



Legal Update

December 2018

The United States District Court for Massachusetts holds that the secret audio recording of police officers and government officials performing their duties in public spaces is lawful.

Procedural History:

This decision involves two consolidated cases filed in the United States District Court for the District of Massachusetts: ***Martin and Perez v. William Gross & Dan Conley*** and ***Project Veritas Action v. Dan Conley***. Both cases challenged the Massachusetts wiretap statute, G.L. c. 272, § 99, which prohibits the willful interception or secret recording of any wire or oral communication through the use of an intercepting device. Previously, the First Circuit Court of Appeals addressed the issue of whether a citizen can openly record a police officer in public. The Court found that citizens have the right to film police while performing their duties in a public space. The decision below examines whether a citizen can secretly film government officials, including police officers, while they are performing their public duties.

Governing Decisions of the First Circuit Court of Appeals:

The First Circuit Court of Appeals held in ***Glik v. Cunniffe***, 655 F.3d 78 (1st Cir. 2011), and ***Gericke v. Begin***, 753 F.3d 1 (1st Cir. 2014), that filming police in public is lawful. In ***Glik***, Boston police arrested the plaintiff after he used his cell phone to openly film police officers

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arresting someone on the Boston Common. Glik was charged with violating § 99 and two other state-law offenses. Although the state criminal charges were dismissed, Glik sued the police under 42 U.S.C. § 1983, claiming that his arrest for audio and video recording of the officers constituted a violation of his rights under the First and Fourth Amendments.

The First Circuit held that police can be filmed in public while performing their duties. The Court acknowledged that the right to record “may be subject to reasonable time, place, and manner restrictions.” The Court did not address these limitations because Glik openly recorded the police arresting someone on the Boston Common, conduct which “fell well within the bounds of the Constitution’s protections.” The First Circuit held in *Glik* that “a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital and well-established liberty safeguarded by the First Amendment.”

In *Gericke v. Begin*, the First Circuit reiterated that filming police officers performing their duties carried out in public is lawful. However, filming may be subject to certain restrictions if there is a concern for public safety. Therefore, “a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering or about to interfere with his duties.”

ISSUE: Can police arrest a person for secretly recording an officer while in the performance of their duties in a public space?

Martin and Perez v. William Gross & Dan Conley: The plaintiffs alleged that § 99 violates the First and Fourteenth Amendments as applied to the secret recording of police officers engaged in their duties in public places. The plaintiffs recorded the police on at least twenty-six (26) occasions performing their duties in public since 2011, but refrained from secretly recording the police for fear that doing so openly will endanger their safety and provoke hostility from officers. After a lengthy analysis of the training materials that BPD officers receive, the Court determined that there was sufficient basis to establish a §1983 claim.

Project Veritas Action Fund v. Dan Conley: The plaintiff (“PVA”) is a nonprofit organization that engages in undercover journalism and it alleged that § 99 violates the First Amendment because it prohibits the secret audio recording of government officials performing their duties in public. The plaintiffs recorded the police on at least eighteen (18) occasions performing their duties in public since 2011, but have refrained from secretly recording the police for fear that doing so openly will endanger their safety and provoke hostility from officers. The plaintiffs have not secretly recorded police. Since 2011, the Suffolk County District Attorney’s Office (“SCDAO”) has opened at least eleven (11) case files that involve a felony charge under § 99. The charges include recording a police officer while performing duties. PVA has refrained from

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investigating certain projects in Massachusetts due to § 99. In this claim, PVA challenges whether § 99 prohibits secret recordings of government officials engaged in their duties in public spaces. The Court also found that there was sufficient basis to establish a §1983 claim.

Conclusion: The United States District Court held that the secret audio recording of government officials, including law enforcement officials, performing their duties in public is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions.

The federal District Court determined that the plaintiffs had valid First Amendment challenges. Consistent with case law from the Supreme Judicial Court, the federal Court found that the purpose of § 99 is to protect privacy interests. Section 99 “was designed to prohibit the use of electronic surveillance devices by private individuals because of the serious threat they pose to the “privacy of all citizens.” *Commonwealth v. Hyde*, 434 Mass. 594, 600-601 (2001). Generally speaking, the protection of individual privacy is a legitimate and significant government interest. See *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001).

Furthermore, § 99 is not narrowly tailored to protect a significant government interest when applied to law enforcement officials discharging their duties in a public place. See *Gericke* at 8 (“In our society, police officers are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights.”). The same applies to government officials performing their duties in public. However, the diminished privacy interests of government officials performing their duties in public must be balanced by the First Amendment interest in newsgathering and information-dissemination. The First Amendment prohibits the “government from limiting the stock of information from which members of the public may draw.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

The defendants argued that secretly recording police may implicate individual privacy or public safety issues -- for instance, when an officer meets with a confidential informant or encounters a crime victim on the street. When such situations arise, police are free to “take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations.” See *Glik, supra* at 84 (“The right to film may be subject to reasonable time, place, and manner restrictions.”). If an officer needs to protect the safety of an informant or her fellow officers, or seeks to preserve conversational privacy with a victim, the officer may order the recording to stop or to conduct the conversation at a safe remove from bystanders or in a private (i.e., non-public) setting. See *ACLU v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (“Police discussions about matters of national and local security do not take place in public where bystanders are within earshot.”). A reasonable restriction would remove the conversation from the scope of the relief sought (and ordered) in this case.

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The Court concluded that §99 does not ban all secret audio recordings of any encounter with a law enforcement official or any other government official. It applies regardless of whether the official being recorded has a significant privacy interest and regardless of whether there is any First Amendment interest in gathering the information in question. “By legislating this broadly - by making it a crime to audio record any conversation, even those that are not in fact private – the State has severed the link between § 99’s means and its end.” *Alvarez, supra* at 606. The lack of a “close fit” between means and end is plain.

Commentary:

- It is unclear whether this decision will be appealed to the First Circuit Court of Appeals.
- While this case has not changed the law in Massachusetts, this decision emphasizes that the purpose of § 99 was to protect privacy rights of private citizens.
- Although police and government officials have diminished privacy rights when performing their duties in a public, they are permitted to impose reasonable restrictions on filming if there is a concern for public safety.
- Police should consult with their legal advisor, police chief or district attorney’s office for further guidance.

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