

Citizen Videotaping LEO – Revisited

On March 16, 2009, Legal Update #LU0917 was distributed to all deputy sheriffs that addressed the proper response by a deputy who is confronted by a motorist who, during a traffic stop, begins videotaping the encounter. That memorandum was intentionally narrow in its scope. It envisioned a situation where a deputy initiates a lawful traffic stop for a non-criminal infraction. The driver exits his vehicle holding a video camera or cell phone which he points at the deputy. The deputy orders the driver to put the camera down, but the driver refuses.

- There is no legal basis to terminate the videotaping if the driver can in all other respects cooperate with the officer and provide their license, registration and proof of insurance, then the use of the camera would not constitute the basis for an Obstruction charge. Obviously, if the driver refuses to cooperate and just continues videotaping, the driver can be charged with Opposing an Officer Without Violence.
- F.S.S. 934.03 makes it a third degree felony to intercept an *oral communication* through the use of any electronic, mechanical, or other device.
- Considering this definition of intercept, the Florida Supreme Court has determined that F.S.S. 934.03 prohibits the tape recording of a face-to-face conversation in which one is participating without the consent of all parties.
- One Florida court has concluded that a deputy had probable cause to believe a violation of F.S.S. 934.03(1) (a) occurred when the suspect had recorded a conversation with another deputy without that deputy's consent. See, *State v. Keen*, 384 So.2d 284 (4DCA 1980).
- **Thus, it is the *audio* portion of the videotaping that constitutes a felony.**

Subsequent to the issuance of that update, a road patrol supervisor raised a new factual scenario:

I am reviewing a case where two deputies were making an arrest in a public area and after the arrest another citizen, not involved in the arrest, stated that he had recorded the arrest on a cell phone. One deputy asked if it was audio or video and when the citizen stated both the deputy stated it was nonconsensual and a felony and demanded the phone.

My question is if the deputy had not asserted any privacy rights prior to the recording and were performing their duties in a public area do they have an expectation of privacy as far as their statements or command being made during the arrest? In other-words, can a citizen be arrested for violating sec. 934.03 for audio recording an arrest made in public?

The March 16, 2009, Legal Update recommended that when a motorist whom is the subject of a traffic stop engages in videotaping the deputy, the deputy should:

- Stay calm. This individual is seeking to provoke the officer into an inappropriate response.
- Remember, all your actions are being preserved in videotape.
- The deputy should advise the person that the recording of their conversations is a violation of state law.
- The deputy should directly and clearly communicate that the individual does not have his/her consent to record their oral communication (thereby asserting privacy rights).
- The deputy should directly and clearly communicate that the failure to turn off the camera (or recording device) will result in a felony arrest.

The new scenario contemplates a third person, not a party to the traffic stop, recording the arrest from afar and the deputy being made aware of this after the fact. As one court noted, "F.S.S. 934.03 is unambiguous and does not include an exception for a private individual who records a police officer without the officer's consent." Further, there is no United States Supreme Court, Eleventh Circuit, or Florida state court decision holding that communications of deputy sheriffs' conduction traffic stops are not protected by F.S.S. 934.03. In fact, as set out above, the only Florida decision addressing this issue actually concluded that it was reasonable for the deputy sheriff to believe a violation of F.S.S. 934.03 occurred when the suspect had recorded a conversation with another deputy without that deputy's consent. See, *State v. Keen*.

However, to claim a statutory violation there must be a reasonable expectation that the conversation is private. A police-citizen contact that occurs on a public street, loud enough for a by-stander to hear away from the action, will not support such a claim. Additionally, if, as in the suggested fact pattern, the deputy did not learn of the recording until after the citizen contact/arrest was concluded, it will be difficult to argue that the act of recording interfered with, or hampered, the deputy in the execution of his lawful duties.

It is important to recognize that sec. 934.03 makes it illegal to intercept oral communications "without the consent of all parties." Accordingly, establishing the deputy's lack of consent is an element of the charge. Additionally, sec. 934.02(2) defines "oral communications" as "any oral communication uttered by a person *exhibiting an expectation that such communication is not subject to interception* under circumstances justifying such expectation..." Once again, a deputy engaged in a citizen contact on a public thoroughfare, speaking loud enough to be heard by others not a party to the contact, will **NOT** exhibit a reasonable expectation that the conversation was not to be overheard or recorded.

That said, if the deputy becomes aware of the third party recording and orders him to cease and desist, advises him that he, the deputy, is not consenting to the oral intercept, and that failure to stop will result in felony arrest, what would appear to be a reasonable response. It would be helpful if the deputy could articulate why the recording interfered

or hampered his duties. It will help to neutralize the “what were you trying to hide?” argument interposed by the defense attorney.

Lessons Learned:

- Modern day technology (i.e., cell phones, and hand held devices) makes videotaping a common occurrence. You Tube, real time blogs, 24 hour news coverage, etc. have become a popular and attractive source of video events. All of which enhances your chances of being videotaped.
- Do not fall for the “*Contempt of Cop*” scenario when confronted with a videotaping situation. Avoid the mindset that “You can’t videotape me” just because... “You can’t!”
- 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.
- When evaluating whether or not the videotaping rises to a criminal violation, be prepared to clearly articulate the basis for your arrest as it is likely to be challenged.
- Regardless, always conduct yourself as if you were in fact being videotaped.

How to Respond:

- Stay calm. This individual is seeking to provoke the officer into an inappropriate response.
- Remember, all your actions are being preserved in videotape.
- LEO should advise the person that the recording of their conversations is a violation of state law.
- LEO should directly and clearly communicate that the individual does not have his/her consent to record their oral communication (thereby asserting privacy rights).
- LEO should directly and clearly communicate that the failure to turn off the camera (or recording device) will result in a felony arrest.