsibility in that municipal officials can, and frequently do, delegate the authority to institute certain policies or customs to other officials. In this instance, for example, it is unlikely that municipal legislators would establish policy relating to the investigation and prosecution of criminal offenses. This is generally left to the police officials. In turn, Chiefs of Police can, and do, delegate authority to conduct searches and seizures to commanding officers who are generally "on scene".

The Complaint alleges that Koopman, in command of the drug bust, was the "decision-maker" for the City of Loveland, and as such executed unconstitutional

policies or customs which deprived Plaintiff of one or more of his constitutional rights. In this case in particular, it was not the Loveland City Council, or even the Loveland Chief of Police that controlled the investigation or made any of the decisions related thereto, it was Defendant Koopman who not only controlled the investigation on scene but also controlled the other LCDTF participants. The City of Loveland is a properly named defendant under *Pembaur*. *See also Anglin v. City of Aspen, 552 F. Supp. 2d 1205, 1216 (D.Colo. 2008)* and *Saye v. St. Vrain Valley School Dist*, 650 F. Supp 716 (D.Colo. 1986), both are Colorado cases which support this legal premise.

B. PLAINTIFF'S MALICIOUS PROSECUTION CLAIM APPROPRIATELY INVOKES BOTH THE FOURTH AND FOURTEENTH AMENDMENTS.

In *Mondragon v. Thompson*, 519 F.3d 1078 (10th Cir. 2008), the Court allowed the case (Section 1983 – malicious prosecution) to proceed on a Fourth and Fourteenth Amendment analysis, citing the holding in *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). The Court stated its grounds: We have held that a plaintiff who claims the government has unconstitutionally imprisoned him has at least two potential constitutional claims. "The initial seizure is governed by the Fourth Amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause". The Tenth Circuit cases cited above do not support Defendants' contentions. The *Pierce* Court discusses at length the constitutional analysis of fourth and fourteenth amendment claims arising out of a malicious prosecution setting. *Pierce v. Gilchrist*, 359 F.3d at 1285-1286. As previously stated,

The Court concluded: "The initial seizure is governed by the fourth amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause." *Id.* The Court concluded it is not necessary to determine when one analysis ends and the other begins when, as in the case of Mr. Myers' Amended Complaint, the complaint raises "claims under both constitutional provisions." *Id.*, at 1286. That position has been cited by numerous subsequent decisions as well. *Mondragon v. Thompson*, 519 F.3d at 1082; *Miller v. Spiers*, 339 Fed. Appx. at 867; *Asten v. City of Boulder*, 652 F.Supp. 2d 1188, 1197 (D. Colo. 2009). Plaintiff's claims lie under both amendments. Dismissing, or striking, as argued by Defendants, those portions relating to the Fourteenth Amendment would have no practical effect as Defendants concede Plaintiff has a legitimate claim under the Fourth Amendment. This argument was previously raised by these Defendants in their Motion to Dismiss. It lacked merit then as it also does now.

C. PLAINTIFF HAS MET HIS BURDEN IN THE AMENDED COMPLAINT UNDER THE APPLICABLE PLAUSIBILITY STANDARD OF PLEADING.

Plaintiff has not restated the earlier allegations set forth in the original complaint other than as they may be generally applicable to his claim in the amended complaint. Plaintiff, instead, pleads specifically those facts which he believes demonstrates malice in paragraph 37 a-l:

- **37a** For example, and as noted by the Defendants, Plaintiff factually alleges that Defendant Koopman had the subject property under video surveillance for approximately 3 to 4 months prior to the warrant and the search. Certainly,

Koopman's affidavit for search warrant was not based on the surveillance at all. It should be clear that at the time Koopman prepared and submitted the affidavit to the court he was aware that none of what he put in the affidavit was factually correct. Therefore, if he did have a confidential informant, the surveillance video would have debunked the information provided to him by the informant. Koopman's reckless behavior in pursuing the warrant, knowing that the informant's claims were not supported by his own video surveillance, can be construed as nothing other than malicious. The presentation of an affidavit to a court both explicitly and implicitly contains assertions as to the informant's reliability. At a minimum, a reasonably prudent well intentioned officer would have questioned his source's reliability *before* obtaining a warrant and certainly *before* executing it.

- **37b** Plaintiff's allegations with regard to the keys are not only pertinent to the dismissed claims but are quite instrumental as a demonstration of Defendant Koopman's state of mind. It was clear that once he had his pet project underway with assistance from multiple agencies that he was not going to be denied the full dramatic effect of a forceful entry by simply using a key to gain entry. What Koopman and others seem to forget is that with every unnecessary use of force someone suffers damages. The lack of due regard for this behavior, especially when given a less destructive alternative, can be nothing short of malicious behavior.

- **37c-d** The facts which demonstrate malice are cumulative throughout the events of this case. Koopman and his "team", during the search recovered an ordinary Mason jar containing a white substance. This jar was portrayed as a "lot of dope" with the obvious intent of implying it was the result of the drug bust against Plaintiff. This is despite the fact that the jar was covered in dust and was rusted. These are facts which should indicate to any prudent well intentioned peace officer that this jar simply could not have been the result of the contemporaneous manufacture of meth by Plaintiff Myers. Moreover, to compound further this absurdity, this jar was retrieved from a building which was not the property of plaintiff or his father. The search was executed against property not rightfully subject to search and the reason for that is the reckless malicious attitude of Koopman.

The accumulation of evidence thus far shows us that Koopman wrongfully portrayed information from an informant as reliable when he had within his possession evidence that cast serious doubt on his informant's information. He insisted on excessive force to gain entry when he had been offered keys to the premises on 3 occasions and had video surveillance that showed no one had been living on the premises for a considerable time. He proclaimed victory in his quest for drugs using a jar of a white substance that he obtained by searching a building not in the possession of, nor accessible to the Plaintiff, that was covered in dust and rust *from an abandoned sugar factory* while not once pausing to reflect that he may have badly missed the mark.

- **37e** The size of the attic entrance is a factual allegation which further debunks the confidential informant's information. Taken with the other known facts that were within the possession of Koopman this further shows Koopman's state of mind as one being motivated by malice. Yes the attic information was obtained by Koopman's "reliable" informant but, nonetheless, Koopman could have and should have abandoned his efforts in the face of the overwhelming evidence that he and his informant were wrong. He did not. That is malice.
- **37f** Plaintiff's circumstances upon arrest and incarceration most certainly are relevant to his claim of malicious prosecution. The importance lies in the fact that Plaintiff's arrest and incarceration occurred after the bungled search, a time when Koopman would have known and processed all of the information he discovered that was wrong during the search. He not only persisted in the arrest of the Plaintiff but in the process reneged on his agreement with both Plaintiff and his attorney by adding two additional charges an act he most certainly knew would result in further detention of the Plaintiff. These were not charges based on new evidence; these were additional charges that Koopman and the district attorney were aware of at the time of the original filing. These charges, if appropriate, could easily have been endorsed by the prosecution at any later date. Therefore, the conclusion is inevitable that this was a malicious act by Koopman.
- **37g** Plaintiff alleges that Koopman had been informed of the results of the environmental hygienist at some point in the prosecution, yet ignored those results in the same manner that he ignored the other evidence that showed no

probable cause. Larimer county regulations require remediation of a meth site and Koopman, being the experienced and knowledgeable drug enforcement officer that he alleges he is, would know this.

- **37h** The amended complaint under paragraph 37h contains a factual allegation of a statement made by the commander of the LCDTF that the field test strips used by Koopman were always accurate. Further, the fact that in this instance all seven of the tests proved false is also a factual allegation. The fact that these test strips are frequently used and prove to be reliable in past instances is, likewise, a factual allegation. Considering the virtual statistical impossibility of *all* tests showing false positive results, and considering the accumulation of evidence thus far which is a clear display of malicious actions on the part of Koopman it is easily the case that Koopman possessed a similar malicious intent with regard to the test strip results.
- **37i-j** Defendants' Motion persistently, and wrongly, brands factual statements as "conclusions". Plaintiff's allegations as to what was stated in the affidavit are factual allegations, not conclusions. Plaintiff's allegations as to what was visible in the surveillance video are factual, not conclusary. The fact that the video surveillance showed none of what was claimed in the affidavit is not a conclusion, but a fact. The fact that Koopman failed to make any mention of the video surveillance in the affidavit is also a fact rather than a conclusion. Moreover, the video surveillance was hardly "limited". The cameras were

running 24/7 over a period of 3-4 months and were perched on a rooftop of an adjacent business, all factual assertions.

- **37k-l** Acts that persist after the dismissal that have no useful purpose in the prosecution of the criminal offense can constitute evidence of a malingering state of mind of Koopman, a state of mind that can only be described as a reckless disregard for the truth, abuse of authority, and malicious.

In summary, Defendants confuse a complaint with a trial. There is no requirement at the pleading phase that a plaintiff prove he has direct evidence of the state of mind of an offender. Those facts alleged in Plaintiff's amended complaint are sufficient to put Defendants on notice of the claims against them. Moreover, the facts asserted are all easily shown with the Defendants' own evidence.

Pierce v. Gilchrist, 359 F.3d 1279, C.A. 10 (Okla.), 2004 is instructional to Plaintiff's claims. Plaintiff asserts, and can factually prove, that Koopman failed to include the results of the video surveillance in the affidavit for a search warrant. The video surveillance is exculpatory both because it fails to show any criminal activity by Plaintiff, much less what was charged by the prosecution, but also because it shows the informant information to be profoundly untrue and, thus, unreliable. *Pierce* states: "In a case involving the withholding of exculpatory evidence, the existence of probable cause is determined by examining the evidence "as if the omitted evidence had been included". Koopman knew that in order to obtain a search warrant he could not include the

results of the video surveillance. Withholding known exculpatory evidence in an affidavit for a search warrant constitutes a complete disregard for the truth and is malicious intent.

D. POLICE OFFICERS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

Plaintiff previously addressed these and similar assertions by Defendants in his Response to Loveland Defendants' original Motion to Dismiss. Defendants' new attempt to cloak Koopman with immunity is not unlike their previous attempt to deny he could be sued for malicious prosecution in the first place since he was not a prosecutor. Defendants' angle now is to argue that Koopman is the same as the prosecutor and, therefore, entitled to prosecutorial immunity. Neither of Defendants' arguments have legal merit. Defendants cite dicta in a concurring opinion by Justice Ginsburg as authority for this position, yet, such dicta was not the gist of the ruling in the case and appeared to be mere "musing" by the Justice. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606 (1993). When functions of prosecutors and detectives are the same, immunity that protects them from Section 1983 liability is also the same. *Buckley.* Koopman never performed any prosecutorial functions, his actions were either investigative or administrative, at best, and neither function has absolute immunity regardless of the actor.

III. CONCLUSION

The Amended Complaint does state with sufficient specificity the existence of constitutional violations and that Plaintiffs' constitutional rights have been violated. The complaint names the "who, what, and where" of those facts which the Plaintiff believes support the claims made in the amended complaint. Plaintiff respectfully submits this matter should be allowed to proceed and Defendants' Motion be denied.

WHEREFORE, Plaintiffs respectfully request the Court deny Defendants' Motion, and for any further relief the Court deems just and proper.

DATED the 31st day of March 2011.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 31st day of March, 2011, I electronically filed the foregoing Response to Defendant Brian Koopman, and City of Loveland's Motion to Dismiss with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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And I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participants name:

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