



THIRD CIRCUIT HOLDS FIRST AMD GRANTS RIGHT TO PHOTOGRAPH, FILM, AUDIO RECORD POLICE IN PUBLIC – REGARDLESS OF PURPOSE

November 2017

For duplication & redistribution of this article, please contact Law Enforcement Risk Management Group by phone at 317-386-8325.
Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

Article Source: http://www.llrmi.com/articles/legal_update/2017_fields_v_philadelphia.shtml

©2017 [Brian S. Batterton](#), J.D., Legal & Liability Risk Management Institute

On July 7, 2017, the Third Circuit Court of Appeals decided *Fields v. City of Philadelphia et al.*ⁱ and *Geraci v. City of Philadelphia et al.*, both decided in one opinion in which the court examined whether a person has a right to film or photograph the police in public, even if, at the time, the person does not express the intent to publish the photo or video in some form of media. The relevant facts of *Fields and Geraci*, taken directly from the case, are as follows:

In September 2012, Amanda Geraci, a member of the police watchdog group "Up Against the Law," attended an anti-fracking protest at the Philadelphia Convention Center. She carried her camera and wore a pink bandana that identified her as a legal observer. About a half hour into the protest, the police acted to arrest a protestor. Geraci moved to a better vantage point to record the arrest and did so without interfering with the police. An officer abruptly pushed Geraci and pinned her against a pillar for one to three minutes, which prevented her from observing or recording the arrest. Geraci was not arrested or cited.

One evening in September 2013, Richard Fields, a sophomore at Temple University, was on a public sidewalk where he observed a number of police officers breaking up a house party across the street. The nearest officer was 15 feet away from him. Using his iPhone, he took a photograph of the scene. An officer noticed Fields taking the photo and asked him whether he "like[d] taking pictures of grown men" and ordered him to leave. J.A. 8. Fields refused, so the officer arrested him, confiscated his phone, and detained him. The officer searched Fields' phone and opened several videos and other photos. The officer then released Fields and issued him a citation for "Obstructing Highway and Other Public Passages." These charges were withdrawn when the officer did not appear at the court hearing...

They also pointed out that the City's Police Department's official policies recognized their First Amendment right. In 2011 the Department published a memorandum advising officers not to interfere with a private citizen's recording of police activity because it was protected by the First Amendment. In 2012 it published an official directive reiterating that

©2017 Article published in the free LLRMI E-Newsletter

Link to article online: http://www.llrmi.com/articles/legal_update/2017_fields_v_philadelphia.shtml
<http://www.llrmi.com> | <http://www.patctech.com>

this right existed. Both the memorandum and directive were read to police officers during roll call for three straight days. And in 2014, after the events in our case and the occurrence of other similar incidents, the Department instituted a formal training program to ensure that officers ceased retaliating against bystanders who recorded their activities.ⁱⁱ

Fields and Geraci filed suit and argued that the officers retaliated against them for exercising their First Amendment rights and also violated their Fourth Amendment rights by detaining them. The plaintiff's also argued that the City was liable for the officer's actions.

The district court granted summary judgment for the officers and the City. The district court reasoned that the City cannot be vicariously liable for the actions of their officers and the officers were not liable because the plaintiffs did not assert a valid First Amendment right since they testified that they were recording because it was "interesting" or "cool" rather than for an "expressive" purpose, such as a media purpose. The plaintiff's appealed the First Amendment issues to the Third Circuit Court of Appeals.

Issue One: Whether the First Amendment protects the activity of recording police officers carrying out official duties in public places regardless of the stated purpose at the time of the recording?

In examining this issue, the Third Circuit first stated

The First Amendment protects the public's right of access to information about their officials' public activities. It "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l. Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978). Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)...

To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately. Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media. Accordingly, recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public. See *PG Publ'g. Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).ⁱⁱⁱ [emphasis added]

The court then noted various reasons regarding why it is important to grant people a First Amendment right to record the police. Some of the reasons were as follows: (1) citizen video fills in the gaps if the police do not record for some reason; (2) the public's creation of contents complements the role of the traditional media as the media often shows private video and this is a common component of news programs; and (3) private video helps identify police misconduct and helps exonerate officers that are innocent of misconduct.

The court did note that the right to record and photograph is not absolute and there are circumstances where it may be restricted, such as when a person is actually interfering with the police in order to video or photograph or if a person were filming an undercover officer which would jeopardize the officer's safety. The court stated

We do not say that all recording is protected or desirable. The right to record police is not absolute. "[I]t is subject to reasonable time, place, and manner restrictions." *Kelly*, 622 F.3d at 262; see *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999). **But in public places these restrictions are restrained.**

We need not, however, address at length the limits of this constitutional right. Defendants offer nothing to justify their actions. Fields took a photograph across the street from where the police were breaking up a party. Geraci moved to a vantage point where she could record a protestor's arrest, but did so without getting in the officers' way. **If a person's recording interferes with police activity, that activity might not be protected. For instance, recording a police conversation with a confidential informant may interfere with an investigation and put a life at stake.** But here there are no countervailing concerns.^{iv} [emphasis added]

The court then established the rule in the Third Circuit as follows:

[U]nder the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.^v [emphasis added]

Issue Two: Whether the law was clearly established such that a reasonable officer confronted with the facts of Fields or Geraci's case would have known they were violating the First Amendment?

Qualified immunity protects government officials from suit as long as they were acting in a discretionary function and did not violate clearly established law. Regarding qualified immunity, the court stated

Government actors are entitled to qualified immunity unless they violated a constitutional right "so clearly established that 'every reasonable official would have understood that what he is doing violates that right.'" *Zaloga v. Borough of Moosic*, 841 F.3d 170, 175 (3d Cir. 2016) (quoting *Reichle v. Howards*, 566 U.S. 658, 659 (2012)) (emphasis in original). "In other words, existing precedent must have placed the statutory or constitutional question *beyond debate*." *Id.* (quoting *Reichle*, 566 U.S. at 664) (emphasis in original). **We do not need Supreme Court precedent or binding Third Circuit precedent to guide us if there is a "robust consensus of cases of persuasive authority in the Courts of Appeals." *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 247-48 (3d Cir. 2016) (alteration and citations omitted). District court decisions, though not binding, also "play a role in the qualified immunity analysis." *Doe v. Delie*, 257 F.3d 309, 321 n.10 (3d Cir. 2001). **To determine whether the right is clearly established, we look at the state of the law when the retaliation occurred, here in 2012 (Geraci) and 2013 (Fields).** See *id.***

To conduct the clearly established inquiry, we "frame the right 'in light of the specific context of the case, not as a broad general proposition,'" *L.R.*, 836 F.3d at 247-48 (citation omitted), as it needs to be "specific enough to put 'every reasonable official' on notice of it."^{vi} [emphasis added]

The court first looked at their Third Circuit precedent and noted that they have never previously held that such a right existed to record the police regardless of purpose; they stated that they only held that it “might” be a right. This is not enough to make the law “clearly established.”

The plaintiff argued that the City of Philadelphia’s own policy stating that citizens have a First Amendment right to record police could make the right “clearly established.” However, this argument goes squarely against the plaintiff’s argument in trying to establish municipal liability; particularly there they argue that the policy is totally ineffective in conveying the right to record to it’s officers. Even the captain over department policy testified that the officers did not understand that there was a constitutional right to record.

Lastly, the court looked at case law from other federal circuits. They noted that the other federal circuits that held there is a First Amendment right to record are distinguishable from this case because those other cases all dealt with citizens recording with “expressive intent” or the “intent to distribute” the recordings.

Therefore, regarding this issue, the court held

[W]e cannot say that the state of the law at the time of our cases (2012 and 2013) gave fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected.^{vii}

Therefore, the court affirmed the grant of qualified immunity for the officers.

Regarding the issue of municipal liability for the City of Philadelphia, the court of appeals remanded the case back to the district court for an initial determination regarding this issue.

ⁱ No. 16-1650, No. 16-1651 (3rd Cir. Decided July 7, 2017)

ⁱⁱ Id. at 8-9

ⁱⁱⁱ Id. at 14

^{iv} Id. at 16

^v Id. at 16-17

^{vi} Id. at 17

^{vii} Id. at 19-20