

TRAINING BULLETIN NO. 2017-001

DATE: 1/24/2017
TO: Police Personnel
FROM: Warren Spencer, Legal Advisor
RE: Issues pertaining to persons videotaping the police

There have been questions regarding the extent of police authority when dealing with persons who are videotaping police officers and police facilities. Given the current climate in our country there are legitimate concerns about officer safety in these situations. This bulletin will examine options available to officers when dealing with videographers.

The Basics:

Reasonable suspicion is defined as: specific articulable facts and circumstances, coupled with reasonable inferences from those facts and circumstances that would lead a reasonable police officer to believe that a particular person was recently engaged in, was engaging in, or would soon be engaged in criminal conduct.

Probable cause is defined as: specific articulable facts and circumstances, coupled with reasonable inferences from those facts and circumstances that would lead a reasonable police officer to believe that a specific person had committed a specific crime.

A **seizure** includes any words or actions, or both, by a police officer that would lead a reasonable person to believe that his or her liberty is restricted.

There are only three types of encounters between officers and civilians:

1. **Consensual** – this requires that the encounter is voluntary and will be judged from the perspective of a reasonable civilian. In other words, would a reasonable person have believed he or she was free to decline the encounter and walk away? If not, then it's a seizure.
2. **Detention** – a detention is temporary in duration and must be based upon reasonable suspicion to be lawful. If reasonable suspicion is not present, then the seizure will be unlawful under the 4th amendment.
3. **Arrest** – an arrest is a greater intrusion on a person's liberty and must be based on probable cause to be lawful. Absent sufficient probable cause, the seizure would be unlawful and violate the 4th amendment.

The Act of Videotaping:

At present, there is no statute that criminalizes a person videotaping police actions or police facilities. It is well established in our law that a person has no reasonable expectation of

privacy conducting activities that occur within public view. That's why the paparazzi can do what they do – follow people around and take videos and photographs.

Interference with Public Duties:

It is a crime to interfere with a police officer. The relevant statute states:

Sec. 38.15. INTERFERENCE WITH PUBLIC DUTIES.

(a) A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with:

(1) a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law;

The crux of the issue is when does conduct actually interfere with police duties? A review of the case law seems to establish some guidance:

1. Generally, speech alone will not constitute interference;
2. The cases indicate that the suspect must do something that physically interferes with the officer's duties. For example, in one case a bystander kept entering the accident scene to try and help the vehicle occupants and the officer repeatedly ordered him back to the sidewalk and he refused to comply.¹

The Concept of the Suspicious Person:

The argument is occasionally offered that the police have the authority to detain "suspicious persons" in order to investigate their activities.

Our courts, from the Supreme Court on down, have set out three categories for police/civilian interaction. Those three are set out above. There is no category to seize suspicious persons. In order to detain a person against his or her will an officer must have reasonable suspicion or probable cause to believe criminal activity is involved. That belief must be reasonable.

In order to lawfully detain a videographer, an officer must articulate reasonable suspicion that he or she is involved in criminal activity. Since it is not against the law to stand on a sidewalk and videotape police activities or facilities, officers must be able to identify some reasonable belief that criminal activity is involved. One option might be is Interference with Public Duties, which is discussed above.

If the videographer is physically interfering with the officer's attempt to perform his or her duties, then an arrest or detention may be justified. This would not apply to someone who is standing where he or she may lawfully stand and videotaping police activities or police facilities and not otherwise physically interfering with the officer's duties.

¹ Spencer v. Rau, W.D. Tex. 2007, 542 F. Supp.2d 583

It may well be that if an officer wants to interact with a videographer who is filming the police station from a lawful vantage point, the officer's only option will be to attempt a consensual encounter (but see the case discussion below).

Failure to Identify:

The Penal Code includes the offense of Failure to Identify – the relevant portion appears below:

Sec. 38.02. FAILURE TO IDENTIFY.

(a) A person commits an offense if he intentionally refuses to give his name, residence address, or date of birth to a peace officer who has lawfully arrested the person and requested the information.

(b) A person commits an offense if he intentionally gives a false or fictitious name, residence address, or date of birth to a peace officer who has:

(1) lawfully arrested the person;

(2) lawfully detained the person; or

(3) requested the information from a person that the peace officer has good cause to believe is a witness to a criminal offense.

The statute makes it clear that it is not a crime to refuse to identify yourself to the police if you are lawfully detained – it is only a crime if you lie to the police about your identity during a detention. If a person is already under arrest for a different crime, then refusing to identify to the police constitutes a second offense.

A person is not generally obligated to identify himself or herself to the police. As noted above, a person who is lawfully detained is not required to provide identification.

If an officer approaches a videographer, the videographer is not required to identify himself or herself to the police until he or she is actually under arrest.

Federal District Court Case:

On 9/21/16 the United States District Court for the Northern District of Texas (the trial court) released an opinion in a section 1983 lawsuit involving a videographer.² On June 25, 2015 there was a person who stood on a sidewalk – a lawful vantage point – and videotaped officers coming and going from the rear entrance. He had a backpack with him. He was wearing a black powder pistol in a holster.³ A uniformed officer crossed the street and confronted the videographer. He asked him his business and demanded to see his identification, threatening to arrest him for failure to identify (discussed above). The videographer told him he was lawfully filming police activity and declined to provide his identification. The contact escalated and the videographer was taken to the ground by the officer. A supervisor came to the scene and released the videographer.

² Sanders v. Lt. Mike Vincent et al., Civil Action No.: 3:15-CV-2782-D

³ The video is on YouTube. It does not indicate the officer noticed the pistol at the outset of the detention. It's probably still there to watch. The plaintiff argues this point in his pleadings.

A civil rights lawsuit was filed by the videographer alleging, among other things, false arrest and excessive use of force – the leg sweep used to take him to the ground.

The city filed a motion claiming the plaintiff failed to state a cause of action against the city and the officers filed motions for qualified immunity. In a civil rights action an officer may be eligible for qualified immunity (in other words, he can't be sued) if the officer's actions do not violate clearly established law. The court agreed that the city's policies and procedures were not the cause of the actions and the city was dismissed. The other officers were granted qualified immunity. The only one left is the officer who initiated the detention and used force against the plaintiff.

There were two issues regarding the officer's actions: (1) the initial detention; and (2) the force used against the plaintiff.

Regarding the detention the court stated:

At the time Officer [B] informed Sanders that he was "under detention," ... he had the following information available to him: Sanders, wearing a backpack containing unidentified items, was videotaping the parking lot of the Addison Police Department without having requested permission to do so, informed the police department of his reasons for doing so, or even notified the police department that he would be doing so, and, when Officer [B] approached Sanders, Sanders refused to tell Officer [B] why he was videotaping the police department and refused to identify himself or provide Officer [B] with identification. Under the totality-of-the-circumstances, these facts are sufficient to create a reasonable suspicion that criminal activity is afoot. [The opinion and pleadings do not state what potential criminal activity is afoot.]

The court took notice that this event followed attacks on a city meeting facility in Garland and police headquarters in Dallas.

Regarding the force used the court stated:

[T]he court concludes that, viewed favorably to Sanders and accepted as true, the well-pleaded allegations in the amended complaint show that Officer [B] used excessive force when he performed a leg sweep to take Sanders down. The facts pleaded in the amended complaint show that Sanders did not verbally or physically threaten Officer [B]; he was not attempting to flee; he was not resisting arrest; he was not given the opportunity to submit voluntarily to Officer [B's] control; and he was never warned that if he did not submit to Officer [B's] orders, physical force would be used against him. Even in light of Sanders' admitted failure to cooperate with Officer [B's] requests during the investigatory detention, the facts alleged show that there was no need for force.

It should be noted that this opinion from the trial court may very well not be the last word in the case.

Hypothetical Discussion:

Using the facts from the court case discussed above, an analysis of continued action, absent the use of force, might be instructive.

Assume all the initial facts are the same, and the court agrees there is reasonable suspicion to detain. During a detention a person is not obligated to identify himself to the police and cannot be arrested for declining to do so (see the discussion above). So if he politely refuses to identify himself, an officer would have to find another legal reason to arrest him – and videotaping from a lawful vantage point is not yet a crime. If no other crime has been committed or is being committed, arrest is not an option, thus neither is the charge of failure to identify. Additionally, the length of the detention must be short and to the point – it is unlikely a court would permit an officer to detain a person for an extended period of time just to argue with him about identifying himself. A detention that lasts too long violates the 4th amendment. Unfortunately, there is no definitive time limit the courts have set for a detention – only that it be reasonable in duration.

If the suspect persists in declining to identify himself, and there is no probable cause to arrest him – the officer will simply have to walk away from the encounter.

Additionally, if the videographer is not carrying a pistol or backpack, the facts would be different from those discussed above and could alter the outcome.

Conclusion:


An officer has only three options to interact with civilians. Unless an officer has reasonable suspicion or probable cause to believe a videographer is involved in criminal activity, the officer's best option is a consensual encounter. At present, filming the police is not a crime.

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Date: 1/24/17

Reviewed by:

Date:


1/26/17

Appendix: 152 SW35 600; 816 SW2d 407; 88 SW3d 672; 88 SCt 1868; 124 SCt 2451; 99 SCt 2637; 562 SW2d 853; 754 WS2d 656