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Cc: "Cox, Billy" <Billy.Cox@heraldtribune.com>
Sent: Wednesday, February 8, 2012 9:05 AM
Subject: Re: Video/Audio Recordings

I received the January 2010 Legal Bulletin #10-12 that you sent to Billy Cox and cited as your authority to have stopped, interfered with and arrested Steve Horrigan while he was recording a matter of public concern on a city street.

A little research in the 11th Circuit finds a 2000 ruling in a Georgia case, [*Smith v. City of Cumming*](#), where the that Court of Appeals agreed with the plaintiffs that “they had a First Amendment right, subject to reasonable time, manner, place restrictions, to photograph or videotape police conduct. The 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.”

Also see a more recent case: *Albella v Simon*, 2011 U.S. Dist. LEXIS 136238 (S.D. Fla. Nov. 28, 2011)

Here, according to the Court "Plaintiff was photographing a police officer in a public area, something he has a First Amendment right to do. See *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“As to the First Amendment claim under Section 1983, we agree with the [plaintiffs] that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The 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.”) (emphasis added).

The Court went on to say: This raised a First Amendment infringement claim. “To establish a prima facie First Amendment violation, [Plaintiff] must show: (1) ‘that a state actor took some adverse action against [him] (2) because of (3) [his] protected conduct, and that such action (4) chilled [the] exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.’” Here, Officer Baez took adverse action (pushing the camera), because of Plaintiff’s protected conduct (photographing Officer Baez in a public space), which chilled Plaintiff’s exercise of his First Amendment rights (he stopped taking pictures). Plaintiff has therefore set forth a prima facie First Amendment Officer Baez is not entitled to qualified immunity on Plaintiff’s claims that Officer Baez violated his First Amendment rights by physically preventing his photography. When photographing Officer Baez, Plaintiff was exercising his First Amendment rights. See Smith, 212 F.3d at 1333. In a similar factual scenario, the Eleventh Circuit denied an officer qualified immunity when he arrested a person for taking photographs at a public event, finding there was no connection between the photography, even if it “could have been used for unlawful activity,” and probable cause for arrest. Williamson v. Mills, 65 F.3d 155, 158 (11th Cir. 1995) (emphasis in original). That citizens may photograph police officers in public places has thus been the law in this Circuit for over 15 years (emphasis added).

I think that you need to revise your guidelines and implement immediate and additional training.

The "Lessons Learned" is very bad advice. The instruction to "Directly and clearly communicate that the individual does not have your consent to record your oral communications (thereby asserting your privacy rights), and give the individual the opportunity to stop recording" is so absurd I cannot imagine anyone would advise such a thing. In public you may not, by a mere statement, create a privacy right. There is no reasonable expectation of privacy for a police officer performing his public duty in a public place and no statement can create that right.

The "How to Respond" section also gives improper guidance

(my comments are in bold):

- Stay calm (**good advice**) This individual is seeking to provoke the officer into an inappropriate response (**incorrect - the individual is exercising a clearly established 1st Amendment right**).
- Remember, all your actions are being preserved in videotape (**correct**).
- LEO should advise the person that the recording of their conversations is a violation of state law (**incorrect as there is no reasonable expectation of a private conversation in public**).
- LEO should directly and clearly communicate that the individual does not have his/her consent to record their oral communication (thereby asserting privacy rights)(**when an officer is speaking in a public place while performing his public duty there is no reasonable expectation of privacy not matter what s/he states**).
- LEO should directly and clearly communicate that the failure to turn off the camera (or recording device) will result in a

felony arrest (**incorrect - this is the type of action that will make the officer & department liable for a civil rights claim under 42 USC 1983**).

In a January 2012 Law Enforcement Newsletter, State Attorney George Wright discusses "Is Videotaping the Police a Crime?" (see attached)

He states:

"All parties must consent to the recording or the disclosure of the contents of any wire, oral or electronic communication in Florida. Recording, disclosing, or endeavoring to disclose without the consent of all parties is a felony, unless the interception is a first offense committed without any illegal purpose, and not for commercial gain. Fla. S tat. ch. 934.03. These first offenses and the interception of cellular frequencies are misdemeanors. State v. News-Press Pub. Co., 338 So. 2d 1313 (1976).

Under the statute, consent is not required for the taping of a nonelectronic communication uttered by a person who does not have a reasonable expectation of privacy in that communication. See definition of "oral communication," Fla. S tat. ch. 934.02. See also Stevenson v. State, 667 So.2d 410 (Fla. Dist. Ct. App. 1996); Paredes v. State, 760 So.2d 167 (Fla. Dist. Ct. App. 2000) (emphasis added).

Once again I respectfully request that the charges against Mr. Horrigan be immediately dropped and that you take corrective action to ensure that incidents like this do not occur again.

Thank you.

Very truly yours,

Mickey H. Osterreicher
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