

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

EMILY MILBURN, INDIVIDUALLY
AND AS NEXT FRIEND OF DYMOND LARAE MILBURN,
PLAINTIFF

V. CIVIL ACTION NO. _____

SERGEANT GILBERT GOMEZ [BADGE #987],
OFFICERS DAVID ROARK [BADGE #332],
JUSTIN POPOVICH [BADGE #336), AND
SEAN STEWART [BADGE #392],
DEFENDANTS

PLAINTIFF, EMILY MILBURN, AS NEXT FRIEND OF DYMOND LARAE
MILBURN'S, ORIGINAL COMPLAINT

This complaint is filed with respect to the violation of Plaintiff's constitutional rights, and the illegal arrest and detention of Plaintiff, by Officers David Roark, Justin Popovich, Sean Stewart, and Sergeant Gilbert Gomez, Galveston Police Department, hereinafter and sometimes referred to as Defendants and/or Defendant Officers.

Plaintiff would show this Honorable Court as follows,
to-wit:

Jurisdiction

1. Jurisdiction vests under 28 U.S.C. § 1331 (federal question); 42 U.S.C. § 1983); 42 U.S.C. § 1343 (civil rights).

2. Plaintiff asserts pendent jurisdiction for the state law claim of illegal arrest and detention.

3. The incidents that form the basis of this lawsuit occurred in Galveston County, Texas.

Parties

4. Plaintiff, Emily Milburn, is a resident of Galveston County, Texas.

5. The Defendant officers were employees of the City of Galveston Police Department at the time of the incident which is the subject of this lawsuit.

6. The incident which is the subject of this lawsuit occurred in Galveston County, Texas.

Factual History

7. On the night of August 22, 2006, Plaintiff's mother, Emily Milburn, was preparing her children for school the next day, when a breaker broke, cutting off electricity to the family's home, located at 2001 24th Street, Galveston, Texas. Plaintiff requested her child, Dymond, to go outside and hit the switch, located downstairs and outside the house.

8. When Plaintiff went outside the house toward the breaker box, a blue van drove up to the house. The time was roughly 7:45 p.m.

9. Several men came out of the van and ran toward Plaintiff. One of the men grabbed Plaintiff, and said "you're a prostitute. You're coming with me."

10. The men were later identified as Officers Justin Popovich, Sean Stewart, and David Roark, and Sergeant Gilbert Gomez of the Galveston Police Department, Narcotics Division. The van they were traveling in was unmarked and the officers were not in uniform. The officers did not identify themselves as police.

11. Dymond grabbed a tree and started yelling "Daddy, Daddy, Daddy."

12. Dymond was twelve (12) years old at the time these events took place.

13. The officer who was holding Plaintiff covered her mouth. The officer was ultimately identified as David Roark.

14. Wilfred Milburn, Plaintiff's father, was on the balcony when heard his daughter's cries for help and came outside. Emily Wilburn also heard the cries and ran outside. When they arrived outside, Plaintiff was hysterical and holding on to the tree with one arm; two officers were striking Plaintiff's child be head, face and throat at the time.

14. At no time did the supervising officer (Gomez) on the scene intervene and stop the illegal seizure and assault.

15. The Officer stated that they had received a call reporting three (3) prostitutes in the neighborhood and that drug dealing was "going down."

16. The officer hit Plaintiff in the back of head with a flashlight, hit her neck, throat, slapped her across the face, and told her to get off the tree.

17. Wilfred Milburn told the officer "that's our daughter. She's twelve."

18. The officer responded, "I don't care if she's twenty-two, thirty-two, or forty-six. Tell her to calm down."

19. Plaintiff's parents asked the officers if they could comfort their daughter. Their request was denied.

20. The family's five (5) month old puppy grabbed the officer's leg. The officer threatened that if they did not grab the dog, he would shoot it.

21. It was ultimately learned that the dispatch call the officers were responding to reported three white females soliciting one white male and one black male drug dealers. The reported location was Avenue P and One-Half (P1/2) and 24th Street, Galveston, Texas.

22. Dymond is an African-American female. During her encounter with the officers on August 22, 2006, Plaintiff was dressed in a black and white T-shirt and red, cotton athletic shorts. At the time, Dymond was five (5) feet and six (6) inches tall, and weighed one hundred and twenty (120) pounds. She was an honor student attending advanced classes at Austin Middle School.

23. As a result of the Officers' assault, Dymond suffered from pain in the back of the head, lower back pain, a sprained wrist with abrasions, and throat, neck and face pain. Plaintiff's parents took her to the University of Texas Medical Branch for treatment. They arrived at the emergency room at 9:24 p.m. on August 22, 2006. Plaintiff was treated for head injuries and multiple contusions. The examining physician found that Plaintiff suffered injuries from multiple blows to the head, face, neck, lower back, left shoulder, and left hip/waist area. She suffered a contusion to the back of the head (where she was struck with a flashlight). There were abrasions on her arm and wrist. Plaintiff's throat was swollen; she had difficulty swallowing, nausea and vomiting, and hoarseness of voice due to being struck in the throat. She had black eyes, scalp lacerations, tenderness of the vertebrae. She was experiencing double vision and loss of hearing.

Plaintiff's ear drum and nose were also injured (blood in ear, bruised nasal septum, and nose bleed).

24. On Friday, September 15, 2006, at 10:00 a.m., twelve (12) year old Dymond Milburn was arrested for assaulting a public servant. The arrest took place while Dymond was at school.

25. Since the incident, Plaintiff has had regular nightmares in which police officers are raping her, beating her, and cutting off her fingers. Her fear prevented her from participating in normal activities (going outside to play) which she no longer considered safe. Plaintiff sought psychological treatment, and on October 31, 2006, she was diagnosed with post-traumatic stress disorder due to the incident which is the subject of this lawsuit.

26. Plaintiff's arrest was without probable cause and without due process. Plaintiff was required to hire counsel to defend her rights against the unfounded charges. Trial on the case against Plaintiff commenced on October 3, 2007; however, a mistrial was declared the same day. At the time of the filing of this lawsuit, no retrial is pending.

Causes of Action
Color of State Law and Violation of
Clearly Defined and Known Rights

27. Defendant Officers at the time of the incident were police officers for the City and County of Galveston. At all times material to this action, Defendants were acting under color of law.

28. Defendants' actions on August 22, 2006, violated Plaintiff's clearly defined rights, including Plaintiff's right to be free from excessive force (seizure and detention). The seizure, assault, and detention was not reasonable and without probable cause. The seizure worked to deny Plaintiffs of a known right and privilege. The assault was unjustified under established state and federal law and violated Plaintiff's rights. Such rights were known rights at the time of the application of excessive force and detention.

Illegal Arrest and Detention

29. The actions of the Defendant Officers on August 22, 2006, also constitute the state law claims of illegal arrest and detention. The seizure and detention were unreasonable and without probable cause. The defendants willfully seized and detained Plaintiff, the detention was without Plaintiff's consent, and without legal authority or justification.

30. Defendants acted intentionally or recklessly, their conduct was extreme and outrageous, their conduct was directed at Plaintiff, and their conduct caused Plaintiff physical injury and severe emotional distress.

31. The subsequent arrest of Plaintiff on September 15, 2006, at her school, was also illegal, and deprived Plaintiff of her known constitutional rights to be free from unreasonable seizure and detention. The arrest derived from the affidavit of Defendant Gomez; the affidavit contained false information was used to allow judicial intervention and justify the search, seizure and arrest.

32. The reciting conduct which occurred on August 22, 2006. The initial seizure of Plaintiff on August 22, 2006, was unreasonable and was not based on probable cause. And the affidavit and the facts recited therein did not provide probable cause to support the subsequent charges and arrest.

Prayer for Damages

33. But/for the offending events in question, Plaintiff suffered injury. Plaintiff sues in the following respects, to-wit:

A. Compensatory damages (severe embarrassment,

- fear, anxiety, loss of sleep, and emotional distress, including a diagnosis of Post-Traumatic Stress Disorder, continuing nightmares and flashbacks, loss of appetite, loss of normal functioning, and negative effect on school grades due to trouble concentrating in class, all associated with the beating suffered at the hands of the law enforcement officers);
- B. Compensation for the physical injuries suffered, including contusions to her head, abrasions, injury, and bruising to her body and appendages;
 - C. Actual damages including medical bills incurred, attorneys' fees (**criminal and civil**), bonding fees and losses associated with the incident;
 - D. Exemplary damages directed against Defendant(s);
 - E. Pre-judgment and post-judgment interest;
 - F. Reasonable and necessary attorneys' fees under 42 U.S.C. § 1988; and
 - G. Costs of suit and other equitable relief to which Plaintiff may be deemed entitled under law.
 - I. Declaratory judgment relief in the form of a declaration that the conduct in question violated Plaintiff's known constitutional rights and that

the acts in question were unconstitutional and
violative of the law of the United States.

DATE: August 22, 2008.

Respectfully submitted,

/S/ ANTHONY P. GRIFFIN

ANTHONY P. GRIFFIN
ATTORNEY-IN-CHARGE

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JURY TRIAL DEMANDED