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SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

2015 APR 31 PM 12:27

Bill No: SB 411 Hearing Date: April 7, 2015
Author: Lara
Version: February 25, 2015
Urgency: No Fiscal: No
Consultant: JRD

Subject: Crimes: Photographing or Recording Officers

HISTORY

Source: California Public Defenders and Conference of California Bar Associations

Prior Legislation: No

Support: American Civil Liberties Union; Asian Law Alliance; Bill of Rights Defense Committee; Courage Campaign; Legal Services for Prisoners with Children

Opposition: None Known

PURPOSE

The purpose of this legislation is to expressly provide that it is not a crime to take a photograph or record a law enforcement officer while the officer is performing any official duty in a public place or in a place where the person taking the photograph or making the recording has a right to be.

Current law states that every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed on the officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment. (Penal Code § 69.)

Under existing law every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as specified, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment. And, except as otherwise provided, every person who knowingly and maliciously interrupts, disrupts, impedes, or otherwise interferes with the transmission of a communication over a public safety radio frequency shall be punished by a fine not exceeding one thousand dollars (\$1,000), imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment. (Penal Code § 148(a).) Every person who, during the commission of one of these offenses:

- Removes or takes any weapon, other than a firearm, from the person of, or immediate presence of, a public officer or peace officer shall be punished by imprisonment in a county jail not to exceed one year or pursuant to subdivision (h) of Section 1170. (Penal Code § 148(b).)
- Removes or takes a firearm from the person of, or immediate presence of, a public officer or peace officer shall be punished by imprisonment pursuant to subdivision (h) of Section 1170. (Penal Code § 148(c).)

This bill would provide that taking a photograph or making an audio or video recording of an executive officer, while the officer is in a public place or in a place where the person taking the photograph or making the recording has the right to be, does not, in and of itself, constitute interference with a public duty, as specified.

This bill would provide that taking a photograph or making an audio or video recording of a public officer or peace officer, while the officer is in a public place or in a place where the person taking the photograph or making the recording has the right to be, does not, in and of itself, constitute obstruction of an officer, as specified, nor does it constitute reasonable suspicion to detain the person or probable cause to arrest the person.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v.*

Brown (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the Author:

Over the past decade, technological advances have made it so that nearly every citizen has a hand-held recording device. Current statutes do not reflect the advancements of recording technology and existing law is not clear on what constitutes an obstruction of an officer when using these devices to record officers exercising their duties in public. This lack of clarity has increased conflict between police officers and members of the public.

In several California cases and beyond, members of the public have been arrested while recording or photographing police activity in public places. Videos and reports have surfaced online of civilians being arrested for recording officers in the cities of Los Angeles, Torrance, and San Diego, as well as the County of Orange. This conflict extends past police officers and civilians to professional photographers and media personnel. In Berkeley, CA a journalist was arrested after recording law enforcement officers in a public place.

As evidenced by these reports, the law's obscurity has led to confusion about protected citizen oversight activities, such as filming and photographing. While many police officers understand the right of people to exercise their first amendment right, current statutes provide little guidance on whether recording constitutes delaying or obstructing an officer. The vagueness of the law necessitates a clarification to give all citizens and law enforcement officers a clear understanding that individuals have a right to record police officers in public during the discharge of their duties.

Additionally, the law should be clarified to include that reasonable suspicion cannot be used against a First Amendment right. When often people are found to be recording an officer and they are detained or arrested, reasonable suspicion is used as a tool for the arrest.

Ultimately, clarifying the law can benefit both police and civilians. A recent example of a civilian recording helping the police occurred on February 28, 2015 when the LAPD turned to deadly force after failing to subdue a man. Bystander video, as well as video from a security camera, shows that the man acted violently toward the police and attempted to grab the officer's gun. Recordings of law enforcement activity can create not only clear evidentiary accounts that benefit civilians, but innocent police officers as well.

As Los Angeles County Sheriff's Chief Bobby Denham of the Central Patrol Division said in the LA Times in response to the introduction of body cameras, "We're in an age now where this kind of technology is expected. It gives us an opportunity to do better." As we move further into the smart-phone age and hand-held recording technologies continue to become more accessible to everyday citizens, SB 411 will help members of the public understand how they can use their First Amendment rights in relation to public police activities. It helps ensure the protections of rights by promoting transparency and community trust. In the end, it is the intent of SB 411 to limit future conflicts between civilians and law enforcement. . .

Our Constitution guarantees us all the fundamental right to freedom of speech. Recent events throughout the country and here in California have raised questions about when an individual can – and can't – record. SB 411 will help erase ambiguity, enhance transparency and ensure that freedom of speech is protected for both civilians and police officers.

2. Effect of Legislation

This legislation expressly provides that it is not a crime to take a photograph or record a law enforcement officer while the officer is performing any official duty in a public place or in a place where the person taking the photograph or making the recording has a right to be.

This is consistent with 9th Circuit case law, which expressly provides that the public be permitted to film matters of public interest:

"In this Circuit, an individual has a right 'to be free from police action motivated by retaliatory animus.'" *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013) (quoting *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1231-32 (9th Cir. 2006)). In general, the public enjoys a "First Amendment right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); see also *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) ("the First Amendment's aegis . . . encompasses a range of conduct related to the gathering and dissemination of information . . . The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles.").

"To demonstrate retaliation in violation of the First Amendment, [a plaintiff] must [show] that [Defendants] took action that would chill or silence a person of ordinary firmness from future First Amendment activities." *Skoog*, 469 F.3d at 1231-32. The Ninth Circuit has explicitly "recognized that a retaliatory police action such as an arrest or search and seizure would chill a person of ordinary

firmness from engaging in future First Amendment activity.” *Ford*, 706 F.3d at 1193.

(*American News and Information Services, Inc. v. William D. Gore*, 2014 U.S. Dist. LEXIS 132591 (September 17, 2014).)

SHOULD CALIFORNIA LAW EXPLICITLY PERMIT THE PHOTOGRAPHING OR RECORDING OF LAW ENFORCEMENT IN PUBLIC WHEN THE OFFICER IS DISCHARGING AN OFFICIAL DUTY?

3. Argument in Support

According to the American Civil Liberties Union of California:

There is a clear constitutional right to photograph and record the police in the performance of their duties. [Footnote omitted.] This right serves as an important check and balance, and provides a means for members of the public to safely and accurately record matters of public importance. Indeed, as one federal court found,

“The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles [of protected First Amendment activity]. 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...[f]reedom of expression has particular significance with respect to government because [i]t 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...Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.”

(*Glik v. Cunniffe* (1st Cir. 2011) 655 F.3d 78, 82-83, internal citations and quotations omitted.) Likewise, in a 2012 letter to the Baltimore Police Department, the U.S. Department of Justice urged,

“Policies should affirmatively set forth the contours of individuals’ First Amendment right to observe and record police officers engaged in the public discharge of their duties. Recording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.”

(Jonathan M. Smith, *U.S. Dept. of Justice Letter to Baltimore City Police Dept.* (May 14, 2012) http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf.) Therefore, protecting our right to photograph and record law enforcement in the performance of their duties both strengthens our communities and ensures the proper functioning of government.

Despite the well-established right to take photographs and make audio and video recordings of police officers, and despite the clear language of Penal Code sections 69 and 148 – which specify that only when a person uses threats or violence to deter or prevent an officer from performing the officer's duties, or when a person resists, delays, or obstructs an officer in the performance of the officer's duties should that person be punished – members of the public have nonetheless been arrested and detained for lawfully photographing and recording the police. Law enforcement officers violate the Constitution's core protections when they arrest and detain people for legally pursuing constitutionally protected activity. Such violations threaten our liberties and make our communities less safe.

By recognizing the existing constitutional right to photograph and record the police, SB 411 helps to safeguard our collective freedoms and takes an important step towards ensuring that individuals are not punished for the mere exercise of their constitutional rights.

-- END --