

Watching, and Recording, the Police

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Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [observing police](#), [recording police](#), [salisbury](#)

Date : September 22, 2010

Last month, a Salisbury woman was convicted in district court of resisting, delaying, or obstructing an officer. In a nutshell, the woman was on her front porch, videotaping a vehicle stop on the street, when an officer involved in the stop instructed her to go inside her house, apparently based on concerns about the safety and security of the scene. She refused, and was arrested. A lengthy local story about the case is [here](#), together with an edited version of the video. The defendant has appealed to superior court, and I don't intend to comment on the case itself. Plenty of other folks have done that, including the [Salisbury Post](#) and the [Washington Examiner](#), if you're interested.

I will say that the issue of citizens' rights to observe and to record the police has been a bit of a hot topic nationally. Gizmodo has [this piece](#) on point; *Reason* magazine summarizes covers the issue [here](#); the widely-read libertarian-leaning blog Instapundit has done a number of pieces on point, including [this one](#); and [this article](#) from the Boston Globe discusses the issue in the context of several charges brought in Massachusetts, to cite just a few examples.

A few states have specific statutes making it a crime to record police officers who are performing their official duties. More often, people who record the police have been charged under states' illegal surveillance statutes. Such charges may be plausible in states where the law requires the consent of all parties to record a conversation, depending in part on whether the surveillance laws of the particular state in question exempt conversations in which the participants have no expectation of privacy. (Most, but not all, state surveillance statutes apparently contain such an exemption.) An illegal surveillance charge probably wouldn't work in North Carolina, though, for a few reasons. First, it's only illegal to "intercept" oral communications when the communication is "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." [G.S. 15A-286\(17\)](#). I doubt that an officer's interaction with a suspect in a public place is subject to the sort of privacy expectation required by the statute. Furthermore, we're a so-called one party consent state. Under [G.S. 15A-287](#), it is illegal to intercept an oral communication only absent "the consent of at least one party to the communication." Since an observer is most likely to record the police when he believes that the police are being heavy-handed, the observer is likely to have the consent of the suspect -- or at least, the suspect is likely to take that position after the fact.

So I tend to think that under state law, citizens can record pretty much any police encounter that they can observe. Even if there were more ambiguity in the law than I think there is, though, I would still advise officers to be very cautious about ordering people not to record them, and about arresting people for recording them or for failing to obey their command to stop recording. Officers have been sued on First Amendment grounds for such conduct. See, e.g., *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (holding that the plaintiffs "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct" but that they had not established a deprivation of that right); *Banks v. Gallagher*, 2010 WL 1903597 (E.D. Pa. Mar. 18, 2010) (unpublished) (discussing First Amendment issue in detail, but ultimately finding that officers were protected by qualified immunity given the lack of settled law).

I'm sure that our courts would uphold some limit on where and how citizens can observe police. For example, a citizen who insisted on observing a SWAT team's attempt to rescue a hostage by following the team's commander around would surely be charged with, and convicted of, resist, delay and obstruct without much fuss. Exactly what those limits are, though, isn't clear. If the Salisbury case works its way up the chain, perhaps it will shed some light on the issue.