IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

JESUS GONZALEZ,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE NO.
	)	
v.	)	09-CV-0384-LA
	)	
VILLAGE OF WEST MILWAUKEE, WISCONSIN, *et. al.*	)	
	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary

Plaintiff brought this action against Defendants for violations of the federal Privacy Act and his 14th Amendment Right to be free from unreasonable searches and seizures. Because the Parties are in agreement regarding the material facts necessary to prove liability on the part of Defendants as to the constitutional claims and the claim pertaining to § 7(b) of the Privacy Act, Plaintiff brings this Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56.

Background

There are two incidents in two different cities, almost a year apart.

(1) West Milwaukee Menards Incident

On May 14, 2008, Defendants Krafcheck and Donovan were on duty as officers with the West Milwaukee Police Department. Deposition of Patrick Krafcheck, p. 6; Deposition of Charles Donovan, p. 9; PFOF, ¶ 1[1]. Ofc. Krafcheck received a telephone call from Jeffrey Jensen, the manager of a Menards home-improvement store in West Milwaukee. Jensen had called to ask if it were legal to carry a handgun in Wisconsin. Krafcheck Depo., p. 8. Deposition of Jeffrey Jensen, pp. 21-27; PFOF, ¶2. Jensen related to Krafcheck that Plaintiff had been shopping in Menards wearing a handgun in a thigh holster and that it made Jensen nervous. *Id.;* PFOF, ¶ 3. Krafcheck told Jensen he would go to the store to "check [Plaintiff] out." *Id.;* PFOF, ¶ 4.

Krafcheck advised Donovan that Plaintiff had been in Menards wearing a firearm and that by legally carrying a holstered pistol Plaintiff "created a disturbance enough where the manager called the police, that the manager felt very uneasy and uncomfortable, and so did several employees." Donovan Depo., pp. 11-12; PFOF, ¶

5. When Donovan arrived in the parking lot of Menards, Plaintiff and Plaintiff's brother were peacefully loading bricks they had purchased from Menards onto a pickup truck. *Id*., p. 24; PFOF, ¶ 6. Donovan approached Plaintiff, who was wearing an empty holster but admitted that he had been in the store wearing a firearm. *Id.*, p. 17; PFOF, ¶ 7. Donovan asked Plaintiff where his handgun was. *Id.;* PFOF, ¶ 8. Plaintiff declined to answer, and Donovan arrested Plaintiff. *Id;* PFOF, ¶ 9. Prior to making the arrest, Donovan did not speak to any witnesses and did not obtain any information about the nature of the supposed "disturbance" in the store other than what Krafcheck had relayed to him second hand about the telephone call from Jeffrey Jensen. *Id.*, pp. 21-23; PFOF, ¶10.

Krafcheck seized Plaintiff's handgun, magazines, ammunition, and gun case from Plaintiff's vehicle after Plaintiff had been handcuffed and placed in a squad car. Krafcheck Depo., pp. 19-24; Donovan Depo., Exhs. 3-4; PFOF, ¶ 11. Krafcheck did not have a warrant and did not have Plaintiff's consent to take possession of Plaintiff's property.

After Plaintiff was transported to the police station, Donovan "processed him." Donovan Depo., p. 36; PFOF, ¶ 12. As part of that processing, Donovan asked

[1] Plaintiff shall use "PFOF" to refer to Plaintiff's Proposed Finding of Facts filed

Plaintiff for his social security number ("SSN"). *Id.;* PFOF, ¶ 13. Donovan did not advise Plaintiff whether disclosure of the SSN was optional or mandatory, by what statutory authority he was requesting it, or what uses would be made of it. *Id.*, p. 37; PFOF, ¶ 14. As a result of Donovan's request, Plaintiff's SSN was put into the records of the West Milwaukee Police Department. *Id.*, Exh. 2; PFOF, ¶ 15.

The Milwaukee County District Attorney ultimately declined to charge Plaintiff with any offenses arising from the Menards incident. Deposition of Jesus Gonzalez, pp. 115-116; PFOF, ¶ 16. While the arrest was pending, the West Milwaukee Police Department retained possession of Plaintiff's firearm and other property for several months. *Id.*, p. 139; PFOF, ¶17.

(2) The Chilton Walmart Incident

On April 10, 2009, Defendant Young was on duty as a police officer for the City of Chilton Police Department. Deposition of Michael Young, p. 14; PFOF, ¶ 18. At approximately 11:47 p.m., Young received a dispatch that a person was at the Chilton Walmart store wearing a handgun and asking to purchase ammunition for a firearm other than the one he was carrying. *Id.*, pp. 17-18; *Id.*, Exh. 1; PFOF, ¶ 19. When Young arrived at the Walmart, the store manager, Jennifer Fairchild, told

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contemporaneously.

Young that Plaintiff was in the sporting goods department and that a store associate was "stalling" Plaintiff in the sporting goods department. Young deposed that Fairchild seemed upset. *Id.*, pp. 22-24; PFOF, ¶ 20.

Young approached Plaintiff in the sporting goods department as Plaintiff was innocently completing his purchase of ammunition. *Id.*, p. 25; PFOF, ¶21. Young drew his pistol and held Plaintiff at gun point while awaiting a backup officer. *Id.*, pp. 26-27; PFOF, ¶ 22. When the backup officer arrived, Young handcuffed Plaintiff and led him out of the store to Young's squad car. *Id.*, pp. 33-36, 46; PFOF, ¶ 23. Young transported Plaintiff to the Chilton Police station. *Id.*, p. 53; PFOF, ¶24. Young placed Plaintiff in an interview room, where Plaintiff was detained while Young made telephone calls. *Id.*, p. 56; PFOF, ¶ 25. Young attempted to call the Calumet County district attorney and assistant district attorney to ask for advice on the situation, but he was not able to reach either one. *Id.*, pp. 56-57; PFOF, ¶ 26. After a total detention of approximately an hour Young released Plaintiff without booking him or citing him for any offenses, but retained possession of Plaintiff's firearm. *Id.*, pp. 58-60; PFOF, ¶ 27.

The Calumet County district attorney of course declined to bring any charges against Plaintiff for any offenses arising from the Walmart arrest. April 23, 2009

from Calumet County District Attorney's Office (Young Depo, Exh. 3); PFOF, ¶ 28. Plaintiff's property was returned to him within a few weeks. Gonzalez Depo., p. 167; PFOF, ¶ 29.

Jurisdiction

This Court has jurisdiction over the claims at issue in this Motion because the causes of action are federal questions, violations of the federal Privacy Act (5 U.S.C. § 552a) and violations of the 14th Amendment. 28 U.S.C. § 1331. Plaintiffs may sue under 42 U.S.C. § 1983 for violations of the Privacy Act. *Schwier v. Cox*, 340 F.3d 1284, 1292 (11th Cir. 2003).

Argument

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed. Rules Civ. Proc. There is a dispute of fact regarding Plaintiff's claim under § 7(a) of the Privacy Act, but there is not such dispute for Plaintiff's § 7(b) claim. There likewise is no dispute regarding Plaintiff's 14th Amendment claims.

I. Violation of Section 7(b) of the Privacy Act

Section 7(b) of the Privacy Act requires that:

Any federal, state, or local government agency which requests an

> individual to disclose his Social Security Account Number shall inform the individual whether that disclosure is mandatory or voluntary, by which statutory or other authority such number is solicited, and which uses will be made of it.

Defendant violated Section 7(b) of the Privacy Act by failing to inform Plaintiff:

1. Whether disclosure of his SSN was mandatory or optional;
2. By what statutory or other authority Plaintiff's SSN was solicited; and
3. What uses will be made of Plaintiff's SSN.

These three notices are required by federal law. The second two are not optional even if the government is requesting the SSN on a voluntary basis. *Schwier v. Cox*, 412 F.Supp. 2d 1266, 1275 (N.D. Ga. 2005).

It is undisputed that Donovan failed to give any notice required by the Privacy Act:

> Q. When you asked him for his social security number, did you tell him whether it was optional or mandatory?
> A. I just asked him, "Can I get your social security number?"
> Q. Okay. Did you tell him by what statutory authority you were requesting it?
> A. I didn't tell him anything other than I needed your social security number. It's part of the booking process.
> Q. Okay. I assume that means you also didn't tell him what uses were going to be made of it?
> A. What uses were going to be made of it. He didn't ask, so I didn't tell him that.

Deposition of Charles Donovan, pp. 36-37; PFOF, ¶ 30.

A violation of a single provision of § 7(b) would be sufficient for Plaintiff to prevail on his claim under § 7(b). It cannot be disputed that Donovan violated all three provisions, and therefore Plaintiff must be awarded judgment as a matter of law on this aspect of Plaintiff's claim.

It also is clear from the discovery documents produced by Defendants that West Milwaukee maintains a record of Plaintiff's SSN. The dissemination and storage of Plaintiff's SSN is a direct result of Donovan's wrongful collection of the SSN.

Adopting the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 2194, 5 U.S.C. § 552a (note), Congress set forth in Section 2 the following findings:

> (1) The privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal Agencies;
> (2) The increasing use of computers and sophisticated information technology, all essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;
> (3) The opportunities for an individual to secure employment, insurance and credit, and his right to due process, and other legal protections are endangered by his misuse of certain information's systems;
> (4) His right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
> (5) In order to protect the privacy of individuals identified in Information Systems maintained by Federal Agencies, it is necessary and proper for Congress to regulate the collection,

> maintenance, use, and dissemination of such information by such agencies.

More than 30 years later, Cynthia M. Fagnoni, a Managing Director of the United States Government Accountability Office testified before Congress that nearly 10 million Americans are victims of identity theft in a single year. Ms. Fagnoni attributed this problem in part to the fact that "SSNs are widely exposed in a variety of public records." [2]

> In enacting [§ 7(b)], Congress intended to permit an individual to make an informed decision whether or not to disclose the social security account number and to bring recognition to, and discourage, unnecessary or improper uses of that number.

Doyle v. Wilson, 529 F.Supp. 1343, 1350 (D. Del. 1982) *citing Analysis of House and Senate Compromise Amendments to the Federal Privacy Act,* printed in 120 Cong.Rec. S21,817 (Dec. 17, 1974) and in 120 Cong.Rec. H12,243 (Dec. 18, 1974). Because Donovan failed to provide Plaintiff the information required by § 7(b), Donovan deprived Plaintiff of the opportunity to make the "informed decision" described in *Doyle.*

[2] Testimony Before the Subcommittee on Social Security, Committee on Ways and means, House of Representatives, March 30, 2006.

II. Violations of Fourteenth Amendment[3]

IIA. West Milwaukee

IIA1. Donovan Seized Plaintiff

A police intervention may be a seizure if, 'taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *United States v. Packer*, 15 F.3d. 654, 657 (7th Cir. 1994) (quoting *Florida v. Bostick*, 111 S.Ct. 2382, 2387 (1991). In the instant case, Donovan handcuffed Plaintiff, told him he was under arrest, and placed him in a squad car. It is clear Plaintiff was "not at liberty to ignore police presence and go about his business." *Dunaway v. New York*, 442 U.S. 200, 207 (1979) ("There can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station.") Plaintiff was, therefore, seized for 14th Amendment purposes.

Donovan arrested Plaintiff without a warrant. A warrantless arrest is *per se* unconstitutional absent exigent circumstances . *Dunaway*, 442 U.S. at 208. "Probable

[3] Plaintiff's 14th Amendment claims are based on the application against the states of rights described in the 4th Amendment. Many cases and commentators use the

cause exists where the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed [by the person to be arrested]." *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

Because Donovan applied an "arrest first, investigate later" approach to Plaintiff, he had very few facts at his disposal when he made the arrest:

> Q. Are you saying that because you knew he had a weapon but you didn't know where it was you arrested him?
>
> A. No. I arrested him based on the facts that I had at that time: That he had gone into the store, that he had created a disturbance enough where the manager called the police; that the manager felt very uneasy and uncomfortable, and so did several employees; and that he was out in the parking lot. And I identified him. He admitted to me in the parking lot that he was the guy in the store with the gun. And I believe that was enough to arrest him for disorderly conduct.
>
> Q. Did – and you got all of your information about what happened in the store I guess from Officer Krafcheck, is that right?
>
> A. That's correct.
>
> …
>
> Q. So did you receive any information from Officer Krafcheck that Mr. Gonzalez had been loud in the store?
>
> A. I received information that he had an argument with the manager.
>
> …
>
> Q. Did you have any information that he had been loud?

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shorthand "4th Amendment" to describe these claims that technically arise under the 14th Amendment when applicable to states and their political subdivisions.

A. I don't think that's necessary. But no, I did not have any information that he had been loud.

Q. Okay. What about that he had been profane?

A. No. I was provided information that he had an argument with the manager inside the store. Usually arguments are voices raised and escalated quite – maybe a little bit, but I had no information other than he had been involved in an argument.

Q. Did you have any information that he was boisterous?

A. No.

Donovan Depo., pp. 20-22; PFOF, ¶31. Donovan apparently had no information pertaining to the substance of the argument. Donovan further deposed that he did not know if he would have arrested Plaintiff for the same conduct if Plaintiff had not been armed. *Id.*, p. 23; PFOF, ¶ 32. Donovan also admitted that he had no information at the time of the arrest that Plaintiff had refused to leave the store or even been asked to leave. *Id;* PFOF, ¶ 33.

The crime of disorderly conduct in Wisconsin is:

> Whoever, in a public place or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

Sec. 947.01, Stats. The crime has two distinct elements. First, the conduct in question must be one of the six enumerated ones or "similar thereto in having a tendency to disrupt good order and to provoke a disturbance." *State v. Givens,* 28 Wis.2d 109, 115

(S.Ct. 1965). Second, the conduct must be engaged in under circumstances that tend to provoke a disturbance of public order. *Id.,* 28 Wis.2d at 117.

Not all offensive or annoying conduct is disorderly:

> This is not intended to imply that all conduct which tends to annoy another is disorderly conduct. Only such conduct as unreasonably offends the sense of decency or propriety of the community is included. This is implicit in the phrase 'tends to disturb or annoy others.' The question is not whether a particular person was disturbed or annoyed but whether the conduct was of a kind which tends to disturb or annoy others. The section does not protect the hypersensitive from conduct which generally is tolerated by the community at large.

Id., 116-117. This is especially true in instances where the person was exercising a constitutional right, in this case the right to bear arms. *State v. Givens,* 28 Wis.2d 109, 122 (S.Ct. 1965). Because Donovan is unsure whether he would have arrested Plaintiff had Plaintiff not been armed, it stands to reason that Plaintiff's bearing an arm had something to do with Donovan's decision to arrest him. Moreover, it is merely the bearing of an arm that resulted in the alleged "disturbance" in the first place.

The right to bear arms is a fundamental federal constitutional right. *District of Columbia v. Heller,* 128 S.Ct. 2783, 2798 (2008) ("By the time of the founding, the right to have arms had become fundamental for English subjects.") It also is a

fundamental right under the Wisconsin Constitution. *State v. Cole,* 2003 WI 112, P20, 265 Wis.2d 520, 537, 665 N.W.2d 328, 336 (S.Ct. 2003) ("We find that the state constitutional right to bear arms is fundamental.")

When a person is engaged in constitutionally protected conduct, courts should consider whether the person is warned by the police about the requirement he or she is violating, given a reasonable opportunity to comply with the requirement, and nevertheless persists in the violation. *Givens*, 28 Wis.2d at 121-22, 135 N.W.2d at 787. Here, Donovan gave Plaintiff no such warning. In fact, Plaintiff was not even engaged in the conduct complained of (i.e., exercising his fundamental state and federal constitutional rights to bear arms) in Donovan's presence.

It is clear from the conversation that Krafcheck had with Jensen that Krafcheck talked Jensen into believing Plaintiff had committed the crime of disorderly conduct. Even though Jensen denied that Plaintiff had caused a disturbance, Krafcheck argued that point with Jensen[4]:

> JENSEN: So I'm thinking, you know – and I don't know what the concealed laws are here. I know you can't do that in Chicago for sure.
> KRAFCHECK: Well, you can't – you can't carry a concealed weapon but –
> JENSEN: It wasn't concealed. It was like right out in the open.

[4] One cannot help but wonder if Donovan would consider Krafcheck to be disorderly on account of Krafcheck's arguing with Jensen.

> KRAFCHECK: Well, what I'm getting at is that, you know, it's disorderly conduct while armed is what – what they will probably come out – come out to be because he caused a disturbance.
> JENSEN: ***He didn't though. He didn't cause a disturbance***.
> KRAFCHECK: Well, he – he – he did because you're call me to ask about – you said you were nervous about it and you said your employees are nervous about it –
> JENSEN: That's true –
> KRAFCHECK: That – will be disorderly causing a disturbance.

Deposition of Jeffery Jensen, pp. 24-25; PFOF, ¶34. [Emphasis supplied].

Krafcheck erroneously believes that any behavior that makes someone nervous is disorderly. That is not the law in Wisconsin. "We find nothing in the language of the statute, in fact, which would elevate the giving of cause for [a person's] discomfort, however we may sympathize with her, to a crime…." *State v. Werstein*, 60 Wis.2d 668, 674 (S.Ct. 1973), *citing Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). In *Werstein*, defendants were convicted of disorderly conduct when they refused to leave an armed forces induction station where they were protesting. Employees in the station testified they were in fear for their safety, even though defendants had not engaged in any violent or threatening behavior. The Supreme Court of Wisconsin reversed the convictions, holding that mere presence of the defendants, with no violent or threatening behavior, cannot constitute disorderly conduct just because defendants' presence made people fearful.

It is difficult to imagine how the bearing of arms, by itself, can be objectively offensive to others when "The right of defense of self, property and family is a fundamental part of our concept of ordered liberty." *State v. Hamdan,* 2003 WI 113, P61, 264 Wis.2d 433, 473, 665 N.W.2d 785, 805 (S.Ct. 2003).

Distilling this case to its essence, Donovan arrested Plaintiff for carrying a firearm. Donovan testified that he does not know if he would have arrested Plaintiff if Plaintiff had not been armed. Donovan summed up his own reasoning when he testified, "Upon my arrival, I made contact with Mr. Gonzalez. He refuses to tell me where the firearm is. ***Of course*** I'm going to place him under arrest and detain him." Donovan Depo., p. 19; PFOF, ¶35.

This Court ruled six years ago that it is not a crime merely to have a gun in Wisconsin. *Brown v. Milwaukee,* 288 F.Supp.2d 962, 971 (E.D.Wis. 2003). In *Brown*, this Court determined that there is no gun exception to the 4th Amendment. *Id., citing Florida v. J.L.*, 529 U.S. 266, 268, 272, 146, L.Ed.2d 254, 120 S.Ct. 1375 (2000). Six years later, it is now well established that a person cannot be stopped in Wisconsin merely for carrying a firearm.

The conduct of the Plaintiff in this case consisted merely of passively carrying a holstered firearm in a public place. There was nothing "violent, abusive, indecent,

profane, boisterous, unreasonably loud" about this conduct. Nor was the conduct "similar thereto in having a tendency to disrupt good order." *City of Oak Creek*, 148 Wis.2d at 540, 436 N.W.2d at 288. Carrying a firearm does not tend to "corrupt the public morals or to outrage the sense of public decency" *Teske v State*, 256 Wis. 440, 444, 41 N.W.2d 642, 644 (1950). It does not tend to "disrupt good order and to provoke a disturbance" like violent, abusive, profane or boisterous conduct does. *Givens*, 28 Wis.2d at 115, 135 N.W.2d at 784. The fact that some people do not like wearing sidearms does not make doing so disorderly.

Plaintiff's conduct was not a "substantial intrusion" which "offend[s] the normal sensibilities of average persons or which constitute[s] significantly abusive or disturbing demeanor in the eyes of reasonable persons" *State v. Zwicker*, 41 Wis.2d 497, 508, 164 N.W.2d 512, 517-18 (1969). "If the [Plaintiffs] had been violent or in any fashion so disorderly that their demeanor could be deemed abusive or disturbing in the eyes of reasonable persons, a different result would be reached." *Werstein*, 60 Wis.2d at 674, 211 N.W.2d at 440.

Nor were there any special "circumstances" in this case where the mere open carry of a firearm might tend to cause or provoke a disturbance *City of Oak Creek*, 148 Wis.2d at 540, 436 N.W.2d at 288. Plaintiff had completed his shopping and was

peacefully loading his truck when he was arrested.

The instant case is quite similar to *St. John v. McColley,* ___ F.Supp.2d ___, 2009 U.S.Dist. LEXIS 89543, 2009 WL 2949302, (D. N.M. Decided Sept. 8, 2009). In *St. John,* plaintiff Matthew St. John was escorted by Alamogordo police officers out of a movie theater after the theater manager called to report that St. John was wearing a holstered handgun inside the theater and that the manager wanted police to "pull [St. John] out" of the theater because St. John's firearm was "making … customer's upset." St. John sued for violations of this 14th Amendment rights.

When officers found St. John, "Mr. St. John was peacefully sitting through the previews for his second movie of the day. Officers had no reason to believe that Mr. St. John had been, was, or would be involved in any criminal activity whatsoever." The district court found the officers' seizure of St. John unreasonable under the 14th and 4th Amendments.

Like Mr. St. John, Plaintiff in the instant case was peacefully loading bricks into a pickup truck when police found him. Because Donovan failed to speak to a single witness before arresting Plaintiff, he only had information that Plaintiff had made people "nervous" in Menards. Jensen informed Krafcheck that Plaintiff had not caused a disturbance. "He didn't, though. He didn't cause a disturbance." Jensen

Dep., p. 24. Donovan had no information that Plaintiff had committed a crime.

An officer may not stop someone known to have a gun out of some generalized suspicion that the possession of the gun might be illegal:

> [Officer] Martin's impetus to investigate the Dudleys was a radio call alerting him to the presence of two people at the truck stop in possession of some guns. Of course the possession of firearms is not, generally speaking, a crime unless you happen to be a convicted felon, the firearms are otherwise illegal, or you are not licensed to possess the gun. Martin, presumably not clairvoyant, could not have known, and did not know, the Dudleys and their guns met all three of these criteria. In fact he testified he had absolutely no knowledge, or suspicion, that the Dudleys were engaged in any criminal activity until he discovered the first sawed-off shotgun. A telephone report of citizens possessing guns or merely engaging in "suspicious" activity, standing alone, cannot amount to reasonable suspicion of crime.

United States v. Dudley, 854 F.Supp. 570, 580 (S.D.Ind. 1994).

As another example of how knowledge that someone is armed is insufficient reason to stop the person, the Third Circuit Court of Appeals unanimously held that a tip that a celebrant at a festival was carrying a pistol was not sufficient to justify a stop of the celebrant. *See United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000). "For all the officers knew, even assuming the reliability of the tip that Ubiles possessed a gun, Ubiles was another celebrant lawfully exercising his right under Virgin Island law to possess a gun in public." *Id*. at 218.

> This situation is no different than if Lockhart had told the officers that Ubiles possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed counterfeit bills-the possession of which is a crime under United States law, see 18 U.S.C. §§ 471-72-the officers would have had no justification to stop Ubiles based merely on information that he possessed a wallet, and the seized bills would have to be suppressed. . . . As with the case of the hypothetical wallet holder, the authorities here had no reason to know that Ubiles's gun was unregistered or that the serial number had been altered. Moreover, they did not testify that it is common for people who carry guns in crowds-or crowds of drunken people-to either alter or fail to register their guns, or to use them to commit further crimes-all of which would be additional evidence giving rise to the inference that Ubiles may have illegally possessed his gun or that criminal activity was afoot. Therefore, as with the wallet holder, the authorities in this case had no reason to believe that Ubiles was engaged in or planning or preparing to engage in illegal activity due to his possession of a gun. Accordingly, ***in stopping him and subsequently searching him, the authorities infringed on Ubiles's Fourth Amendment rights***.

Id. at 218 (emphasis added).

Donovan's arrest of Plaintiff was unfounded. Considering the information available to Donovan at the time he made the arrest, he lacked probable cause, or even arguable probable cause to arrest Plaintiff. Donovan therefore violated Plaintiff's right to be free from unreasonable seizures.

IIA2. Krafcheck's Search of Car and Seizure of Firearm Were Unlawful

After Donovan arrested Plaintiff and placed him in a squad car, Krafcheck searched Plaintiff's vehicle and seized Plaintiff's firearm and accessories without a warrant and without consent. There was no danger that Plaintiff could have gained access to the firearm, because he was handcuffed in the back of a squad car. There was no probable cause (as discussed above in Part IIA1) that Plaintiff had committed a crime, so there was no valid search.

Even if there had been a valid arrest, and even if the firearm were evidence of a crime, the case and other accessories were not evidence of anything and should not have been seized. Because all items seized were seized without a warrant, and because the search of the vehicle took place without a warrant, the entire search and seizure were unconstitutional.

IIB. The Arrest in Chilton Was Unlawful

Officer Young also arrested Plaintiff without a warrant. Officer Young makes the astonishing claim, however, that he did not arrest Plaintiff, even though he threatened Plaintiff with a gun, handcuffed him, searched him, disarmed him, escorted him from a store in full view of the public to a squad car, transported him to the police

station, and detained him in an interview room against his will for a total of about two hours. The Supreme Court has held, however, that whether someone is technically under arrest is immaterial to the 4th Amendment. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In *Dunaway*, the Court ruled that a person who is held at gunpoint, handcuffed, and transported to the police station for questioning has been unconstitutionally detained if there was no probable cause to arrest him. 442 U.S. at 216 ("We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation").

The analysis of the case against Young is similar to the case against Donovan and Krafcheck, with one simplifying exception. There is no allegation that Plaintiff had even an "argument" with anyone at the Chilton Walmart. He simply entered the store, bought ammunition, and was confronted by Young pointing a gun at him. No Walmart employee ever approached Plaintiff about his wearing a firearm. Young had no information other than that Plaintiff was wearing a firearm and Ms. Fairchild was upset. There simply was no probable cause to believe Plaintiff had committed a crime and hence no justification in holding him at gunpoint, searching him, disarming him,

handcuffing him, escorting him out of the store, and transporting him to the police station in a squad car.

Remedies

Declaratory Judgment Regarding Illegal Arrests

Plaintiff seeks a declaration that Defendants Donovan, Krafcheck, and Young violated Plaintiff's right to be free from unreasonable searches and seizures when they arrested him and seized his firearm with no probable cause that Plaintiff had committed or was about to commit a crime. Plaintiff also seeks a declaration that West Milwaukee and Chilton violated Plaintiff's right to be free from unreasonable seizures by retaining his firearms and accessories after they were seized of the respective officers.

Declaratory and Injunctive Relief for Privacy Act Violation

Plaintiff seeks a declaration that Donovan violated § 7(b) of the Privacy Act by asking Plaintiff for his SSN without providing the warning required by the Act. Plaintiff seeks a declaration that West Milwaukee contributed to this violation by retaining Plaintiff's SSN in its records. Plaintiff seeks an order expunging his SSN from West Milwaukee's records. This remedy is commonly applied in Privacy Act violation cases. *Wolman v. United States*, 901 F.Supp. 310, 312 (D. D.C. 1980)

("Defendants are ordered to delete and not otherwise use the Social Security number of any registrant…."); *Hobson v. Wilson*, 737 F.2d 1, 64 (D.C. Cir 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843 (1985) ("[I]t is now well-established that an order for expungement of records is, in proper circumstances, a permissible remedy for an agency's violation of the Privacy Act.")

Plaintiff seeks damages against all Defendants in an amount to be determined at trial. Finally, Plaintiffs seek an award of attorney's fees under 42 U.S.C. § 1988,

in an amount to be determined pursuant to a motion for such fees to be filed at the conclusion of the case.

JOHN R. MONROE,

___/s/ John R. Monroe_____

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Certificate of Service

I certify that on November 30, 2009, I filed a copy of the foregoing using the ECF system, which automatically will send a copy via email to the following:

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