UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

06-10068-CIV-KING/GARBER

PETER ANGELOTTI,

Plaintiff,

vs.

RICHARD ROTH, in his capacity
as Sheriff of Monroe County, Florida,
and Joseph Linares, Individually,

Defendants.
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**DEFENDANTS SHERIFF AND LINARES' RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS OR FOR SPECIAL JURY INSTRUCTION**

The Defendants, RICHARD ROTH, as Sheriff of Monroe County, Florida, and JOSEPH LINARES, by and through their undersigned counsel, pursuant to Local Rule 7.1 for the United States District Court, Southern District of Florida, file this their Response to Plaintiff's Motion for Sanctions or for Special Jury Instruction dated September 28, 2006, and would state as follows:

**FACTUAL BACKGROUND**

The Plaintiff has filed suit against the Defendants Roth and Linares alleging that his constitutional rights were violated when he was allegedly subjected to the use of excessive force while incarcerated as an inmate in the Monroe County Jail. Specifically, the Plaintiff was lawfully arrested in Big Pine Key by Deputy Drielsma of the Monroe County Sheriff's Office on February 3, 2004 and transported to the Monroe County Jail, Key West facility.

The Defendant Linares has filed a Motion for Summary Judgment (and Memorandum of Law) which sets forth the factual circumstances surrounding the Plaintiff's claims.[1]

On February 3, 2004, at approximately 1:47 a.m., Deputy Drielsma of the Monroe County Sheriff's Office was dispatched to the 1600/1700 block of Narcissus on Big Pine Key, Florida, reference a neighborhood disturbance. Upon Deputy Drielsma's arrival, he met with some unidentified neighbors and then shortly thereafter observed the Plaintiff engaging in behavior that led to his arrest.[2] During the course of Deputy Drielsma's decision to arrest the Plaintiff, he called for and met with backup deputy Sgt. Roberts and eventually handcuffed the Plaintiff and placed him in the rear of his patrol car. (See Exhibit A to the Defendant Linares' Motion for Summary Judgment, Plaintiff's deposition, and Exhibit B to Defendant Linares' Motion for Summary Judgment, Deputy Drielsma's Arrest Report.)[3]

As Deputy Drielsma attempted to leave the neighborhood on Big Pine Key where the Plaintiff was arrested, the Plaintiff began to verbally abuse Deputy Drielsma. This abuse included numerous verbal threats and fowl language. In addition, the Plaintiff began to physically destroy the rear of Deputy Drielsma's patrol car. As a result, Deputy Drielsma elected not to transport the

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[1]The Defendants adopt the Defendant Linares' Motion for Summary Judgment and all supporting exhibits as if fully set forth herein.

[2]Deputy Drielsma is not a party to this suit. Furthermore, the Plaintiff cannot challenge the validity of his arrest due to the fact that he pled guilty to offenses for which he was arrested. See Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364 (1994). See Exhibit 1, Plea Agreement, which is attached to Exhibit A to the Defendant Linares' Motion for Summary Judgment.

[3]In addition, the Plaintiff recalls that Deputy Drielsma arrested him on Big Pine Key at approximately 2:00 a.m. See Exhibit A to Defendant Linares' Motion for Summary Judgment at pg. 22.

Plaintiff to the jail in Marathon and rather elected to transport him to the main jail in Key West, Florida.[4]

Guards in the jail, including Lt. Linares, were advised via dispatch at 2:45 a.m. that Deputy Drielsma was on his way to the jail with a violent inmate. Deputy Drielsma arrived with the Plaintiff in the rear of his patrol car at the Key West main jail facility at approximately 3:00 a.m. on February 3, 2004. (See Exhibit C, Lt. Linares Report, and Exhibit B, Deputy Drielsma's Arrest Report, which are both attached to Defendant Linares' Motion for Summary Judgment. See also attached Exhibit A, Lt. Linares deposition at pg. 15, lns. 23-25).

As recited in the Plaintiff's Motion for Sanctions or for Special Jury Instruction at paragraph 5, video surveillance footage of the Plaintiff's arrival in the sally port and movement via elevator into the jail was recorded and has been produced to the Plaintiff. The crux of the Plaintiff's argument for sanctions or for special jury instruction is that the Plaintiff believes there should have been additional video of the Plaintiff upon being processed through the intake booking area, including video images depicting the use of force upon the Plaintiff, including the placement of the Plaintiff in the restraint chair, the application of a spit mask, and the application of pepper spray.[5]

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[4]This Court is well aware of the distance between Big Pine Key and Key West. However, for purposes of the record, the Plaintiff concedes that it is approximately 25-30 miles from Big Pine Key to Key West and that the Marathon jail would have been a slightly shorter distance from the place of his arrest as opposed to the distance between the place of his arrest and the Key West jail. See Exhibit A, Plaintiff's deposition pg. 66, which is attached Defendant Linares' Motion for Summary Judgment.

[5]Again, the facts surrounding the use of force upon the Plaintiff at the time of his arrival in the intake/booking area are more fully described in Defendant Linares' Motion for Summary Judgment, particularly the Plaintiff's deposition which is attached as Exhibit A thereto.

As the Court is aware, this suit was originally filed in the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida, Case No. 2006-CA-577-K. Thereafter, this case was removed to the United States District Court, Southern District of Florida. However, as noted in the Plaintiff's Motion for Sanctions or for Special Jury Instruction, the Plaintiff was prosecuted by the State of Florida as a result of his arrest by Deputy Drielsma on February 3, 2004. Specifically, the Plaintiff attaches as exhibits to his Motion for Sanctions or for Special Jury Instruction, a Motion for Subpoena Duces Tecum in that matter styled State of Florida, Plaintiff v. Peter Angelotti, Defendant, Case No. 2004-CF-115-K, Judge Richard Payne. That Motion is dated March 18, 2004. In addition, the Plaintiff attaches as an exhibit to his Motion for Sanctions or for Special Jury Instruction, Judge Richard G. Payne's Order on Motion for Subpoena Duces Tecum, wherein Judge Payne, who presided over the above-referenced criminal case, issued an Order to the Sheriff, who was not a party to the criminal case, directing the Sheriff of Monroe County, Florida to produce any and all videotapes on February 3 and 4, 2004 of Mr. Angelotti in the Monroe County Detention Center. That Order is dated March 29, 2004. Consequently, Plaintiff's request for the videotape information was made before this civil lawsuit was filed.[6]

As reflected in the attached Exhibit B, Affidavit of Jim McInnis, there is no factual evidence to support any sanctions order or request for special jury instruction in this case. Specifically, Mr. McInnis testified, in pertinent part, as follows:

> 8. The jail security system consists of nine Intellex units, which operate 144 cameras. As a result, each Intellex unit records data from 16 separate cameras (9 x 16 = 144). Thus, it is possible that images from some cameras can be lost due

[6]The Court's Order dated March 29, 2004, was issued 55 days after the Plaintiff's incarceration in the jail on February 3, 2004, as February was a leap year in 2004. (See attached Exhibit B, Affidavit of Jim McInnis at ¶ 13).

to the failure of a particular Intellex unit, while images from another Intellex unit may still exist. In addition, the Intellex hard drives can fill up at different rates depending upon the amount of data (images) that a particular group of cameras are capturing. Therefore, in areas of the jail that are more active, like the booking area, the Intellex unit can fill up faster than an Intellex unit that controls cameras that cover other less active areas of the jail. In essence, an Intellex is a computer hard drive. Data from the computer hard drives can be recorded onto analog tapes, which are approximately 3" x 2" x 3/4" in size. These data tapes cost approximately $60.00 each.

9. The Intellex digital recording hard drives are controlled by a computer. As a result, there have been several problems with this system that cannot be explained. In fact, by way of example, I discovered that all nine of the Intellex units stopped recording from March 23-26, 2006. In addition, I was able to determine that the failure was not the result of any tampering.

10. Although I was not employed by the Sheriff as the Maintenance Supervisor during the time that the Plaintiff was incarcerated in the Monroe County Jail/Key West Facility in February of 2004, I have reviewed the Incident Report prepared by Paul Cooper, who was the technician at the time. In addition, I have read the deposition of Mr. Cooper taken in that matter styled State of Florida v. Peter Angelotti, Case No. 2004-CF-116-K. (See attached Exhibits "1" and "2"). Mr. Cooper's report indicates that when he was attempting to retrieve data off of Intellex unit number 7, he discovered that there was no information between 2:07 a.m. and 8:08 a.m. Although Mr. Cooper's Incident Report is dated March 25, 2004, it is my understanding from reviewing his criminal deposition, which was taken by the Plaintiff's attorney in that matter styled State of Florida v. Peter Angelotti, Case No. 2004-CF-116-K on August 30, 2004, that Mr. Cooper had been instructed by Captain Remley of the Monroe County Sheriff's Office to attempt to locate jail video images of the Plaintiff, Peter Angelotti, during the time of his incarceration in the Monroe County Jail in February of 2004.

11. That the Intellex hard drive systems, like any computer hard drive, can only hold a certain amount of digital information. Consequently, when the hard drives are full they no longer record images.

12. That based upon my experience and knowledge, including the review of Mr. Cooper's Incident Report and deposition given in the criminal case, it is my opinion that the most likely scenario to explain the missing images from Intellex unit number 7 is that the hard drive was full and no longer recorded images as of 2:07 a.m. It has been the procedure at the Monroe County Jail at the time of Mr. Angelotti's incarceration through the present for staff to pull the analog backup tapes of the digital images which in turn are retained for approximatley 60 days, every morning at 8:00 a.m. Consequently, it appears, in my opinion, that the Intellex

> stopped recording at 2:07 a.m. as the hard drive was full and that at approximately 8:08 a.m. that morning during the tape retrieval process, the Intellex would have been reset to begin recording again. Of course, since the hard drive was full as of 2:07 a.m., there would have been no images recorded on the hard drive between 2:07 a.m. and 8:08 a.m. Therefore, there would have been no data to transfer onto an analog tape. Consequently, there never would have been any images recorded at all during that time.[7]

A plain reading of Mr. Cooper's deposition, as taken in the criminal case by Plaintiff's counsel, and Mr. Cooper's Incident Report reveals that Mr. Cooper has absolutely no idea why video data from Intellex number 7 was missing from the start time 2:07 a.m. through 8:08 a.m. (See attached Exhibit B, Affidavit of Jim McInnis and Exhibits 1 and 2 attached thereto). Consequently, Mr. Cooper, through his own sworn testimony in the criminal deposition, as taken by Plaintiff's counsel, actually had no personal knowledge whatsoever that anyone tampered with the video recording system in the Monroe County jail. Rather, and most importantly, Mr. Cooper reported what is, for purposes of this litigation, an inadmissible hearsay statement based upon a phone call that Mr. Cooper made to an unknown technical support employee for Sensomatic (the company that provides maintenance for the system) who in turn guessed that perhaps the system had been unplugged. (See attached Exhibit B, Affidavit of Jim McInnis and Exhibits 1 and 2 attached thereto).

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[7]Mr. McInnis has attached to his Affidavit a copy of Mr. Cooper's deposition which was taken by the Plaintiff's attorney, Mr. Milligan, during the criminal case prosecuted by the State of Florida against Mr. Angelotti before the existence of this civil suit. For reasons unknown, Mr. Cooper's deposition, as well as his report, were not attached by Plaintiff's counsel to the Plaintiff's Motion for Sanctions or for Special Jury Instruction. The Plaintiff's failure to provide evidentiary support for the Motion, as well as his failure to cite to federal case law which provides a different standard than the state case law cited by the Plaintiff, provides grounds to deny the Plaintiff's Motion, for the Plaintiff's failure to carry his initial burden. However, counsel for the Defendants believes that it is important to provide a full and complete record for the Court when resolving a serious matter such as this.

Lt. Linares had absolutely nothing to do with any failure of the jail's video security system to record. Furthermore, the room where the Intellex computers are housed is some 300 feet away from the area where the Plaintiff was brought into the jail on a completely different floor of the jail facility. In addition, there are no wires on the security cameras which are mounted into the ceiling of the intake booking area where the Plaintiff was housed that can be unplugged. (See attached Exhibit A, Linares' deposition, pgs. 18, 19, and 20 and attached Exhibit C, Affidavit of Lt. Linares).

**ARGUMENT**

The Plaintiff's Motion for Sanctions or for Special Jury Instruction cites only to state case law. However, these cases offer no guidance to the Court in resolving this Motion as it is federal law which controls the resolution of this evidentiary issue and not state case law.[8]

"In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith. Mere negligence in losing or destroying the record is not enough for an adverse inference as it does not sustain an inference of consciousness of a weak case." (Citations; internal quotes, and footnote omitted). See Bashir v. Amtrak, 119 F.3d 929 (11th Cir. 1997).[9]

Plaintiff's Motion for Sanctions or for Special Jury Instruction should be denied on its face as the Plaintiff fails to attach anything of evidentiary value that demonstrates that the Defendants

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[8]See Flury v. Diamler Chrysler Corporation, 427 F.3d 939, 944 (11th Cir. 2005) [federal law governs the imposition of spoliation sanctions].

[9]The Eleventh Circuit in Bashir relied on Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975). The Eleventh Circuit in Bashir also noted that Vick was binding precedent in the Eleventh Circuit, citing Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). See also Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107 (S.D. Fla. 1987) [bad faith is the primary element when considering the imposition of sanctions].

engaged in bad faith as it would relate to any claim that there was video evidence of the Plaintiff in the Monroe County jail during the time when force was allegedly used upon him. In that regard, the Plaintiff's reliance upon state case law is misplaced. Furthermore, and perhaps more importantly, it is obvious, based upon the record, as more fully developed by the Defendants, that Mr. Cooper, the former maintenance supervisor in the Monroe County jail, had absolutely no idea whatsoever why Intellex number 7 failed to record from 2:07 a.m. through and including 8:08 a.m. The wholly unsubstantiated hearsay statement of the unidentified technical support person employed by Sensomatic offers nothing of evidentiary value to support a finding of bad faith. In fact, the overwhelming evidence is to contrary.

Specifically, it should be remembered that Deputy Drielsma responded to a call for police services on Big Pine Key on February 3, 2004 at 1:47 a.m. Upon responding, Deputy Drielsma first met with some neighbors. He thereafter had a conversation with the Plaintiff and also summoned backup officer, namely his supervisor Sgt. Roberts. (See Exhibit B attached to Defendant Linares' Motion for Summary Judgment as well as Exhibit A, Plaintiff's deposition, attached to Defendant Linares' Motion for Summary Judgment). As a result, the Plaintiff was actually arrested by Deputy Drielsma on Big Pine Key at approximately 2:00 a.m. **at the earliest**. At 2:45 a.m. dispatch notified the jail that Deputy Drielsma was on his way in with a violent prisoner. The Plaintiff arrived at the jail at approximately 3:00 a.m. (See Exhibit C attached to Defendant Linares' Motion for Summary Judgment, as well as Exhibit A attached to this response at pg. 15 and Exhibit C attached to this response, Affidavit of Lt. Linares).

Consequently, the evidence clearly demonstrates that Intellex number 7 stopped recording **before** Mr. Angelotti arrived at the jail. It makes absolutely no sense that someone would tamper

with the recording system **before** Mr. Angelotti's arrival at the jail since there would be no way of knowing what was going to happen at the jail as it would relate to the Plaintiff's behavior and any need to use force until the Plaintiff arrived. Furthermore, since there would be no way of knowing what Mr. Angelotti's behavior would be in the jail it makes no sense that the Intellex that controlled the cameras in the sally port and elevator would not have also been tampered with prior to Mr. Angelotti's arrival in anticipation of some need to use force. Again, as stated in the Plaintiff's Motion, the Plaintiff has that video footage.[10]

Lt. Linares had absolutely nothing to do with tampering with the video security system on the night in question. (See attached Exhibit A, deposition of Lt. Linares taken in this civil action and attached Exhibit C, Affidavit of Lt. Linares). Furthermore, as can bee seen by the evidence, the room where the Intellex hard drives are located is approximately 300 feet away from the area where Lt. Linares was located with the Plaintiff upon his arrival in the jail. That room is also located on a completely different floor of the jail.

It is simply not plausible that Lt. Linares or some other employee of the Sheriff's Office would walk 300 feet, through 7 security doors, and travel to a different floor of the jail in order to shut off an Intellex system at about the same time that Deputy Drielsma was actually arresting Peter Angelotti on Big Pine Key, Florida in anticipation of some use of force event that had yet to occur while also simultaneously failing to disconnect the Intellex that operated the cameras in the sally port and the elevator which depict Mr. Angelotti's initial arrival at 3:00 a.m.

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[10]Interestingly, Mr. Cooper's deposition and report also fails to establish that Intellex number 7 controlled a bank of 16 cameras, including cameras in the area of intake and booking where the Plaintiff was allegedly subjected to the use of force. Obviously, the Intellex that controlled the cameras in the sally port and elevator were still recording at 3:00 a.m., when the Plaintiff arrived with Deputy Drielsma.

The overwhelming evidence in this case demonstrates that Mr. Cooper actually has no personal knowledge whatsoever regarding the alleged failure to record the video images of the Plaintiff in the intake booking area of the jail. Furthermore, as presented by attached Exhibit B, Affidavit of Jim McInnis, the most likely explanation for the lack of video images is the simple fact that the Intellex hard drive became full and was no longer recording information, consequently, any data transferred from the hard drive onto an analog tape would not have including any such video images between 2:07 a.m. through 8:08 a.m. since it never existed on the hard drive to begin with. Thus, there is no evidence of the bad faith destruction or loss of video evidence.

The Plaintiff's Motion for Sanctions or for Special Jury Instruction should be denied.

**I HEREBY CERTIFY** that a true copy of the foregoing was mailed to: **CHARLES M. MILLIGAN, ESQ.,** 403 Whitehead Street, Key West, FL 33041-1367, this 13th day of October, 2006.

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