

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Chambers of
BENSON EVERETT LEGG
United States District Judge

101 West Lombard Street
Baltimore, Maryland 21201
410-962-0723

February 17, 2012

MEMORANDUM TO COUNSEL RE: Sharp v. Baltimore City Police Dept. et al.
Civil No. L-11-2888

Dear Counsel:

Christopher Sharp filed this action under 42 U.S.C. § 1983. He asserts claims against three unidentified Baltimore Police Department (“BPD”) officers who allegedly seized his cell phone and erased all of its video content, including personal videos and footage he took of an arrest at the 2010 Preakness. Defendants Bealefeld, who has been sued in his official capacity, and the BPD (collectively “the BPD”) have moved to dismiss or for partial summary judgment. Docket No. 20. The Court heard oral argument on February 13, 2012. For the reasons stated on the record, the motion is DENIED, and the case shall proceed to discovery. The merits of Sharp’s claims shall again be tested at the summary judgment stage once the evidentiary record has been developed.

The First Amendment generally protects the right of citizens to take photographs and videos in public places. The parties agree that this right extends to photos and videos of police officers discharging their official duties, but the exercise of the right may be limited by reasonable time, place, and manner restrictions.¹ Any right not to have one’s picture taken in public, if such a right in fact exists, does not extend to police officers who are performing their

¹ With a possible exception, the analysis of the State constitutional claims, which are brought only against the individual officers, is the same as the analysis of the U.S. constitutional claims. It is an open question whether the right to record police officers conducting their official duties in public is more firmly established under Maryland state court precedent than it is under Fourth Circuit precedent.

official duties.

The Fourth Amendment requires police to obtain a warrant before seizing or searching a citizen's camera or cell phone, unless an exception to the warrant requirement applies. One such exception occurs when the property owner voluntarily consents to the search or seizure. In this case, a factual dispute exists as to whether Sharp voluntarily surrendered his cell phone or whether he was coerced. Other exceptions to the warrant requirement (e.g., to preserve evidence) may exist, but it remains to be determined whether they apply to this case.

The Fourteenth Amendment prevents the Government from permanently depriving a citizen of his property without due process of law, which generally requires notice and an opportunity for the citizen to be heard. Although this issue is not foreclosed, the BPD has not asserted a legitimate reason for deleting Sharp's videos, whether the video of the arrest or his personal videos. If Sharp can prove a violation, he may be entitled to damages.

There also exists a factual dispute as to whether the BPD promulgated or was deliberately indifferent to an illegal "policy, custom, or usage." See Monell v. Dept. of Social Servs. of the City of New York, 436 U.S. 658 (1978).

Sharp has requested the Court to issue an injunction that prohibits future violations. The BCD, without conceding liability or acknowledging the existence of a constitutional right, has adopted a policy recognizing a citizen's right to record the police at work and a program to train officers on the policy. Because the policy, General Order J-16, was made public on February 10, 2012, Sharp and his counsel have not yet had time to review the policy to determine whether it includes the relief that they are requesting. The BCD contends that General Order J-16 moots Sharp's claim for injunctive relief, but, as mentioned, the policy was not issued in time to be considered at the hearing on February 13th. Moreover, Sharp's counsel argued, on the basis of

recent violations, that the policy is not being followed. Accordingly, the policy may not moot Sharp's claim for injunctive relief.

The Court's normal practice in Section 1983 cases involving the police is to separate the plaintiff's claims against the individual officers from the Monell claims against the police department. The individual claims are resolved first. Whether the plaintiff wins or loses, resolution of his individual claims against the officers normally makes resolution of the Monell claims unnecessary. The instant case may present an exception to this rule. The Court deems defendants to have moved to bifurcate. Briefing on the motion shall not be necessary unless the Court specifically requires it.

Counsel shall meet and confer and submit a discovery plan and proposed schedule to the Court by **February 27, 2012**. Although the scope of phase one discovery remains to be determined, the Court considers the following subjects to be fair game.

- (i) The depositions of Sharp, Dudek, Chyzhova, the unnamed officers, and any bystanders or witnesses who were present during the incident at the 2010 Preakness;
- (ii) Whether the officer who erased the videos from Sharp's cell phone sought technical assistance;
- (iii) A deposition of the person primarily responsible for writing General Order J-16;
- (iv) The training program to inform officers regarding General Order J-16;
- (v) Information relating to the Scott Cover incident, which occurred at the Cross Street market in the early hours of Saturday, February 11th;
- (vi) Other alleged violations of General Order J-16 since it was adopted in November 2011;
- (vii) The unnamed officers' understanding of the Maryland Wiretap Act and any directives

- from the BPD regarding the Act's interpretation; and
- (viii) Pre-General Order J-16 BPD policies and directives of any kind related to video recordings by citizens of police activity.

Counsel shall also advise the Court by February 27th whether the unnamed officers have been identified and who will be representing them.

Despite the informal nature of this memorandum, it shall constitute an Order of the Court and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/

Benson Everett Legg