

## Section 1983 Claims and the Right to Record the

### Digital Media and Data Privacy Law Blog

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Posted in Wiretapping

In two recent posts, linked [here](#) and [here](#), we discussed wiretapping arrests for videotaping or recording the police. One of the potential results of such an arrest is a Section 1983 lawsuit based, in part, on a violation of the arrestee's First Amendment rights. It is in these cases that the "right to record the police" has been most directly confronted by the courts.

As discussed below, in some cases courts have looked favorably on such claims, while in others cases they have not.

The U.S. Court of Appeals for the Third Circuit dealt with the issue in the recent case *Kelly v. Borough of Carlisle*. In *Kelly*, the plaintiff filed a civil lawsuit under 42 U.S.C. Section 1983 claiming that his constitutional rights were violated when he was arrested for filming with his hand-held video camera a police officer during a traffic stop. The plaintiff was a passenger in the truck that was stopped for speeding and violating a bumper height restriction, and he turned on the video camera (which he claimed was visible in his lap) during the course of the traffic stop after, he claimed, the officer began yelling at the driver. Toward the end of the traffic stop, the officer informed the plaintiff and the driver that he was taping their interaction using a car-mounted video camera and a microphone on the officer's shirt. The officer then observed the plaintiff was recording him. Believing the recording by the plaintiff was a violation of the Pennsylvania wiretapping statute, the officer ordered the plaintiff to turn over the camera, which the plaintiff did. After returning to his patrol car and speaking to an assistant district attorney, the officer called for additional police assistance and arrested the plaintiff for violating the wiretap statute.

The charges against Kelly were later dropped, but he filed a Section 1983 lawsuit alleging First and Fourth Amendment violations by the officer and the city. The district court granted the defendant-officer's summary judgment motion based on qualified immunity and granted the defendant-city's summary judgment motion based on the plaintiff's failure to present facts sufficient to establish municipal liability.

The first issue addressed by the Third Circuit on appeal was whether qualified immunity applied to the officer's actions. For qualified immunity to apply, and shield the government officer from liability for civil damages, his conduct must not have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Therefore, with respect to the alleged First Amendment violation, the question for the Third Circuit in *Kelly* was whether

there is a “clearly established” right to videotape the police.

In reaching its conclusion, the Third Circuit analyzed cases from district courts within the Third Circuit as well as federal courts in other jurisdictions (these decisions are discussed below). It ultimately found there was insufficient case law demonstrating a “clearly established” right to record the police at the time the defendant was arrested.

The court further stated that its decision on the First Amendment question was supported by the fact that none of the cases reviewed involved traffic stops—an activity the U.S. Supreme Court has found to be “inherently dangerous.” Thus, the court determined that the right to videotape police officers during traffic stops was not clearly established, and the police officer was entitled to qualified immunity on the alleged First Amendment violation.

In synthesizing earlier precedents, the Third Circuit in *Kelly* found a distinction between videotaping *with an expressive purpose*, which may be protected by the First Amendment, and videotaping *without an expressive purpose*, which may not be protected.

For example, the Third Circuit in *Kelly* cited *Robinson v. Fetterman*, in which the U.S. District Court for the Eastern District of Pennsylvania held that there is a free speech right to film police officers in the performance of their public duties. This case involved a citizen who videotaped state troopers conducting truck inspections on a local road because the citizen was concerned about the safety of the inspections. The citizen filmed the troopers from about 20 to 30 feet away, without interfering in their activities, and with the permission of the landowner from whose property he conducted his videotaping activities. Nevertheless, the troopers arrested him for harassment under a state statute. At trial, the citizen was found guilty of harassment, but the charges were dismissed on appeal, and he later filed a Section 1983 lawsuit against the troopers.

In analyzing the Section 1983 claims made by the plaintiff in *Robinson*, the district court stated the following:

The activities of the police, like those of other public officials, are subject to public scrutiny. Indeed, “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.” Although Robinson need not assert any particular reason for videotaping the troopers, he was doing so in order to make a visual record of what he believed was the unsafe manner in which they were performing their duties. He had previously talked to . . . a Representative in the Pennsylvania General Assembly, about his concerns. Robinson’s right to free

speech encompasses the right to receive information and ideas. He also has a First Amendment right to express his concern about the safety of the truck inspections to the appropriate government agency or officials, whether his expression takes the form of speech or conduct. Videotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case. In sum, there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants on October 23, 2002.

Therefore, the district court found the troopers liable for violating Robinson's First Amendment right to videotape police conduct. The Third Circuit in *Kelly* recognized this case as suggesting a "broad right to videotape the police."

The Third Circuit in *Kelly* also examined the Eleventh Circuit's decision in *Smith v. City of Cumming*, which involved a couple who filed a Section 1983 lawsuit alleging that the city police harassed them and prevented them from videotaping police actions. Here, the Eleventh Circuit stated that the plaintiffs enjoyed a "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph and videotape police conduct." The court continued, citing a long string of federal trial and appellate court cases, "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." Although the Eleventh Circuit clearly recognized the First Amendment right to videotape police activities, the court affirmed the lower court's grant of summary judgment in favor of the defendants because the plaintiffs failed to show the defendants had violated that right. However, as in *Robinson*, the Third Circuit recognized the Eleventh Circuit in *Smith* announced a broad right to record the police.

The Third Circuit in *Kelly* also analyzed the Ninth Circuit's decision in *Fordyce v. City of Seattle*, in reaching its conclusion. *Fordyce* involved a Section 1983 plaintiff, an activist and "amateur journalist," who was arrested for violating a Washington state wiretap statute when he videotaped (using audio and video) a public march without obtaining the consent of the bystanders he recorded. Ultimately, the Ninth Circuit held that qualified immunity applied to the officer's arrest of the plaintiff because a reasonable officer could have believed the plaintiff/arrestee was recording a private conversation in violation of the statute. But in doing so, the court suggested that there is a First Amendment right to "film matters of public interest." Police conduct in the course of carrying out their public duties would, presumably, qualify as a matter of public interest.

In spite of these cases that support a First Amendment right to record the police, the Third Circuit in *Kelly* found persuasive other cases that would limit that right (if any). The U.S. District Court of the District of New Jersey in *Pomykacz v. Borough of West Wildwood* held that photographing a police officer in connection with a citizen's political activism was protected by the First

Amendment. The Section 1983 plaintiff, suspecting an inappropriate romantic relationship between a police officer and the mayor of West Wildwood that created a potential conflict of interest, nepotism, and preferential treatment, took photographs of the officer and the mayor, and was then arrested for stalking. In evaluating the defendants motion for summary judgment, the district court found sufficient evidence that the plaintiff, a self-proclaimed “citizen-activist,” was a concerned citizen “who at times spoke her mind to Borough officials and other citizens about her concerns regarding the official conduct of the police department and the mayor. Such speech is clearly protected by the First Amendment.” However, the district court declined the invitation to rule that videotaping or photographing the police in the course of their duties is, per se, protected by the First Amendment. In a footnote, the court wrote:

Pomykacz makes the blanket assertion that “the observation and monitoring of public officials is protected by the [F]irst [A]mendment.” The Court does not necessarily agree. An argument can be made that the act of photographing, in the abstract, is not sufficiently expressive or communicative and therefore not within the scope of First Amendment protection—even when the subject of the photography is a public servant. . . . Indeed, the Third Circuit has stated, albeit in *dicta*, that “videotaping or photographing the police in the performance of their duties on public property may be a protected activity. . . . [P]hotography or videography that has a communicative or expressive purpose enjoys some First Amendment protection.” However, in this case the record supports the conclusion that Pomykacz’s photography and monitoring was part and parcel of her political activism and that Officer Ferentz and Mayor Fox knew as much. Pomykacz expressed her concerns about construction at the municipal building and the relationship between Officer Ferentz and Mayor Fox. She was arrested because, among other things, she took a picture of Officer Ferentz in the municipal building while Mayor Fox was there. Thus the photography was tightly intertwined with Pomykacz’s speech and it is appropriate to address her speech and conduct together.

The district court in *Pomykacz* ultimately denied the defendants’ summary judgment motion with respect to the plaintiff’s Section 1983 claim based on the First Amendment violation.

Finally, the Third Circuit in *Kelly* also considered its own earlier decision in *Gilles v. Davis*. *Gilles* involved two plaintiffs—one a campus evangelist and the other a member of his campus ministry who videotaped the other man preaching provocatively to a group of students. After they were arrested for disorderly conduct, they brought a Section 1983 claim against the arresting officers. Their First Amendment claim based on the videotaping activity was dealt with in a footnote. The Third Circuit wrote in *dicta*: “[V]ideotaping does not constitute a protected First Amendment activity. But videotaping or photographing the police in the performance of their duties on public

property may be a protected activity. More generally, photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection."

In other words, the Third Circuit suggested in *Gilles* that videotaping the police in the course of carrying out their public duties may be a protected activity—but is not absolutely so. The determinative factor for the Third Circuit was whether the videotaping was done with a communicative or expressive purpose.

In summary, the Third Circuit in *Kelly* relied on cases such as *Robinson*, *Smith*, *Fordyce*, *Pomykacz*, and *Gilles*, as a collective, for the proposition that videotaping the police with an expressive purpose may be protected by the First Amendment, while videotaping the police without an expressive purpose may not be protected. The Third Circuit did not offer any test or standard to determine when a videotape is made with an expressive purpose, so, presumably, the purpose of the filming must be analyzed based on the facts of each particular case.

For the average citizen, demonstrating that videotaping the police was done with an expressive purpose may be a challenge, but, presumably, posting video to a blog or YouTube would meet the threshold. For a journalist, demonstrating an expressive purpose would presumably be easier as taking video is part of the newsgathering and publication process.

Whether or not other circuits concur with the Third Circuit's analysis in *Kelly* remains to be seen as case law develops further.

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Now that we have explored wiretapping arrests following incidents when citizens record police activity, and the Section 1983 claims that sometimes follow such arrests, in our next and final post on recording police activity, we will discuss another potential obstacle to exercising the right to record the police—state obstruction statutes.