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The Public Has The First Amendment Right To Record Police Activity. Can Police Seize Them As Evidence?

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Our Scenario

An officer makes a traffic stop because the subject vehicle has been moving erratically and confirms that the driver has been drinking alcoholic beverages. The officer is driving a patrol vehicle equipped with audio/visual recording devices and he is wearing a portable microphone. The officer asks the driver to perform some sobriety tests to which the driver agrees. As the officer is getting the driver from the vehicle to move him to a location where he can visually record the interview and any sobriety tests he administers, he notices a person standing on the sidewalk holding up what appears to be a cellphone.

Although most of the officer's attention is on keeping the obviously intoxicated driver under control and out of harm's way, he becomes concerned about this person on the sidewalk and tells him to move on. Although the person backs up, he still remains near the officer and continues to hold up his cell phone. The officer calls for backup. He then starts interviewing the driver and preparing for sobriety tests all the while keeping an eye on the person on the sidewalk.

The backup officer, upon arriving at the scene, becomes suspicious of the situation and parks his patrol vehicle so its recording equipment captures a wider view than the first officer's vehicle does. The view includes the sidewalk. The backup officer approaches the person with the cell phone and asks him what he is doing. He tells the officer he is recording the incident. The officer's instincts are to tell the guy to move on so they do not have to deal with him. However, he recalls a training bulletin about people recording officers and decides to step away and monitor the situation to ensure the person does nothing to interfere or threaten the officers.

As the incident progresses, the driver starts to give the original officer a hard time about taking sobriety tests. The first officer warns the driver that he will be arrested. The driver then throws a punch at the officer and tries to run to his vehicle. The officers tackle the driver and attempt to bring him under control. The driver continues to struggle all the while kicking and cursing at the officers.

Another backup officer arrives and observes the resisting driver and person with the cell phone standing on the sidewalk. By this time, the driver is pretty much under control, and it appears no more

assistance is needed to get the driver seated in the rear of the patrol car, so the second backup officer goes to the person on the curb, not knowing what his involvement in the incident may be, and tells him not to leave. The person keeps holding up the phone and tells the officer he is not going anywhere right away. The second backup officer stays with the person on the sidewalk.

The original officer approaches the person who is still recording the incident with his cell phone. The officer explains that the recording the person has made is evidence and asks for the person's identification and the cellphone so the recording can be preserved. The person refuses to provide either and starts to walk away.

What now?

Legal Background

A case is being heard in the U.S. District Court in Maryland, *Garcia v. Montgomery County #8:12-cv-03592 (USDC Md.)*. Garcia, a journalist, sued after police arrested and charged him with disorderly conduct for photographing an incident during which Montgomery County Police Department officers arrested two men. Garcia became concerned that the actions of the officers were inappropriate and might involve excessive force. He initially recorded the incident from at least 30 feet away and then from nearly 100 feet away after an officer flashed him with a spotlight. Garcia did not interfere with the police activity. Other than clearly and audibly identifying himself as a member of the press, Garcia did not speak to the officers. At the criminal trial, Garcia was acquitted of the charge because he was on a public street when he observed the arrest.

The U.S. Department of Justice (DOJ) filed a Statement of Interest of the United States to the court in the Garcia case requesting that the court not grant Montgomery County's motion to dismiss. The DOJ said the First and Fourth Amendments protect an individual who peacefully photographs police activity on a public street if officers arrest the individual and seize the camera of that individual for that activity. The DOJ also expressed its concern that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights. Although the *Garcia* case remains with the court, the DOJ has made it clear, for a second time, that in its opinion a person has the constitutional right to record police activity.

On January 10, 2012, in *Sharp v. Baltimore City Police Department, # 1:11-cv-02888*, U.S. District Court (D. Md.) Sharp alleged that Baltimore City Police officers seized, searched and deleted the contents of his cell phone after he used it to record officers forcibly arresting his friend. The DOJ filed a Statement of Interest of the United States with the court in this matter. In that Statement, the United States urged the Court to find that private individuals have a First Amendment right to record police officers in the public discharge of their duties and that officers who seize and destroy such recordings without a warrant or due process violate an individual's Fourth and Fourteenth Amendment. **The Statement also said that law enforcement must develop constitutionally adequate policies to guide officer conduct effectively, to accurately reflect the extent of individuals' rights under the First, Fourth and Fourteenth Amendments, and to diminish the likelihood of future constitutional violations.**

There are no Sixth Circuit or U.S. Supreme Court rulings that specifically address the constitutional rights of a person to record police officers in the public discharge of their duties or the rights of the individual when officers seize and/or destroy such recordings without a warrant or due process. Yet it is apparent that the U.S. Department of Justice believes this type of behavior is a violation of a person's constitutional rights and the DOJ has made that clear and so have the courts in other Districts. *Smith v. Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000), Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995)*.

What About Our Scenario?

LEAF's Legal Advisor, Audrey Forbush of Plunkett Cooney PC, reviewed the newsletter scenario. She remarked that the officers did nothing to infringe upon the constitutional rights of the person recording the incident. She continued that with the proliferation of recording devices used by police, public entities and business for security purposes, officers should not be concerned about who is recording as long as the recording process does not compromise the officer's safety or interfere with the police activity.

In the scenario, the officers asked the person to identify himself and to surrender the phone he used as a recording device. His response was to refuse and walk away. Forbush said there were a few elements to the incident that need to be discussed in order to ensure the officers do not violate the constitutional rights of the person as the incident progresses.

Exigent Circumstances

One of the key rulings in *Katz v United States, 389 US 347(1967)*, opined Forbush, is that the Fourth Amendment permits "reasonable searches," and, in the absence of one of the judicially recognized exceptions to the warrant requirement, searches conducted without a warrant are, per se, unreasonable. She remarked that the recognized exceptions are exigent circumstances. Exigent circumstances have been defined as a "specially pressing or urgent law enforcement need," *Illinois v. McArthur 531 US __, 148 L.Ed.2d 838, 847 (2001),* and a "compelling need for official action and no time to secure a warrant." *Michigan v. Tyler 436 US 499, 509 (1978).* The courts list several dangers that make up exigent circumstances and one of those compelling needs is the Imminent Destruction of Evidence.

Imminent Destruction of Evidence

The Sixth Circuit Court in *United States v. Sangineto-Miranda, 859 F.2d 1501, 1511 (6th Cir. 1988)* said that one of the recognized situations that may justify acting without a warrant is an "urgent need to prevent evidence from being lost or destroyed." The courts said that to establish exigent circumstances under this exception, the government must first show "an objectively reasonable basis for concluding that the loss or destruction of evidence is imminent." Second, we must "balance the interests by weighing the governmental interest being served by the intrusion against the individual interest that would be protected if a warrant were required" *United States v. Plavcak, 411 F.3d 655, 664 (6th Cir. 2005).*

Forbush pointed to the ruling in *Illinois v. McArthur, 531 U.S. 326, 332 (2001)* in which the court ruled that it is reasonable for law enforcement to conclude that a defendant, suspecting an imminent search would, if given the chance," get rid of contraband quickly." She said applying that ruling to our newsletter scenario, the question the officers must ask themselves is if they have an objectively reasonable basis for concluding that the recorded evidence on the phone would be destroyed if the phone was not seized immediately, pending application for a search warrant?

In *Plavcak*, the court, in evaluating whether the officers were objectively reasonable, established that a subject's attempt to leave the area creates a reasonable basis for concluding that the evidence would be lost or destroyed if the phone were not seized.

Electronic Evidence

Forbush points to the June 2012 unpublished opinion from the Sixth Circuit Court of Appeals, *U.S. v Bradley, 488 Fed Appx 99 (CA 6th 2012)* as a good resource for understanding the court's analysis of preserving and protecting electronic evidence. In its opinion, the Court wrote that it recognized that courts continue to struggle with the application Fourth Amendment jurisprudence to computers and the variety of interests implicated by seizures and searches of personal electronics. The court noted in *Bradley* that although there are strong personal interests that demand caution by police in seizing personal computers, the government's interest in preventing the destruction of evidence is equally strong when

electronic evidence is at issue.

Immediate Seizure

In *United States v. Jacobsen, 466 U.S. 109, 124 (1984)* , the court said a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes the possessory interests protected by the Fourth Amendment's prohibition on unreasonable seizures. Forbush said the analysis of the need for immediate seizure must be two-pronged. Establishing that exigent circumstances exist to justify a warrantless seizure is one of the prongs. The second is looking at the totality of circumstances to determine if it is reasonable to seize the property immediately and deprive the possessor access to and/or use of the property.

In evaluating the totality of circumstances our scenario presents, Forbush said it is likely the court would conclude that it is reasonable to take the phone and hold it. This action would deprive the possessor of its use for the time necessary to get a warrant and have a person specialized in searching electronic equipment execute it.

The Person Is Leaving -- What Should Be Done?

Forbush believes that the officers in our scenario have reasonable suspicion to stop the person. Each officer saw him holding his phone in a fashion that suggested that he was recording the incident and that the recording is evidence. As noted above, officers may make warrantless searches and seizures if they find that exigent circumstances exist. The officers have probable cause to assume the phone contains evidence and have a compelling need to take immediate action to protect it from being lost and/or destroyed. The need for action leaves no time to get a warrant.

Should the person refuse to stop, to identify himself and to surrender the evidence, he could be open to criminal charges. Therefore, the officers should take action to stop the person. The action must be reasonable and commensurate with the totality of circumstances, including the seriousness of the crime. Officers should explain that they have probable cause to believe the phone contains evidence of a crime -- the assault on the officer -- and they want to obtain and preserve it. Since the courts have already recognized that electronic devices present a challenge to preserving evidence that can be easily destroyed and considering our person's lack of cooperation, demanding custody of the phone, Forbush said, is reasonable.

A Matter Of Discretion

In Forbush's opinion, officers have discretion in managing a person who refuses to provide the evidence or identification. Because all the crimes in our scenario are misdemeanors, the officers should consider the actual need for the evidence against the potential risk in obtaining it. They should consider the need to review and/or obtain the evidence, to maintain the chain of custody, and to address the person's obvious desire to keep his phone. An innovative solution to the immediate problem of obtaining the evidence could be to electronically transfer the video to a department owned device that allows officers to verify the integrity of the video upon receipt. This would enable the officers to return the phone to its owner immediately.

It would be prudent, according to Forbush, for officers to seek input from a supervisor or commanding officer before seizing the phone or arresting the person. If none is available, she adds that it may be advisable to contact the on-call prosecutor for guidance on the seizure and/or arrest.

In Conclusion

In summing up her conclusions, Forbush used the same totality of circumstances analysis of the actions of the officers that the courts use. She said that in our scenario, the officers could reasonably conclude that the person was taping the encounter they had with the driver, that the recording captured the driver's assault on the officer, and that the in-car police video also captured the images since the officer positioned the driver to capture the sobriety test results. Given these

circumstances, it is reasonable for the officers to stop the person, seize the phone and ask the person for consent to see the video to determine its evidentiary value. This is the time to try to get the person to understand the importance of the evidence and to seek a quick solution to electronically exchange the information. Officers should also take the time at the scene to verify that the in-car video properly recorded the incident and determine if they actually need the phone video.

In addition, Forbush said that it is important to remember the clock is ticking on the time of seizure. When it comes to the length of an investigative detention, the U. S. Supreme Court in *United States v. Sharpe, 470 U.S. 675; 105 S.Ct. 1568; 84 L.Ed.2d 605 (1985*) held that the Fourth Amendment imposes no rigid time limitations on investigative detentions. At the same time, citing *Florida v. Royer, 460 U.S. 491; 103 S.Ct. 1319; 75 L.Ed.2d 229 (1983)*, the court also stated, "[a]n investigative detention must be temporary and last no longer then that is necessary to effectuate the purpose of the stop." They also said "But when the delay in ending a Terry stop is attributable to the evasive actions of a suspect, the police do not exceed the permissible duration of an investigatory stop." In *Bennett v. City of Eastpointe, 410 F.3d 810, 825-26 (6th Cir.2005),* the Sixth Circuit ruled that the reasonableness of the detention is judged on two distinct criteria: (1) whether it was sufficiently limited in time, and (2) whether the law enforcement officials used the least intrusive investigative means reasonably available.

She reminds law enforcement that the court of public opinion will also evaluate the totality of circumstances for the reasonableness of immediately seizing the evidence. The public may question the reasonablness when they weigh the seriousness of the crime and the amount of force used to get the phone, especially with the existence of the two recordings from the patrol vehicles. This is especially true if the officers review their own video and find that it captured the specifics of the incident and meets the burden of proof needed for the driver's crime.

Forbush remarked that if the person refuses to surrender the phone, officers might seize it by exercising the amount of control necessary to overcome any resistance encountered. If the person resists to the extent that a crime occurs then an arrest can be made. Though she does not diminish the importance of officer safety, Forbush opined that officers should consider the nature of the crime for which they are seeking evidence about. That will be part of the evaluation of whether the actions they take to seize the person to get the phone were "objectively reasonable in light of the facts and circumstances confronting them, without regard to underlying intent or motivation.", *Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989).*

Since this type of scenario might occur in any department, Forbush strongly recommends establishing a policy for handling people who record police activity and the possible need to seize evidence. Forbush suggests the discussion should include the department's legal advisor and prosecutor. Police Departments in Miami, Florida, Washington DC and the IACP have sample policies on the web.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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