

Body Worn Cameras: Legal Issues on the Horizon

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In recent years, many law enforcement agencies have begun to require officers to employ body worn cameras. The adoption of this technology raises a number of legal questions. The enactment of a new North Carolina statute regulating public access to law enforcement recordings has generated additional issues. This manuscript provides a short overview of those issues.

I. Fourth Amendment Issues

Historically, courts have ruled that an officer may photograph or record his or her surroundings without running afoul of the Fourth Amendment. Courts have not seen recording as infringing on reasonable expectations of privacy beyond the intrusion associated with the officer's presence. See, e.g., *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) (“[T]he recording of visual images of a scene by means of photography does not amount to a seizure because it does not ‘meaningfully interfere’ with any possessory interest. . . . Because the police officers in this case were properly on the . . . premises, they could record by photography scenes presented to their plain view.”).

A. Mosaic Theory

Criminal defendants may argue that, even if a single officer's use of a single camera to record a single location or a single person does not normally intrude on anyone's reasonable expectation of privacy, the repeated use of multiple cameras to record many locations and many people nonetheless implicate the Fourth Amendment. The argument would be that body worn cameras contribute to a system of surveillance that is so comprehensive that the cumulative effect unreasonably erodes privacy. This argument would be rooted in the so-called mosaic theory of the Fourth Amendment, first elucidated in *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) (ruling that long-term GPS tracking of a suspect's vehicle is a Fourth Amendment search even if short-term tracking does nothing more than police may do through physical surveillance without a warrant, and reasoning in part that “[t]he difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life”), and seemingly endorsed, in several opinions, by a majority of Justices of the United States Supreme Court in *United States v. Jones*, ___ U.S. ___, 132 S.Ct. 945 (2012).

This argument may become stronger in the future, as body worn cameras are used by more officers to record more interactions, and as such cameras are supplemented by additional surveillance technologies like automated license plate readers and drone-mounted cameras. As of this writing, no court has yet applied the mosaic theory to body worn cameras, though some

courts have applied the theory to question officers' prolonged use of stationary surveillance cameras. See, e.g., *United States v. Vargas*, Case No. CR-12-6025-EFS, Order Granting Defendant's Motion to Suppress (E.D. Wa. Dec. 15, 2014) (ruling that officers' warrantless use of a camera, mounted on a utility pole near the defendant's home, to surveil the defendant's property for six weeks violated the Fourth Amendment, stating that a "reasonable expectation of privacy prohibits the warrantless, continuous, and covert recording of [the defendant's] front yard for six weeks," and describing the use of the camera as suggestive of the "Orwellian state").

B. Later Review of Recordings

Generally, an officer may review seized evidence as often as he or she likes without needing to obtain authorization each time. However, some commentators have suggested that the rules should be different regarding digital evidence generally, and recordings from body worn cameras specifically. For example, one has argued that "viewing the footage of a home search should at least sometimes itself constitute a Fourth Amendment search," because "[r]eentering the home after completion of the search would . . . require a new warrant," and so should virtually reentering the home by reviewing the recording. Stephen E. Henderson, *Fourth Amendment Time Machines (and What They Might Say About Police Body Cameras)*, 18 U. Pa. J. Const. L. 933 (2016). The concern animating this argument is that "cameras . . . record all sorts of events and details never noticed by the officers, and potentially permanently store them for later high-tech perusal." *Id.* The fear is that allowing officers to comb through past footage anytime, for any reason, in search of evidence of any crime, greatly expands the authority of law enforcement at the expense of personal privacy.

II. Public Access

A. National Controversy

Advocates for body worn cameras have often argue that cameras are tools for transparency and accountability. Yet states vary greatly in the extent to which they permit public access to body worn camera footage. See Sarah Breitenbach, *States Impose Wildly Different Policies in Releasing Police Videos*, Pew Charitable Trusts Oct. 11, 2016 (stating that "[a]t least 21 states and dozens of municipalities have instituted policies that range from treating body camera footage like other public records to imposing outright bans on releasing footage").

B. Former North Carolina Law

Until recently, North Carolina did not have a specific provision regulating public access to body worn camera recordings. Rather, access was determined under North Carolina's general public records provisions. Although North Carolina law makes a wide array of records available to the public, it contains an exception for "[r]ecords of criminal investigations." G.S. 132-1.4. This exception likely covered many of the recordings in which the media and the public had the

greatest interest, as recordings of violent confrontations between officers and citizens may contain evidence of criminal conduct by the officers, the citizens, or both. Furthermore, because such recordings may also be pertinent to personnel decisions, they might be confidential under the personnel privacy laws. See generally Frayda Bluestein, How Public Are Law Enforcement Vehicle or Body Camera Videos? (Not Very, in North Carolina), Coates' Canons: NC Local Government Law Blog, Sept. 17, 2014.

C. New North Carolina Law

In the 2016 legislative session, the General Assembly enacted S.L. 2016-88, which created new G.S. 132-1.4A to regulate public access to recordings from body worn cameras, dashboard cameras, and other law enforcement recording devices. For a general discussion of the new law, see Frayda Bluestein, Answers to Questions about North Carolina's Body-Worn Camera Law, Coates' Canons: NC Local Government Law Blog, July 20, 2016.

The new law provides two levels of access:

- Disclosure means allowing a person to view, but not copy, a recording. A law enforcement agency may disclose a recording to a person depicted in the recording or to his or her personal representative. In deciding whether to disclose, the agency is required to balance various factors listed in the law. If the agency denies disclosure, or fails to timely act on a request for disclosure, the person seeking disclosure may petition a superior court judge for an order requiring disclosure. The judge is likewise required to balance several enumerated factors in making his or her decision.
- Release means providing a copy of a recording to a person. The law provides an expedited process for "a person authorized to receive disclosure," i.e., a person depicted in a video, to seek release. But it also allows any other person to seek release. In either event, release is permitted only pursuant to an order of a superior court judge, after considering various factors listed in the law. An agency may not release a video on its own, with limited exceptions. North Carolina may be unique in allowing body worn camera recordings to be released only pursuant to court order.

It is worth noting that the law does not apply to "interviews or interrogations of suspects or witnesses." G.S. 132-1.4A(a)(6). It is unclear whether an officer's brief, on-the-scene questioning of a witness is an "interview" for purposes of this provision.

D. Appeals Under the New Law

As noted above, a law enforcement agency's decisions regarding disclosure may be appealed to superior court, and decisions regarding release must be made by a superior court judge in the first instance. But superior court may not be the end of the road for controversies about release and disclosure. New G.S. 132-1.4A does not provide specific procedures for appeals to the appellate division. However, the statute does not preclude such appeals, and actually

provides that actions for release and disclosure “shall be accorded priority by the trial *and appellate* courts.” (Emphasis added.) Given that G.S. 1-277(a) generally allows an appeal of “every judicial order . . . which affects a substantial right,” it seems likely that disputes regarding release and disclosure may be presented to the appellate division.

Questions may arise regarding who is entitled to bring such an appeal. When superior court proceedings begin, the statute requires that the person requesting disclosure or release notify (1) the head of the custodial law enforcement agency, (2) any officers who appear in the recording, and (3) the DA. It is unclear whether that means that all listed persons or entities are “parties” entitled to appeal, cf. G.S. 1-271 (providing that “[a]ny party aggrieved” may appeal), or to appear in any appeal that is filed, or whether a person or entity seeking to appeal or to appear in an appeal would need to be able to establish an interest beyond being listed in the statute in order to satisfy constitutional standing requirements.

A final procedural issue concerns the meaning of “accord[ing] priority” to these appeals. The statute does not offer any detail about the nature of the priority to be accorded, apparently leaving the development of an appropriate priority system to the courts.

E. Redaction

Courts may also grapple with whether to allow, or to require, certain parts of a recording to be redacted before disclosure or release. For example, G.S. 132-1.4A generally allows the disclosure or release of “only those portions of the recording that are relevant to the person’s request.” A court may be called upon to determine what is “relevant,” which may not always be obvious. If an officer responds to a call concerning domestic violence, interacts with and records the battered victim, then is involved in a confrontation with the abuser that ends with the officer shooting the abuser, the media may seek the release of the recording of the shooting. If a court decides to order release, is the officer’s interaction with the battered victim relevant, or does the relevant portion of the recording begin when the officer makes contact with the abuser?

Furthermore, a court that orders release of a recording is empowered to “place any conditions . . . on the release of the record that the court . . . deems appropriate,” G.S. 132-1.4A(f). This provision seems to allow a court to require the redaction or blurring of portions of a recording, such as portions showing people who are not fully dressed.

A final example of when redaction may arise as a concern is with recordings that pertain to juvenile suspects. The law generally provides that law enforcement records concerning juveniles be kept confidential. G.S. 7B-3001(b) (“[A]ll law enforcement records and files concerning a juvenile shall be . . . withheld from public inspection”).

III. Discovery

Under North Carolina's open file criminal discovery laws, body worn camera recordings made in connection with a criminal investigation are part of the State's "file" and, in felony cases, generally must be disclosed to the defendant. G.S. 15A-903. New G.S. 132-1.4A(g) accommodates open file discovery by requiring a law enforcement agency to disclose or release a recording to a district attorney for law enforcement purposes such as reviewing potential charges, introducing evidence in court, and complying with discovery obligations. No court order is required before this type of release or disclosure is permitted.

A defendant who receives a recording in discovery is free to show, or to provide a copy of, the recording to anyone the defendant wishes. The disclosure and release procedures and limitations set forth in new G.S. 132-1.4A apply only to "[r]ecordings in the custody of a law enforcement agency," not to recordings in the custody of a defendant. If the State believes that limits should be placed on a defendant's use, release, or disclosure of a recording, the mechanism for addressing that issue is a motion for a protective order under G.S. 15A-908.

IV. Use of Recordings in Litigation

As body worn cameras are more widely implemented, they will more often be used in litigation. The use of such recording presents several issues.

A. Foundation

The first issue is how to authenticate body camera recordings. Courts have recognized two ways of authenticating video: (1) through the testimony of a witness who states that the recording fairly and accurately depicts the events recorded, and/or (2) through the testimony of a witness who establishes that the camera was working properly when it generated the recording, and that the recording has not been altered since it was created. See generally Jeff Welty, *One Case, Two Ways of Authenticating Video*, NC Criminal Law Blog, June 27, 2016. In many cases, the officer wearing the camera will be in a position to authenticate the recording, though in some cases, as when the officer is killed during the recorded incident, another witness may be required to lay the foundation. See, e.g., *Woodward v. State*, 123 So.3d 989 (Ala. Ct. Crim. App. 2011) (the defendant killed a law enforcement officer; over the defendant's objection, the state was allowed to introduce a recording made by the camera in the deceased officer's vehicle; the reviewing court affirmed, recognizing the two methods of authentication described above and finding the second method satisfied by another officer's testimony about the workings of the camera system).

B. Recording Quality

Body worn camera recordings are often of low quality due to dim lighting, camera movement, subject movement, and other factors. Courts are likely to rule that the quality of a recording normally will go to the weight of the evidence rather than its admissibility; that is the general rule pertaining to concerns regarding the quality or audibility of an audio record. Cf. *United States v.*

Parks, 100 F.3d 1300 (7th Cir. 1996) (“[O]ur cases have consistently maintained that partially unintelligible tape recordings are admissible unless the unintelligible portions are so substantial as to render the entire recording untrustworthy. . . . Any inaudibility of a portion of a tape is relevant only as to the weight of the evidence, a jury question, and not as to its admissibility.”); Hines v. State, 383 S.W.3d 615 (Tx. Ct. App. 2012) (in a DWI case, the trial judge properly admitted dashboard camera footage; although the footage was a “jumbled mess” because the camera “did not operate correctly as it was produced from an older model dashboard camera,” an officer testified that “the portions of the evening that the dashboard camera recorded depicted exactly what happened that night”).

C. Camera Perspective

Body worn cameras, by their nature, record events from the officer’s perspective. This effectively puts the viewer in the officer’s place, and may tend to make the viewer more sympathetic to the officer and less sympathetic to those with whom the officer is interacting. Academic research supports the importance of camera perspective in determining viewer response. For example, Professor Daniel Lassiter, of the University of Ohio, filmed a police interrogation of a suspect from three angles: the officer’s perspective, the suspect’s perspective, and a neutral perspective. Study subjects were divided into three groups, each of which viewed one of the recordings. The subjects who watched the interrogation from the officer’s perspective rated it as much less coercive and much more reliable than those who watched it from the suspect’s perspective. Courts likely will be called upon to address a number of questions regarding claims of camera perspective bias, including the extent to which such alleged bias may be addressed in cross-examination and in closing argument, and whether litigants may present expert testimony regarding such bias.