

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Kennon Dunn,

Plaintiff,

vs.

City of Fort Valley, et al.,

Defendants.

CIVIL ACTION NO.: 5:19-CV-00287-TES

AMENDED AMICUS BRIEF OF
GEORGIA FIRST AMENDMENT FOUNDATION
AND PEN AMERICA¹

The Georgia First Amendment Foundation and PEN America respectfully submit this brief as *amicus curiae* and request that the Court deny the Motion to Dismiss filed by Defendants.

Appellate courts throughout the United States, including in the Eleventh Circuit, have repeatedly issued forceful opinions attempting to make one point clear under our law: citizens and journalists must be permitted to film peacefully in public spaces without interference or obstruction by law enforcement.

¹ This Amicus Brief, originally filed on April 14, 2020, has been amended to remove co-counsel Nora Benavidez from the signature page pursuant to the notices issues on April 14 and April 30, 2020. The undersigned counsel, Thomas Clyde, will represent amici henceforth. Other than this amendment to the signature page, the brief is substantively identical to the original brief (Doc. No. 22).

This case is a troubling reminder that this basic principle is still not adhered to in many communities. Defendants’ motion requesting the dismissal of the Complaint would require the Court to set aside well-established precedent and muddy the otherwise clear First Amendment principles that appellate courts have articulated.

Additionally, the importance of protecting the right of citizens and journalists to film in public spaces has taken on heightened importance in the current environment. Citizens who are now required to “shelter in place” because of the coronavirus pandemic must increasingly depend on surrogates to provide audio and video recordings in order to understand and observe the activities of government. Those who are still in a position to film should not face the threat of arrest or detention for filming, only to see such government misconduct defended with after-the-fact claims about “loitering.”

Given the importance of filming, particularly in these challenging times, Amici request that the Court deny Defendants’ Motion and allow this case to proceed to an adjudication on the merits.

Identity and Interest of Amicus Curiae

The Georgia First Amendment Foundation is a non-profit which advocates for greater government transparency and free speech, and which, for more than 25 years, has been providing educational services to citizens, journalists and public

officials about Georgia’s laws regarding newsgathering, including filming. As part of its overarching mission, the Georgia First Amendment Foundation works to ensure Georgia’s citizens access to Georgia public forums and spaces, including government buildings.

PEN America is a nonprofit organization that represents and advocates for the interests of writers and journalists, both in the United States and abroad. Its membership includes over 7,500 novelists, poets, journalists, essayists, and other professionals, and it is affiliated with over 100 centers worldwide that comprise the PEN International network. PEN America stands at the intersection of literature and human rights to protect free expression and individual writers and journalists facing threats for their speech. PEN America has a particular interest in opposing censorship schemes in all forms that inhibit creative expression and communication of ideas and information.

Argument and Citation of Authority

I. Eleventh Circuit Appellate Decisions Have Squarely Protected the Right to Film in Public Space and Public Buildings.

The United States Supreme Court has long recognized that the First Amendment protects the right to film as there is “an undoubted right to gather news from any source by means within the law.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (“[W]e

conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”).

The Eleventh Circuit has been at the forefront of recognizing that citizens and journalists enjoy a right to film in public spaces without improper interference by law enforcement or other government authorities. The Eleventh Circuit forcefully recognized this principle over twenty five years ago in a case involving the traditional media, *WSB-TV v. Lee*, 842 F. 2d 1266 (11th Cir. 1988). In *Lee*, the Eleventh Circuit reversed the entry of summary judgment against a WSB-TV cameraman and reporter who complained that their First Amendment rights were violated when a sheriff aggressively interfered in their newsgathering and filming. The court recognized an alleged effort by the defendants “to thwart or impede plaintiffs in gathering and reporting news relating to the sheriff’s use of inmate labor” was sufficient to state an actionable claim. *Id.* at 1270.

Since *Lee*, this Circuit has repeatedly recognized that the First Amendment right to film activities in public spaces and government buildings extends to all citizens, whether part of the traditional media or not. In *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000), this Circuit acknowledged that citizens had a First Amendment right to film, subject to reasonable time, manner and place restrictions. *See also Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (finding that plaintiff’s interest in filming public meetings is protected by the First

Amendment); *Williamson v. Mills*, 65 F.3d 155 (11th Cir. 1995) (reversing district court’s grant of qualified immunity to a law enforcement officer who arrested a participant in a demonstration for photographing police).²

The Eleventh Circuit emphasized this legal principle again recently in *Toole v. City of Atlanta*, No. 19-11729, 798 Fed. Appx. 381 (11th Cir. Dec. 26, 2019). Similar to the circumstances at issue in this action, the plaintiff in *Toole* alleged police illegally arrested him to thwart his legitimate filming of police activity in a public place. The Eleventh Circuit rejected the defendants efforts to dismiss the case at the summary judgment stage, finding that plaintiff was “engaging in constitutionally protected activities—namely, protesting and filming police conduct—at the time of his unlawful arrest.” *Id.* at 387. In *Toole*, the Circuit emphasized that law enforcement’s attempts to ameliorate its misconduct did not alter the fact that an actionable constitutional injury had occurred: “The fact that [plaintiff’s] phone was returned to him and that was able to film inside the paddy wagon does not change the fact that Toole’s unlawful arrest stopped him from

² Contemporaneously with this Circuit’s recognition of constitutional protection of the right to film in public places, other Circuits throughout the Country have acknowledged that this right has become well-established. *See Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2001) (“The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [the First Amendment].”); *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3rd Cir. 2005) (“[V]ideotaping or photographing the police in the performance of their duties on public property may be protected activit[ies]”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “First Amendment right to film matters of public interest.”).

continuing to participate in the protest or film police conduct in public, or that his arrest was allegedly effected to stop him from filming.” *Id.*

II. Based on the Eleventh Circuit’s Well-Established Authority, the Court Should Find Plaintiff Has Stated Viable Claims.

According to the Complaint, “Mr. Dunn arrived in Fort Valley to videotape and photograph the historic downtown area and to film his first Public Service Announcement regarding missing persons in Fort Valley.” [Doc. 1 ¶ 16]. His conduct that day in and around the Fort Valley Police Department and Fort Valley City Hall [Doc. 1 ¶¶ 18-19] was entirely consistent with a citizen exercising his constitutional right to film in public spaces and public buildings. The actions of law enforcement in arresting him were grossly at odds with the well-established precedent stated in this Circuit.

This Court should find that Mr. Dunn has stated viable claims in his Complaint. To hold otherwise would simply invite law enforcement to use after-the-fact claims of “loitering” as a method to frustrate First Amendment principles. Such improper police conduct is an even more virulent threat to First Amendment rights in the environment our society finds itself in today, where citizens are given limited physical access to government facilities and public spaces in order to address the coronavirus epidemic. In these unusual times, it is particularly important that courts recognize those who film the activities of government are doing a public service protected by one of our nation’s core constitutional rights.

Their constitutional service to other citizens should not lead to arrest on specious claims of loitering.

This the 18th day of May, 2020

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that, on May 18, 2020, I filed a copy of the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send notice of the filing to all counsel of record, including:

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DATED this 18th day of May, 2020

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