

# **Sharpe v. Winterville Police**

decided by the Fourth Circuit Court of Appeals on February 7, 2023

**N.C.: Plaintiff appeals the dismissal of his lawsuit on First Amendment grounds.**

## **Issue:**

Whether a town's alleged policy that bans video livestreaming certain interactions with law enforcement violates the First Amendment?

Whether a police officer who, during a traffic stop, attempted to stop a passenger from livestreaming the encounter may be successfully sued under § 1983 for violating the passenger's First Amendment rights?

## **Facts:**

The plaintiff was the passenger in a vehicle that police stopped due to a traffic violation. At the beginning of the traffic stop, the plaintiff turned on the video recording function of his smartphone and began livestreaming — broadcasting in real-time — via Facebook Live to his Facebook account, which reached a live audience and provoked live responses. In response, the officer told the plaintiff “We ain’t gonna do Facebook Live, because that’s an officer safety issue.” At the same time, he attempted to grab the plaintiff’s phone, but the plaintiff moved it further inside the vehicle, out of the officer’s reach, and stated, apparently to his Facebook Live audience. The officer then told the plaintiff “If you were recording, that is just fine. . . . We record, too,” but “in the future, if you’re on Facebook Live, your phone is gonna be taken from you, . . . [a]nd if you don’t want to give up your phone, you’ll go to jail.”

The plaintiff sued under 42 U.S.C. § 1983. He sued the officers in their official capacities—effectively suing the Town—for allegedly having a policy that prohibits recording and livestreaming public police interactions in violation of the First Amendment. He also sued the officer in his individual capacity. The Town countered that livestreaming a traffic stop endangers officers because viewers can locate the officers and intervene in the encounter. The district court dismissed the lawsuit on the pleadings and the plaintiff appealed.

## **Held:**

Affirmed in Part, Reversed in Part. The Court examined two questions in this case. First, whether a town's alleged policy that bans video livestreaming certain interactions with law enforcement violates the First Amendment. Second, whether a police officer who, during a traffic stop, attempted to stop a passenger from livestreaming the encounter may be successfully sued under § 1983 for violating the passenger's First Amendment rights.

Regarding the first question, the Court noted that the plaintiff need only plausibly allege (1) that the Town has a policy preventing a passenger from livestreaming their traffic stop and (2) that such a policy violates his First Amendment rights. The Court repeated that, under *Monell*, when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts an injury, the government as an entity is responsible under § 1983.

The Court then held that livestreaming a police traffic stop is speech protected by the First Amendment. As a result, the Court explained, if the policy in fact exists to prohibit livestreaming, that regulation only survives First Amendment scrutiny if the Town demonstrates that: (1) the Town has weighty enough interests at stake; (2) the policy furthers those interest; and (3) the policy is sufficiently tailored to furthering those interests.

In this case, the Court acknowledged that officer-safety interest might be enough to sustain the policy but found that the record in this case did not sufficiently establish that to be true. Therefore, the Court held that the plaintiff had plausibly alleged that the Town adopted a livestreaming policy that violates the First Amendment.

The Court then ruled that the officer, in his individual capacity, was protected by Qualified Immunity. The Court observed that there was no “controlling authority” in the 4th Circuit that establishes the plaintiff had the right to livestream his own traffic stop when his car was pulled over. The Court distinguished cases from other jurisdictions that concerned recording, rather than livestreaming, a traffic stop.

The Court wrote: “A different balance is struck when an officer prevents a bystander from recording someone else’s traffic stop than when the officer prevents a passenger from livestreaming their own stop... Without a consensus of cases barring the latter, Sharpe cannot show that a reasonable official in Officer Helms’s shoes would understand that his actions violated the First Amendment. ... Qualified immunity protects Officer Helms unless it was clearly established at the time of the traffic stop that forbidding a passenger from livestreaming their own traffic stop violated the First Amendment. Here, no precedent in this Circuit nor consensus of authority from the other Circuits established that Officer Helms’s actions were unconstitutional.”

**Bottom Line:**

Livestreaming a police traffic stop is speech protected by the First Amendment. If there is a policy that prohibits livestreaming, that regulation only survives First Amendment scrutiny if the government demonstrates that: (1) there are weighty enough interests at stake; (2) the policy furthers those interests; and (3) the policy is sufficiently tailored to furthering those interests. Officer safety interest might be enough to sustain the policy, but it must be articulated. This officer received qualified immunity because there was no controlling authority at the time. Since we now have this court decision, we are all put on notice that livestreaming is protected free speech, and we cannot restrict that right unless our policy meets the above elements.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/211827.P.pdf>