

Videotaping Police: A First Amendment Review



**JAMES W. PIMENTEL
GENERAL COUNSEL
CLAY COUNTY SHERIFF'S OFFICE**

Smith v. City of Cumming (11th Cir. 2000)



- Facts: 42 USC 1983 Civil Rights action, alleging that police officers in the City of Cumming, Georgia violated their First Amendment rights by preventing them from videotaping police actions.
- Rule: people have a First Amendment right, subject to reasonable time, manner, and place restrictions, to videotape or photograph police conduct.
- Holding: although the plaintiffs had a First Amendment right, they did not prove that the actions of the defendant(s) violated that right.

Lessons of Smith v. City of Cumming



- The 11th Circuit Court of Appeals is our Federal Circuit. Therefore, in our circuit, the courts have ruled that people have a First Amendment right to photograph or videotape law enforcement activities.
- The right is not unlimited: like other First Amendment activities, it is subject to reasonable time, manner, and place restrictions.
- Any restrictions will be reviewed by the Courts under the Strict Scrutiny standard in a 42 USC 1983 action.

Lessons from Smith v. City of Cumming



- The Strict Scrutiny Standard: the restrictions must be:
- Imposed without reference to the content of the speech;
- Narrowly tailored to serve a significant government interest; and
- Leave open ample alternative channels for communication of the information.

Civil Liability



- Glik v. Cunniffe, 655 F.3d 78 (1st Circuit 2011): denied qualified immunity for officers who were sued under 42 USC 1983 for violation of civil rights. He claimed his First and Fourth Amendment rights were violated.
- Glik used his cellphone from 10 feet away to record an arrest on Boston Common – a city park. Boston PD officers arrested Glik under a Massachusetts state statute similar to FSS 934.03 (wiretapping) and disturbing the peace. The charges were dismissed by the court.

FSS 934.03



- For an oral communication to be protected under 934.03(1)(a), the person recorded must have an actual subjective expectation of privacy, along with a societal recognition that such expectation is reasonable. The more public that a space is, the less likely that a court will view an expectation of privacy as reasonable.
- Law Enforcement Newsletter, January 2012, State Attorney for the Eight Judicial Circuit