



OFFICERS BEING RECORDED BY CITIZENS WHILE WORKING



ENFORCEMENT ACTION IS NOT THE BEST
PRACTICE AND MAY LEAD TO LIABILITY

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Over the past few decades law enforcement has seen the proliferation of cameras and audio recording devices as well as the impact these devices have upon operations. More than 20 years ago, everyone in law enforcement watched the video of the Rodney King arrest and its aftermath. That degree of recording was nothing compared to what officers face today. While officers sometimes become frustrated and emotionally charged when being recorded during an adversarial event, the message is loud and clear...*Get over it!* There is little or nothing that can be done about citizens recording law enforcement officers in a public place or any place the citizens have the right to be.

A case decided by the United States Court of Appeals for the First Circuit provides an example of the exposure an officer will face for taking enforcement action based upon a person's filming or recording the officer in that Circuit.¹

The court reported the facts as follows:

As he was walking past the Boston Common on the evening of October 1, 2007, Simon Glik caught sight of three police officers -- the individual defendants here -- arresting a young man. Glik heard another bystander say something to the effect of, "You are hurting him, stop." Concerned that the officers were employing excessive force to effect the arrest, Glik stopped roughly ten feet away and began recording video footage of the arrest on his cell phone.

After placing the suspect in handcuffs, one of the officers turned to Glik and said, "I think you have taken enough pictures." Glik replied, "I am recording this. I saw you punch him."

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An officer¹ then approached Glik and asked if Glik's cell phone recorded audio. When Glik affirmed that he was recording audio, the officer placed him in handcuffs, arresting him for, inter alia, and unlawful audio recording in violation of Massachusetts's wiretap statute. Glik was taken to the South Boston police station. In the course of booking, the police confiscated Glik's cell phone and a computer flash drive and held them as evidence.

Glik was charged with violating the wiretap statute, aiding in the escape of a prisoner, and disturbing the peace. It is noted that Massachusetts is one of the few two-party consent states in the country where both parties to the audio being recorded must consent. The charge was quickly disposed due to the fact that it was admitted that Glik was openly recording using his cellular phone and therefore the wiretap statute which applies to secret recording did not apply. The prosecutor dismissed the aiding in the escape of a prisoner charge due to a total lack of probable cause. With respect to the disturbing the peace charge, the criminal trial court asserted: "The fact that the officers were unhappy they were being recorded during an arrest . . . does not make a lawful exercise of a First Amendment right a crime."

Glik filed an Internal Affairs complaint against the officers but no action was taken. He then filed a lawsuit. The officers sought to have the lawsuit dismissed arguing that the law was not clearly established that a person had a constitutional right to record a police officer, thus the officers did not know the arrest was unconstitutional. The trial court disagreed which prompted an appeal to the United States Court of Appeal for the 1st Circuit.

On appeal, the United States Court of Appeal for the 1st Circuit framed the question for the case as follows: "Is there a constitutionally protected right to videotape police carrying out their duties in in public?" The short answer to the question provided by the court: "Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative." Thus, enforcement action taken against someone who is taping law enforcement in a public place violates the person's 1st Amendment rights.

In its decision the court pointed out that there is no distinction between the common person and a person working for the media. In doing so, the court noted that with today's technology and the proliferation of cellular phone with video and audio recording capabilities, everyone is potentially recording information for public broadcast.

The court also recognized that citizens have a 1st Amendment right to verbally criticize and challenge law enforcement officers who are conducting their duty. The court asserted:

In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights. See *City of Houston v. Hill*, 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."). Indeed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby

risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63. The same restraint demanded of law enforcement officers in the face of "provocative and challenging" speech, *id.* at 461 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949)), must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.

The 1st Amendment is not the only issue with these cases. There are additional statutes and 4th Amendment cases dealing with the seizure of cameras which also limit government's ability to react to photographing, videoing, and audio recording. The federal privacy protection act is one such federal statute asserting the following:

Officers may not seize the work product (film, photos, notes, recordings etc.) or equipment from a reporter or photographer in an effort to further a criminal investigation.

42 U.S.C. sec. 2000 (aa):..."Notwithstanding any other law, It shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce..."

Thus, any seizure of cameras, cellular phones etc. based on the fact that a person is recording officers will also violate this statute if there is any reasonable basis for believing the person is going to disseminate the video as public communication. As noted by the court in *Glik* this could be anyone, not just a bona fide media person.

While there are some cases indicating that the First Amendment right to record law enforcement is not clearly established and that there may be some restrictions based on danger, these cases involving arresting a person for recording the police or seizing photographic, video, or audio equipment or the recordings themselves are bad cases. A senior officer once told this author, leave the garbage arrests out in the street...don't bring garbage into the jail.

NOTE: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

CITATIONS:

ⁱ *Glik v. Cunniffe*, 2011 U.S. App. LEXIS 17841 (1st Cir. 2011).