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IS A PICTURE WORTH A THOUSAND LAWSUITS?

THE RIGHT OF PRIVATE CITIZENS TO RECORD POLICE OFFICERS IN THE DISCHARGE OF THEIR PUBLIC DUTIES

I.

The adage “A picture is worth a thousand words” means that a complex idea can be conveyed with just a single still image. Certainly, the world has greatly changed since the adage became common parlance in the 1920s. Some of the greatest changes the world has seen in the last few decades have occurred in the arena of technology. In the Twenty-First Century, computers and a myriad of other electronic devices are essential to how the world turns. We need them for business, recreation and simply to help us get through our daily lives. Millions of people carry laptops and other mobile devices for reasons ranging from business to personal pursuits.

As technology has advanced, the concept of the “still image” seems archaic, somehow replaced by moving images, first captured on film, later on videotape, and now digitally. As to the latter, video capture devices that can be held in the palm of the hand have long since surpassed early, bulky, and cumbersome video cameras. Millions of personal videos are stored on PCs, tablets, phones and discs. Millions more are uploaded to websites such as YouTube. In short, the presence of video recordings has become all pervasive, and, in many instances, all intrusive.

II.

With the incredible proliferation of video capture devices, it was simply a matter of time before they were adopted for use by the law enforcement community to capture the interaction between an officer and the suspect. Surveillance cameras and dash cams are examples that come quickly to mind. Time has shown, however, that this coin does in fact have two sides. The other side is the use of recording devices by the public to record police activity. The tensions that have arisen between public and law enforcement over this issue erupted in our own backyard in 2010. In March of that year, a win by the University of Maryland men’s basketball team over Duke caused students to take to the streets in celebration. As the celebration quickly got out of hand, officers from the Prince George’s County Police Department responded, including officers clad in riot gear and some mounted on horseback. According to police reports, one of the students confronted officers, verbally provoked and

assaulted them, and then fought with them as they tried to detain him. However, several video recordings captured by students at the time showed something far different. The videos revealed the officers to be the aggressors and their use of what could be deemed excessive force. As a result of the videos, four officers were suspended and the criminal charges against the student were dropped.

A second event added more fuel to the fire. In April 2010, a Maryland State Trooper pulled over a motorcyclist for speeding. The motorcyclist had a video camera mounted on his helmet and he recorded the traffic stop. His video showed that the trooper, dressed in street clothes, got out of his car shouting, with his gun drawn. The motorcyclist was issued a speeding ticket but, because he was angry at the way he had been treated, he posted his video on YouTube. A few days later, Maryland State Police conducted an early-morning raid on his home, held him and his parents for ninety minutes, confiscated his computer, arrested him and took him to jail. The motorcyclist was charged with two felony violations of the Maryland Wiretap Act. The charges stemmed from the motorcyclist's recording the trooper without his consent and his alleged possession of an "intercept device," *i.e.*, the helmet mounted camera. The outcry over the behavior of the Maryland State Police was fast and furious. In the midst of it, the criminal charges were dropped.

This event prompted a member of the Maryland House of Delegates to ask the Attorney General if the Maryland Wiretap Act applied to situations in which citizens recorded the public activities of police officers. In response, the Attorney General issued a letter of advice in July 2010. The Attorney General first concluded that the State Wiretap Act does not regulate video recording except to the extent that sound is recorded as part of the video. If so, the issue then becomes whether the recorded statements were part of a "private conversation" between officer and the citizen. If the recorded conversations were "private," the Wiretap Act would apply. The Attorney General quickly pointed out, however, that most conversations between an officer and a citizen who is arrested or detained are not likely to be considered "private" and, therefore, protected by the Act. The Attorney General's observation in this regard was, and remains, consistent with the holdings of courts in other states when construing their wiretap laws.

III.

That was 2010. Now, the issues surrounding the video recording of police activities have reached constitutional proportions, raising questions under the First, Fourth, and Fourteenth Amendments. These questions are being addressed case-by-case, court-by-court, jurisdiction by jurisdiction.¹ The United States Supreme Court has not addressed directly addressed them, but the courts that have seem to be of like mind. Here again, Maryland is at the vanguard.

The event in Maryland giving rise to consideration of the constitutional issues occurred at the 2010 Preakness. Christopher Sharp claims that officers of the Baltimore

¹ See *Glik v. Cunniffe*, 655 F. 3d 78 (1st Cir. 2011), a case concerning the videotaping of police officers in public: "Gathering information about government officials in a form that can readily be disseminated to other serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" (citation omitted).

Police Department (“BPD”) “ordered” and “intimidated” him into surrendering the cell phone he used to record his friend’s arrest. When Sharp asked what would happen to the phone, he alleges that an officer told him “they’ll probably just erase it and give it back.” Sharp surrendered the phone, and, when it was returned, all video recordings--including not only the arrest-- but also family videos had been deleted. As a result, Sharp sued (*Christopher Sharp v. Baltimore City Police Department, et al.*, Civil Action No. 11-cv-02888-BEL), alleging that the BPD has a policy, custom, or practice of enabling its officers to engage in unlawful acts against those who video record them in public. These unlawful acts allegedly include threats, unlawful arrests, and destruction of personal property.

The lawsuit has attracted the interest of powerful organizations including the American Civil Liberties Union of Maryland Foundation and the United States Department of Justice (“DOJ”). On January 10, 2012, the DOJ filed a “Statement of Interest” in the case, asserting:

“This litigation presents constitutional questions of great moment in the digital age: whether private citizens have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate citizens’ Fourth and Fourteenth rights when they seize and destroy such recordings without a warrant or due process.”

Let there be no confusion as to where DOJ stands: “The United States urges this Court to answer both of these questions in the affirmative.” DOJ continued:

“The right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution; they are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.”

The *Sharp* case is proceeding in the United States District Court. That doesn’t mean that BPD has not acted in response. Knowing that the lawsuit was coming, BPD initiated Roll Call Training on the topic of “Wire Tapping Law” and the recording of police officers while they perform their official duties. That training, given in August 2011, made clear to BPD members that it *is* lawful for a person to videotape activities by a police officer in a public place and in the course of the officer’s regular duty. The training further explained the scope of the Maryland Wiretap Act and why it does not apply in the majority of police-citizen encounters. The lawsuit by Christopher Sharp came two weeks later. BPD then repeated the Roll Call Training and transmitted a department-wide email on the same topic. An additional training for all active sergeants was conducted in early October. Finally, on November 8, 2011, the BPD promulgated General Order J-16 (see page 5) which affirms the right of individuals to observe, photograph, and/or video record the official public duties of any member of the BPD. Police Academy trainees are now being trained on General Order J-16, and current officers will review the Order during their annual in-service training.

Despite the response of the BPD, the lawsuit continues. BPD’s motion to dismiss was denied on February 17, 2012. In denying the motion, the court observed that the parties have

agreed that the public has a right to take photos and videos of police discharging their official duties, but that the exercise of the right “may be limited by reasonable time, place, and manner restrictions.” The court also said that any right not to have one’s picture taken in public, if such right exists, does not extend to police officers performing their official duties.

IV.

We knew at the start how many words a picture was worth. Now, for the law enforcement community, the question is whether that same picture is worth a thousand lawsuits. The answer must be a resounding “no.” Just one day after the BPD released General Order J 16 to the public, yet another video surfaced on YouTube, and was broadcast on the local news, showing BPD officers’ seemingly violating their own general order. Fertile ground for yet another lawsuit. As a consequence of just how quickly these matters are winding up in court, now is the time to carefully examine what your department is or is not doing as a result of the issues raised here. The questions come quickly:

- Are you considering a directive similar to that adopted by BPD? If not, why not?
- Do your patrol officers and supervisors know how to respond in circumstances where they are being recorded?
- What training are you providing to address these issues?
- Are officers being trained that a warrant is necessary before seizing or searching a recording device unless an exception to the warrant requirement (including consent) applies?
- What reasonable time, place, and manner restrictions, if any, have you placed on a citizen’s “right” to record officers performing their public duties?

If you address these questions now, you will be in a much stronger position if and when the lawsuit comes. Until it does, all officers should assume that the public is watching and the camera is recording.

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this publication is prepared by professionals, it should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

Excerpts from Baltimore City Police Department General Order J-16

Upon discovery that a bystander is observing, photographing, or video recording the conduct of police activity:

1. DO NOT impede or prevent the bystander's ability to continue doing so based solely on your discovery of his/her presence.
2. DO NOT seize or otherwise demand to take possession of any camera or video recording device the bystander may possess based solely on your discovery of his/her presence.
3. DO NOT demand to review, manipulate, or erase any images or video recording captured by the bystander based solely on your discovery of his/her presence.
4. For investigative purposes, be mindful of the potential that the bystander may witness, or capture images/video of events considered at some later time to be material evidence.
5. BEFORE taking any police action which would stop a bystander from observing, photographing, or video recording the conduct of police activity, Officer(s) must have observed the bystander committing some act [deemed criminal, such as obstruction, disorderly conduct or interfering with an officer's lawful duties.]