Is There A Right To Record the Police?

Digital Media and Data Privacy Law Blog

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Posted in Wiretapping

According to one recent judicial opinion, *Ickes v. Borough of Bedford* (W.D. Pa. Dec. 3, 2010), "the issue of police officers arresting citizens for recording them in public has recently been brought to the forefront of the cultural Zeitgeist." From the "don't taze me, bro" video to lesser known incidents, YouTube and other video content sharing sites are rife with examples of recorded videos of interactions between police and arrestee/detainees. Moreover, the "right" to record or film police officers has received much attention in the news media and the blogosphere.

The First Amendment plainly states, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Of course, First Amendment freedoms have never been construed by a majority of the U.S. Supreme Court as "absolute." So, does the First Amendment provide a right to record the activities of the police in the course of performing their official duties?

The answer is familiar: Sometimes.

We will explore cases involving the right to record the police in a series of blog posts. This post focuses on whether citizens (including journalists) may, in some states, run afoul of state wiretapping statutes when they record police activities.

Maryland

When citizens or journalists wish to videotape or otherwise record the activities of the police, one possible obstacle is state wiretapping or surveillance statutes. For example, the *Baltimore Sun* reported that a Harford County, Maryland, man was indicted for various acts in connection with a police traffic stop, including violation of the state wiretapping statute for taping his own traffic stop and later posting it on YouTube.

A Maryland circuit court judge dismissed the videotaping and Internet posting charges. Even though Maryland's wiretapping statute, Md. Cts. & Jud. Proc. Code Ann. §§ 10-401, 10-402, requires all parties to a conversation to consent to being recorded, the law also requires the taped material to be a "private conversation" for a violation of the statute to occur. The Harford County judge found no violation of the wiretapping statute because the officer had no reasonable expectation of privacy in the conversation. According to the *Sun*, the judge wrote that the defendant's encounter "'took place on a public highway in full view of the public. Under such circumstances, I cannot, by any stretch conclude that the troopers had any reasonable expectation

of privacy in their conversation with the defendant which society would be prepared to recognize as reasonable.'" So, in this case, the citizen was entitled to record his interaction with the police, even without the consent of the police officers involved.

Illinois

In Illinois, however, the law is different. In an order issued in January 2011, the U.S. District Court for the Northern District of Illinois rejected a request for a declaratory judgment and injunctive relief filed by the ACLU of Illinois (ACLU) related to the ACLU's proposed plan to audio record the police, without consent of the recorded officers, when the officers are performing their public duties in public places. In *American Civil Liberties Union of Illinois v. Alvarez*, the ACLU sought a declaration that the Illinois Eavesdropping Act, 720 ILCS 5/14, which requires consent of all parties to the recorded conversation, did not apply to the ACLU's recording program. Members of the ACLU had been prepared to audio record the police while monitoring a Chicago Police Department program of suspicion-less container searches on Chicago's lakefront and during a protest, but they did not do so for fear of prosecution under the eavesdropping statute. Presumably, the ACLU's intent was to monitor the police for possible violations of law.

The case had earlier been dismissed for lack of standing, but the plaintiffs moved, in part, to alter the judgment and file an amended complaint to cure any defects in standing. Finding some standing issues to have been remedied, the Northern District of Illinois held that the ACLU had not alleged a "cognizable First Amendment injury." The court wrote, "[t]he ACLU cites neither Supreme Court nor Seventh Circuit authority that the First Amendment includes a right to audio record." The court, therefore, found that amending the complaint would be "futile" and denied the motion to alter the judgment and amend the complaint.

In reaching its decision, the district court rejected the ACLU's argument based on *Federal Election Commission v. Akins* that a "failure to receive information may constitute a constitutional injury." The court reasoned that *Akins* was inapposite as it dealt with a statute requiring the disclosure of information—according to the court, "[d]enial of access to statutorily required disclosures is not analogous to a purported First Amendment right to non-consensual audio recording of police activities." Moreover, the court agreed with the government that a "willing speaker" must exist to implicate the First Amendment right to free speech. According to the court, "[p]olice officers and civilians may be willing speakers with one another, but the ACLU does not allege this willingness of the speakers extends to the ACLU, an independent third party audio recording conversations without the consent of the participants." Therefore, the court found the ACLU had no standing to assert a First Amendment injury.

According to the ACLU's website, the district court's opinion has been appealed to the Seventh Circuit.

The ACLU case illustrates an important point about states that have all-party consent wiretapping statutes—i.e., statues that require the consent of all parties to the conversation prior to recording. Arguably, the case would have turned out differently (and would likely never have been brought) if Illinois had a one-party consent statute. The case also illustrates a distinction between audio recording and video recording. Had the ACLU proposed to purely video record instead of audio record the police, perhaps the case would have turned out differently. The Illinois statute, 720 ILCS 5/14-2(a)(1)(A), at issue apparently prohibits the recording of conversations, not images. (Of course, the material may have been less useful without the audio portion as well as the video.)

North Carolina

In North Carolina, although there are no reported cases on the issue, it appears that it would be difficult under the state wiretapping law to prosecute a citizen who videotapes or records the police in the course of carrying out their duties. N.C. Gen. Stat. § 15A-287 provides, in part, "[e]xcept as otherwise specifically provided in this Article, a person is guilty of a Class H felony if, without the consent of at least one party to the communication, the person: (1) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." Section 15A-287, and its definitions (as discussed below), have been interpreted to apply to audio recordings but not video recordings. *See Kroh v. Kroh*, 152 N.C. App. 347, 351-52, 567 S.E.2d 760, 763 (2002). Thus, the act may prohibit audio recordings where at least one party to the communication does not consent. However, even assuming that the citizen records audio in the videotape recording, it seems likely that the citizen would have (or could obtain) the consent of at least one party to the recording—either herself, if the altercation involves her, or the consent of the suspect who is in the altercation with the police.

Moreover, the definition of "oral communication" is such that it limits the application of the wiretapping statute to communications subject to an expectation of privacy. N.C. Gen. Stat. § 15A-286(17) defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ." Arguably, a police officer and arrestee/detainee would have little or no expectation of privacy during a confrontation in a public place during the course of the officer's public duties and the arrestee/detainee's alleged violation of law.

For all these reasons, it seems unlikely that the North Carolina wiretapping statute could be successfully used as a basis to convict a citizen or journalist for videotaping or recording the police in the course of carrying out their duties. However, as the Illinois case demonstrates, the outcome

may vary from state to state.

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In a post to follow, we will review a First Circuit opinion, *Jean v. Massachusetts State Police*, which represents a slightly different twist on the use of wiretapping statutes to prosecute citizens for recording police activities. Later posts will address Section 1983 claims made by those arrested for wiretapping statute violations when they recorded police activity and potential violations of state obstruction statutes when citizens record the police.