



Lakeland Police Department
Crime Analysis & Intelligence Center

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Lakeland Police Department

Video/Audio Recording Information

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The following issue was posed to Lakeland Police Department General Counsel, Roger Mallory.

*whether a citizen, a non-law enforcement officer,
may lawfully video and/or audio record a police officer
while the police officer is engaged in their work.*

Mr. Mallory provided the following response to this question to provide you with information as to the law on this subject.

As you would likely expect...the answer is "It depends on the relevant facts." Sound familiar?

Because the law regarding video-recording/photographing only (i.e., without recording sound/oral communications), and audio-recording is not identical I will address them separately and then provide opinion that relates to those circumstances when either or both activit(y)(ies) occur(s).

VIDEO-RECORDING (including still photographs)

The law is that absent a clear case of the subject unlawfully interfering with your execution of your legal duty (i.e., the video-recording/photography constitutes the crime of "Resisting With/Without Violence"; hereafter "Resisting"), and if you are located in a place lawfully accessible to the general public, the subject may lawfully do so. A couple of examples of those circumstances in which video-recording/photographing of you might constitute the crime of Resisting might be:

1. You are conducting surveillance from a location under circumstances in which we have a clear and reasonable intention and investigative need to remain secret and the video-recording/photographing can be reasonably expected to include your chosen location such that a viewer of that video/photograph could identify that location, and

2. You are acting in an undercover capacity, you are actively conducting law enforcement business (not, e.g., on lunch break, etc.), i.e., you are actually performing some legal duty (e.g., conducting an investigation), and the video-recording/photographing would somehow reveal your identity as a police officer, thereby endangering you and/or denying you the opportunity to continue to perform your legal duty.

AUDIO-RECORDING

Subject to the same restrictions stated above regarding actual instances of the audio-recording subject committing a Resisting crime against you, a subject may lawfully audio-record your oral communications/voice/sounds IF, and this is a big "IF", the recording subject, by words, conduct, or words and conduct informed or put you on notice that they were engaged in that audio-recording. By "words" I mean, of course, they, before audio-recording, informed you of their intention to audio-record you/your oral communications/voice/sounds. Those "words" could be reduced to writing and then provided to you before the audio-recording commenced.

By "conduct" I mean subject behavior that demonstrates their intention to, and/or is the act of audio-recording. They, e.g., show you a clearly identifiable recording device of some type and demonstrate they are activating the device, or the clearly identifiable recording device is otherwise displayed in your plain view and you could determine from casual observation that it may be activated.

If, however, you had an objectively reasonable basis upon which, it was your expectation, your oral communications/voice were/was not being recorded, and the person recording intended to record, the subject commits the felony crime of wiretapping (see Section 934.04(1) and (4), F.S.). Again, all the relevant facts must be considered to determine whether your expectation that your communications/voice were/was not being recorded was objectively reasonable. And the determination by a court of the presence or absence of objective reasonableness will be made, in part, on the basis of the modern reality of the abundance of video and audio recording devices in our environment. We would be wise to remember that the courts will not likely accept your expectation of non-recording if that expectation is tainted by hypersensitivity or something the courts might construe to be an unusually high degree of paranoia.

GENERAL LAW RELATING TO ENCOUNTERS WITH CITIZENS

WHO ARE VIDEO (PHOTOGRAPHING) AND/OR AUDIO RECORDING

Often, of course, a citizen is both video and audio recording. I can easily envision a circumstance in which video/audio recording citizen(s) could obstruct an active investigation by their physical presence. That is, obstruct or oppose the officer in their performance or attempted performance of their legal duty such that the citizen has committed the crime of Resisting.

Absent, e.g.,

1. A law violation such as Resisting,
2. Clear exigency we can articulate,
3. The recording is unique evidence of a crime and that evidence is “in plain view” or ‘plainly viewable’/determinable from the observations of the officer, or the evidentiary value of recording, as evidence, is rapidly dissipating and becoming unavailable (sometimes referred to as “evanescent evidence”), or
4. Valid consent,

the officer concerned about the recording lacks a legal basis to go “hands on” and/or seize the recording device from the possession of the recording citizen.

The case law does not support an officer’s position that a citizen who appeared to be video and/or audio-recording the officer/scene caused the officer to be distracted, and that mere distraction rose to the level of actual obstruction or opposition of the officer in their performance or attempted performance of their legal duty (i.e., the commission of the crime of Resisting). For the citizen to actually obstruct the investigation, i.e., commit the crime of Resisting, the courts would require facts that show, at a minimum, that the location of the citizen in relation to the officer and investigative events, was so close as to, e.g., physically deny the officer a position of strategic cover or retreat, access to their vehicle, access to fellow officers engaged at the scene, access to a needed weapon of convenience, access to a subject, witness, etc. Absent additional facts beyond mere distraction, a court will conclude the crime of Resisting did not occur and the officer was being unduly hypersensitive, thin-skinned, and perhaps displayed conduct that was less than that of a law enforcement professional.

With respect to the possibility of exigency as a basis to arrest and/or seize the recording device, you should know that, indeed, not even a very recent homicide in the area in which law enforcement is conducting an investigation has been found a lawful basis to conduct a warrantless search/seizure. (See Mincey v. Arizona, 437 U.S. 385, U.S. Sup. Ct. (1978); Flippo v. W. Va., 528 U.S. 11, U.S. Sup. Ct. (1999)). That is, there is no legally recognized “murder scene exception” to the Fourth Amendment requirement of a search warrant. I offer this to clearly make the case that what may be experienced by you as exigency, may very well not pass muster as grounds to ignore the Fourth Amendment search warrant requirement. Not even on the basis that you were “working” a murder scene; let alone conducting a traffic investigation, making a citizen encounter, etc.

CONCLUSION

Members of the general public seem to possess devices that audio, video, and audio/video-record in greater and greater numbers such that their presence in our law enforcement environment should be expected. With YouTube®, Twitter®, other social media forms, any one of us can reasonably expect that to be present in society is to be subject to video-recording and posting “for the world to see.” I foresee little or no diversion from this progression from a distant, historical, objectively reasonable sense of privacy, to an objectively reasonable sense that in whatever publicly observable conduct one engages, currently, one can reasonably expect to be video-recorded and that video-recording uploaded to, and made available to the world via the miracle of “social media” and/or electronic, commercial media.

Going “hands on” and/or seizing a video-recording device requires a lawful basis; examples of which are provided above. An officer’s subjective expectation that they will not be video-recorded while conducting their enforcement business is not sufficient to justify this officer conduct.

Audio-recording, however, is somewhat different. If the person whose oral communications are being recorded has a reasonable expectation their oral communications are not subject to interception/recording, then the intentional audio-recording of them by a citizen constitutes the felony crime of wiretapping. To the very short list of legal bases for going “hands on” and seizing video-recording devices offered above, if the recording is audio-recording, we can add the legal basis to arrest and seize the recording device as evidence of the crime of wiretapping. Be aware, however, that in charging the crime of wiretapping, prosecution and conviction is not guaranteed as the law of wiretapping includes a well-hidden, but complete criminal defense of “good faith reliance” on a “good faith determination” that the criminal law of wiretapping did not apply. (See Section 934.10(2)(c), F.S., misleadingly entitled only “Civil Remedies.”)