



THE FACTS, THE LAW, WHY IT MATTERS: The Wrongful Prosecution of Anthony Graber

WHAT IS HAPPENING?

The Maryland State Police (MSP) is inappropriately applying the state wiretap laws to prosecute a motorcyclist who posted a YouTube video of an MSP trooper making a traffic stop with his gun drawn.

On March 5, 2010, Anthony Graber was riding his motorcycle on Interstate 95, and was confronted by a plainclothes Maryland State Police trooper as he came to a stop at an exit. Graber had a video camera prominently mounted on his helmet to record his ride, and the camera recorded the officer's actions and statements at the outset of the encounter, which ended with Graber receiving a ticket for speeding. Five days later, Graber posted a video on YouTube (<http://www.youtube.com/watch?v=BHjjiF55M8JQ> and <http://www.youtube.com/watch?v=G7PC9cZEWcQ&NR=1>), showing the encounter, in which the state trooper leaps out of his unmarked vehicle, not in a uniform, and with his gun drawn, yelling at Graber for several seconds to get off of his motorcycle before identifying himself as a police officer.

On March 15, the trooper became aware of the video, and obtained an arrest warrant charging Graber with a violation of the state wiretap law, even though no violation actually occurred. Based on the wiretap charges, the State Police also obtained a search warrant authorizing them to seize all of the Graber family's computers and hard drives, along with Graber's video camera. Several weeks later, the Harford County State's Attorney obtained a grand jury indictment adding several additional motor vehicle charges, and additional wiretap violations, including one alleging possession of "a device . . . primarily useful for the purpose of surreptitious interception of oral communications," referring to the widely sold and clearly noticeable GoPro video camera that had been mounted on Graber's motorcycle helmet.

Graber, a Staff Sergeant in the Maryland Air National Guard, and a computer systems engineer, faces up to 16 years in prison if convicted on all of the charges, along with the loss of his job if he is convicted of any of the wiretap charges, each of which is a felony with a maximum penalty of five years in prison. Graber lives in Harford County with his wife and two young children.

WHY DOES IT MATTER?

This prosecution by the Maryland State Police and Harford County State's Attorney is profoundly dangerous, and seems meant to intimidate people from making a record of what public officials do. It is antithetical to a democracy for the government to tell its citizens that they do not have the right to record what government officials say or do or how they behave. While inappropriate police directives telling citizens to stop recording

law enforcement activity are not that uncommon, prosecuting someone for doing so is almost unheard of. Here, the prosecution is doubly inappropriate because it appears to have been undertaken in response to Graber's constitutionally protected activity of posting the video on YouTube. Citizens recording police conduct with video or cell phone cameras have documented important cases of misconduct around the country.

WHAT IS THE LAW?

The ACLU of Maryland has long been concerned about improper police threats that Maryland's wiretap law prevents citizens from recording their encounters with law enforcement. In order for such recording to be illegal under the Maryland law, it must involve audio, and the subjects must have a reasonable expectation of privacy in their communications.

Police officers doing their jobs in a public place, such as an interstate highway, cannot reasonably claim that their communications are private. This is especially true for highway stops, since many police departments – including the Maryland State Police (MSP) – record the stops themselves, thus negating any possibility that the officer would reasonably believe the conversation to be private.

Public officials performing their official duties simply lack any expectation of privacy in their on-the-job interactions, since those are not private conversations; they are official acts. To conclude otherwise would allow any official to prosecute anyone who recorded the official performing his or her job if the official found the disclosure embarrassing (which is precisely what we believe the MSP is trying to do in Anthony Graber's case.)

WHERE DOES MARYLAND STAND?

Although Maryland is one of the few states whose wiretap law requires the consent of all parties to tape an "oral communication," (as opposed to one party consent, which is the rule in most states), the law does not mean that any taping without the consent of all the parties is unlawful. The wiretap statute defines "oral communication" as a "private conversation," which Maryland courts have said means that the taping is unlawful only if the participants have a "reasonable expectation of privacy" in the communication.

In August 2000, the Maryland Attorney General issued a legal opinion (<http://www.oag.state.md.us/Opinions/2000/85oag225.pdf>) in response to a query from the Montgomery County Police about whether their officers might face liability under Maryland's wiretap act if vehicle mounted audio and video recorders "accidentally" recorded conversations of persons passing by during a traffic stop. In the course of concluding that they would not face any liability, the Attorney General stated

It is also notable that many encounters between uniformed police officers and citizens could hardly be characterized as "private conversations." For example, any driver pulled over by a uniformed officer in a traffic stop is acutely aware that his or her statements are being made to a police officer and, indeed, that they may be repeated as evidence in a courtroom. It is difficult to characterize such a conversation as "private."

Obviously, if citizens stopped by police cannot have a reasonable expectation of privacy in those interactions, the officers themselves cannot either. The Attorney General's conclusion in this regard is in accord with that of every state supreme court around the country that has considered the issue in an analogous context. Courts in Illinois, New

Jersey, Pennsylvania, and Washington have all concluded that citizens do not violate their state's similar wiretap provisions when they record police actions, because the officers do not have a reasonable expectation of privacy when performing their duties. We have looked, and have not been able to find a single court anywhere in the country that has found an expectation of privacy for an officer in such circumstances.