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# Capturing the Truth: Navigating the Intersection of Freedom of Speech and Video Recording in Law Enforcement

By **Daigle Law Group**

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In a recent opinion, the Fourth Circuit Court of Appeals established their position on the extent to which the First Amendment protections extend to recording and livestreaming officer civilian interactions. In *Sharpe v. Winterville Police Department*<sup>[1]</sup>, the court considered the First Amendment right for a passenger to livestream their own traffic stop. After issuing this opinion, the Fourth Circuit became the second even-numbered circuit to find that the right to record and livestream is clearly established.

## BACKGROUND

The incident occurred in 2018, when two officers from the Winterville Police Department stopped a car in North Carolina. The stop was routine in nature and stemmed from a minor traffic infraction. At the outset of the stop, the passenger, Dijon Sharpe, began live streaming the encounter on Facebook Live. Officer Helms and Officer Ellis informed Sharpe that while he was free to record the stop, he was barred from livestreaming the encounter on the social media site. The officers claimed that they were concerned for their safety, as real-time data and location services are implicit in livestreaming. Refusing to comply with the officers' request, officer Helms reached inside the open window on the passenger side door and attempted to grab Sharpe's phone. The officers threatened Sharpe, insisting that his refusal to end the recording would result in arrest.

Sharpe sued Officer Helms in his individual capacity, and the town of Winterville under 42 U.S.C. § 1983, asserting that the town's policy prohibiting livestreaming and recording one's own, public encounter, with police officers was an infringement on his First Amendment rights.

## SUMMARY

The district court ruled that the town's policy was constitutional, but on appeal, the Fourth Circuit addressed two questions: whether the town's policy violated the First Amendment, and whether Officer Helms violated Sharpe's First Amendment rights by attempting to stop the livestream.

## ANALYSIS AND IMPLICATIONS

To survive First Amendment scrutiny, the town was required to show that their policy preventing someone in a stopped vehicle from livestreaming their traffic stop – is tailored to weighty enough interests. The Fourth Circuit analyzed both claims brought by Sharpe.

First, in discussing the official-capacity claim against the department and town, the Fourth Circuit determined that the district court's decision to throw out the claim was wrongly decided. In writing their opinion, the Circuit found that the plaintiff had sufficiently alleged that the Town of Winterville had a policy barring livestreaming one's own traffic stop that exists in violation of the First Amendment. Therefore, the claim was remanded back to the Eastern district, where the trial court will further evaluate Winterville's declared interest in officer safety. On remand, the plaintiff now bears the burden of showing that the Winterville policy exists. If Sharpe is successful in making this showing, the burden will shift to Winterville to prove that their policy is not violative of the First Amendment. The court's reasoning focused on assessing the benefits that livestreaming officer-civilian interactions provides. Noting that, "recording police encounters creates information that contributes to discussion about governmental affairs."

Next, the court looked to plaintiff's claim suing Officer Helm in his individual capacity. The opinion acknowledged that the traffic stop, and Officer Helms conduct therein, was conducted under the policy that purportedly violated the First Amendment. However, at the time of the stop, it was not clearly established that the actions taken by Helm were impermissible under the First Amendment. While prior case law clearly establishes that a person is permitted to record video footage of their encounter with an officer, these decisions did not consider livestreaming and only focused on the act of recording. For this reason, the doctrine of Qualified Immunity extends to Officer Helm and Sharpe's individual capacity claim fails.

## **CONCLUSION**

The Fourth Circuit emphasized that their decision here is consistent with recent decisions issued by the other circuits in the context of First Amendment guarantees and the right to record officer-civilian encounters.

The decision in *Sharpe v. Winterville Police Department* further confirms the consensus among the Federal Circuit courts: First Amendment protections extend to a person's right to film officer encounters and livestreaming at least in the Fourth Circuit falls within the scope of free speech.

## **TAKEAWAY**

For departments within the jurisdiction of the Fourth Circuit, it is clearly established that recording a livestream video of an officer-civilian encounter is free speech, and thus protected by the First Amendment. For departments that are not within the Circuit's jurisdiction, the opinion is persuasive authority and suggests that live streaming one's own traffic stop may be permitted. All departments should be on notice that a department policy prohibiting livestreaming may be unconstitutional.

## RESOURCES

### Eight Circuit Court of Appeals

*Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021).

This case considered video recording on government property. An individual took photos and videos of a public park and subsequently posted their captures on social media. Following this, the city enacted a policy that prohibited the recording children in any public park. The Eight Circuit wrote, "the act of . . . recording videos [is] entitled to First Amendment protection because [it is] an important stage of the speech process that ends with the dissemination of information about a public controversy."

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[1]*Sharpe v. Winterville Police Department*, No. 21-1827 (4th Cir. Feb. 7, 2023).

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