

Exercising the Right to Record the Police May Lead

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We previously wrote [here](#) and [here](#) about cases involving wiretapping prosecutions as a result of recording police activities. In addition to running afoul of wiretapping statutes, citizens or journalists who videotape or record the police have also been arrested for violating state obstruction statutes, in certain circumstances. Two such cases are discussed below.

For example, in *Berglund v. City of Maplewood*, two journalists who hosted a public access cable program were arrested for videotaping their own arrest. The journalists refused to pay a \$15 fee to attend a public event, which they intended to film and show on their cable program, and they were asked to leave by the police because they refused to pay. The police department alleged that a verbal and physical altercation with the journalists ensued and that force was necessary to subdue at least one of them. The journalists were charged with disorderly conduct and obstructing legal process.

The journalists captured the altercation on videotape. The police confiscated the tape at the scene without a warrant. Later that evening, the police viewed the tape and made a copy to give to the journalists, keeping the original as evidence. Two days later, one of the journalists obtained the copy from the police. The video was shown on the journalists' cable program a few days later.

The journalists later filed a Section 1983 claim against the city and the police officers alleging the officers violated the journalists' First, Fourth, and Fourteenth Amendment rights by, among other things, seizing the videotape, viewing and copying the tape, preventing the plaintiffs from gathering and disseminating information, refusing to return the tape, and controlling the tape's publication.

With regard to the alleged First Amendment violation, the U.S. District Court for the District of Minnesota held that there was no violation. The court recognized that the First Amendment protects the right to gather information, but stated that the right is not absolute. (Other courts have held that newsgathering activities receive First Amendment protection.) The court reasoned, as the U.S. Supreme Court had before it, that the First Amendment does not guarantee the media a special right of access to information that is not available to the public generally. The court wrote:

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Here, plaintiffs had no greater right than the public to gather information at this event. Like all other members of the public, plaintiffs only had access to the information at the event if they paid the \$15 attendance fee. Because they refused to pay the \$15 attendance fee, they had no right to the information at the event under the First Amendment. Thus, defendants did not violate plaintiffs' First Amendment right by seizing the videotape and removing plaintiffs from the event.

The court granted summary judgment in favor of the defendants on all the plaintiffs' claims, including the First Amendment-based claim.

Berglund illustrates the application of obstruction laws to a particular situation where journalists videotaped the police in the course of their public duties. In *Berglund*, the obstruction statute applied in part because the plaintiffs tried to assert a greater right to be at an event than the general public. Of course, the U.S. Supreme Court has long been hostile to the view that the press enjoys greater First Amendment protection than the general public. See, e.g., *Branzburg v. Hayes*.

A recent North Carolina case also involves application of a state obstruction statute to a citizen who videotaped police conduct. The *Salisbury Post* reported in August 2010 that a woman in Salisbury, N.C., was found guilty of resisting, obstructing, and delaying an officer after she refused an officer's order to go inside her home while she filmed a traffic stop from her front porch. (Video of the incident is posted here.) According to the *Salisbury Post*'s coverage, the judge reasoned that the woman could have observed the incident from inside her home and should have respected the officer's request. The Rowan County District Court sentenced the woman to 6 months of probation and community service.

Presumably, this Salisbury woman was charged with violating N.C. Gen. Stat. § 14-233, which provides, "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." The elements of the offense are: (1) that the victim was a public officer; (2) that the arrestee knew or had reasonable grounds to believe that the victim was a public officer; (3) that the victim was discharging or attempting to discharge a duty of his office; (4) that the arrestee resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and (5) that the arrestee acted willfully and unlawfully, that is intentionally and without justification or excuse.

According to the U.S. District Court for the Eastern District of North Carolina in *Bostic v. Rodriguez*, the purpose of § 14-233 is "to enforce orderly conduct in the important mission of preserving the peace, carrying out the judgments and orders of the court, and upholding the dignity of the law." The statute "is concerned with acts threatening a public officer with injury only insofar as they interfere with the performance of his official duties."

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Section 14-233 has been found not to apply to communications simply intended to assert rights, seek clarification, or obtain information in a peaceful way. Indeed, “merely remonstrating with an officer . . . or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer in the performance of his duties.” However, actual physical force or assault, or permanently preventing the officer from discharging his duties, are not necessary to violate § 14-233. The state must merely prove that “the officer was obstructed or interfered with, and that such obstruction or interference was willful on the part of the defendant.” *State v. Burton*, 108 N.C. App. 219, 225, 423 S.E.2d 484, 488 (1992).

It appears that § 14-233 may be used in a manner that limits the right of citizens to record the police (to the extent there is such a right recognized by the courts) in those instances where the recording hampers the officer’s ability to perform his duties—for example, hampering the officer in safely executing a traffic stop. The application of the statute appears to require a case-by-case analysis of the facts of the particular incident.

In the case of the Salisbury woman, it appears that her refusal to heed the officer’s order to go inside her home while the officer dealt with two occupants of a car that had previously given chase was sufficient evidence of obstruction. Unfortunately, neither a transcript of the hearing nor a copy of the written order explaining the court’s analysis of the case were available.

The *Berglund* and Salisbury cases demonstrate that journalists or citizens who record the police may have to contend not only with wiretapping statutes, as we discussed earlier, but obstruction statutes, as well.