STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Alfredo Valentin

Docket No. 216-2015-CR-766

ORDER

Defendant, Alfredo Valentin, is charged with Unlawful Interception of Oral Communication under RSA 570-A:2, I-a. He moves to dismiss based on the First Amendment to the U.S. Constitution and insufficiency of the indictment. The Court held a hearing on October 13, 2015. Upon consideration of the pleadings, arguments, and the applicable law, the Court finds and rules as follows.

Background

For the purposes of this motion, construing all evidence in the light most favorable to the State, the Court finds the following facts. See State v. Lacasse, 153 N.H. 670, 672 (2006). On March 3, 2015, defendant found Manchester police officers searching his residence. Defendant left his home and returned one to two hours later. Police were still searching his residence. Sergeant Brian LaVeille and Lieutenant Christopher Sanders approached defendant in his driveway and spoke with him. Defendant recorded some of this interaction on his cell phone. The State contends that defendant held the phone by his leg, so as to conceal that he was recording.

The State charged defendant with a misdemeanor wiretapping offense under RSA 570-A:2, I-a, which provides in relevant part:

> [a] person is guilty of a misdemeanor if, except as otherwise specifically provided in this chapter or without consent of all parties to the communication, the person knowingly intercepts a telecommunication or oral communication when the person is a party to the communication.

Analysis

Defendant argues that the Court must dismiss the charge against him because it violates the First Amendment. "It is firmly established that the First Amendment protects a range of conduct surrounding the gathering and dissemination of information" including "the right of individuals to videotape police officers performing their duties in public." Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014); see Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011) ("[T]he First Amendment protects the filming of governmental officials in public spaces . . . .").

"Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" Glik, 655 F.3d at 82 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

> '[F]reedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.

Id. (citations omitted) (quoting First Nat'l Bank v. Belotti, 435 U.S. 765, 777 n.11 (1978)). "In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." Id. at 84. "The same restraint demanded of police officers in the face of provocative and challenging speech, must be

expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." Id. (quotation omitted).

The State does not dispute that defendant filmed police performing their duties in public. Nonetheless, the State argues that the First Amendment does not protect defendant's conduct because defendant concealed the fact that he was recording. The State contends the U.S. Court of Appeals for the First Circuit in Glik and Gericke "found that, in the absence of a statutory exception, the 1st Amendment to the Federal Constitution does not protect an individual who intercepts public officials' oral communications unless . . . the act of recording is done openly." (State's Obj. at 2.) The State further asserts:

> [t]he decision in Glick [sic] turned on the question of the openness of the actor's conduct, that is whether it was readily apparent to the officers whose communications were recorded that the actor was engaged in recording them. The Court determined that, because the Glick's [sic] conduct was open and obvious to the officers . . . his conduct was constitutionally protected.

(Id. at 2–3.)

The State's representation of Glik and Gericke is manifestly incorrect. The question of "openness" did not enter into the First Amendment analysis in either case. In Glik, the plaintiff brought First and Fourth Amendment claims against Massachusetts following an arrest under Massachusetts' wiretap statute for recording police. 655 F.3d at 79. In its First Amendment analysis, the Glik Court wrote, "[i]s there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative." Id. at 82. Glik later suggests that the First Amendment does not protect filming that interferes with police duties. Id. at 84. The

Court, however, explicitly declined to specify further limitations stating, "[t]o be sure, the right to film is not without limitations. . . . We have no occasion to explore those limitations here, however." Id. at 84. Likewise, Gericke allows for reasonable restrictions on the right to record police, but never discusses whether such recordings must be open. 753 F.3d at 8–9.

The question of openness did enter into Glik's Fourth Amendment analysis. 655 F.3d at 86. In his Fourth Amendment claim, the Glik plaintiff alleged he was arrested for violating Massachusetts' wiretap statute without probable cause. Id. Massachusetts' wiretap statute extends only to "secret" recordings, so the Court's Fourth Amendment analysis turned on whether the police had probable cause to believe the plaintiff secretly recorded them. Id.

The State argues Glik's analysis of whether the recording was secret shows that the First Amendment does not protect secret recordings. If the First Amendment protects secret recordings, the State argues, there could have been no probable cause to arrest the plaintiff, and so the Court would have had no reason to decide whether the recording was secret. To the contrary, the fact that a criminal charge violates the First Amendment does not mean that the arrest underlying the charge violates the Fourth Amendment. See Michigan v. DeFillippo, 443 U.S. 31, 38 (1979) ("The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."). Thus, the Glik's analysis about whether the recording was secret for Fourth Amendment purposes does not show that secret recordings are beyond the First Amendment's protection.

To the extent the State relies on Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001), to demonstrate that the First Amendment does not protect secret recordings, this reliance is misplaced. The Massachusetts Supreme Judicial Court in that case upheld the conviction of a defendant under Massachusetts' wiretap statute after he secretly recorded an interaction with police. Id. at 964. The defendant's challenge in Hyde was based on statutory interpretation of Massachusetts' wiretap statute. Id. at 965. The case did not address the First Amendment. See id. Notably, Hyde was decided before Glik and Gericke clarified the First Circuit's position that the First Amendment protects the recording of police officers.

As such, absent contrary authority from the State, the Court finds that the First Amendment protects secretly filming police in public, for the same reasons that the First Amendment generally protects filming police. The public has the right to gather and disseminate information about the police. Glik, 655 F.3d at 82.

It is "clearly established . . . that the First Amendment right to film police carrying out duties in public . . . remains unfettered if no reasonable restriction is imposed or in place." Gericke, 753 F.3d at 8. "Reasonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them." Id. at 7–8. The right to film "may be subject to reasonable time, place, and manner restrictions." See Glik, 655 F.3d at 84. However, the State points to no existing restrictions that specifically forbid secretly filming police. Thus the Court need not consider whether such a restriction would qualify as a reasonable manner restriction.

The First Amendment also does not protect the filming of police that causes legitimate safety concerns or that "interfere[s] with police duties." Gericke, 753 F.3d at

8. However, the State points to no specific safety concerns caused by defendant's filming and does not allege defendant's filming interfered with police duties. The State argues secret filming of police allows confidential information to be recorded without police knowledge and allows criminals to secretly record undercover officers, thereby creating danger to those undercover officers. However, the State does not allege defendant actually filmed any confidential information or undercover officers. As such, the conduct for which defendant has been criminally charged is protected by the First Amendment.

Defendant also argues that the charge must be dismissed based on the sufficiency of the indictment. However, because the charge must be dismissed based on the First Amendment, the Court need not consider the sufficiency of the indictment.

Accordingly, for the foregoing reasons, defendant's motion to dismiss is GRANTED.

SO ORDERED.

10/21/15
Date

Gillian L. Abramson
Presiding Justice