

STATE OF NORTH CAROLINA
RANDOLPH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 09 R 181

In Re: Contents of Audio and Video Tapes in Possession
Of the Archdale Police Department

ORDER

THIS MATTER was heard on September 18, 2009 during a term of Randolph County Superior Administrative Court pursuant to the Motion of Intervenors to vacate a prior order of this court sealing records. The Court having reserved ruling in open court, finds by the preponderance of the evidence the facts set out below from matters established of record and enters the following order.

1. Courtland Benjamin Smith was shot and killed on the side of Interstate 85, in Randolph County on August 23, 2009 by an officer of the Archdale Police Department following a traffic stop.
2. The two Archdale Police cruisers dispatched to the scene were equipped with dash-mounted video cameras (video hereafter), both of which recorded portions of the incident prior to Mr. Smith being shot. The incident generated other records including a 911 call to Guilford County and Archdale Police radio traffic.
3. The State of North Carolina moved the Court between August 24 and August 26, 2009 under North Carolina General Statute 132-1.4(e) to seal the following records related to the incident: Guilford County 911 recording, Archdale Police radio traffic and video.
4. The State contended under NCGS 132-1.4(e) that release of the records would jeopardize an on-going criminal investigation into the shooting of Mr. Smith by the State Bureau of Investigation.
5. The State moved additionally that the motions and supporting affidavits be sealed.
6. The Court after considering the motions, supporting affidavits and hearing a summation of the contents of the video, found and concluded that release of the records would jeopardize the on-going criminal investigation and entered orders

- sealing the following records: 911 recording, Archdale radio traffic, video, and the motions and supporting affidavits.
7. On August 26, 2009, the State on its own motion requested the Court unseal the 911 recording and Archdale Police radio traffic as making them public would no longer undermine an ongoing investigation and it was so ordered.
 8. The Court entered an order which unsealed the motions and supporting affidavits after receiving an informal request from Intervenor's counsel to unseal remaining records. The informal request to unseal the video was denied.
 9. The Intervenors are a group of print and electronic media. They move the Court to be allowed to intervene and for the Court to vacate the order which sealed the video and to provide an unedited version of the 911 call.
 10. The Intervenors contend that determining the applicability of NCGS 132 to video is a matter of first impression in North Carolina and argue that the video is a public record under the provisions of NCGS 132 and the common law. The Intervenors argue NCGS 132 should be liberally construed and the statute strongly favors records of public agencies being subject to public review. The Intervenors do not set out specific provisions of NCGS 132 which provide for the release of the video. The Intervenors did not address in their brief or argument the contention that the common law required release of the video.
 11. The caselaw cited by the Intervenors is a trial court decision of a Federal Magistrate in Indiana. The facts of the Indiana case to the case under consideration are dissimilar and the Court finds that it is not instructive.
 12. The Court agrees with the Intervenors that the scope of NCGS 132-1 is indeed broad.
 13. The statute at NCGS 132-1.4(a) specifically sets out that records of criminal investigations are not public records as defined by NCGS 132-1 and also provides that a court of competent jurisdiction may release records of criminal investigations.
 14. The Court finds the video in question is in the custody of the State Bureau of Investigation. The State Bureau of Investigation is conducting an investigation to

- determine if criminal charges should be brought against the officer responsible for shooting Mr. Smith.
15. The Intervenors contend that the burden is on the State as set out in NCGS 132-1.4(e) to show by a preponderance of the evidence that release of the video will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or undermine an on-going criminal investigation.
 16. The provisions of NCGS 132-1.4(e) apply to the ability of the State to move the Court not to release any public records as set out in NCGS 132-1.4(c).
 17. The provisions of NCGS 132-1.4(c) sets out exceptions to the general rule in NCGS 132-1.4(a) that records of criminal investigations are not public record. These exceptions include 911 communications, broadcast communications between employees of law enforcement agencies and circumstances surrounding an arrest among others.
 18. There is no provision in NCGS 132-1.4(c) for the release of a video. The rules of statutory construction require the Court to adhere to a limited list of exceptions to a general rule. NCGS 132-1.4(a) sets out the general rule that records compiled in a criminal investigation are not public records. The list of exceptions in NCGS 132-1.4(c) are narrow and limited.
 19. The Intervenors contend that the NCGS 132-1.4 (c) does not address video because video was not in widespread use at the time of the passage of the statute. The Intervenors then cite a study in their brief that video was in widespread use by 2003. The Court finds the statute was amended as recently as 2006 to include the Innocence Inquiry Commission in NCGS 132-1.4(a). Further NCGS 132-1 sets out the following as public records: photographs, sound recordings, magnetic tape or other tapes, but these items are not set out in NCGS 132-1.4(c). Photographs and surveillance are set out in NCGS 132-1.4 (b)(1) as some items that are not public records.
 20. The Court is not free to assume the legislature forgot about video or that the legislature intended to include video within NCGS 132-1.4(c).
 21. The plain language of NCGS 132-1.4(b)(1) is broad. "All records or any information that pertains to a person that is compiled by public law enforcement

agencies for the purpose of ...attempting to solve violations of the law...". The list of specific items that follow do not include video, the Court finds that the list is not exhaustive but rather illustrative. The Court finds that video when compiled by a public law enforcement agency for the purpose of solving a violation of the law fall within the definition of NCGS 132-1.4(b)(1) and to argue otherwise ignores the plain language of the statute.

22. The Intervenor next argue that the video because of the presumed automatic nature of being triggered is not a record of criminal investigation under the definition of NCGS 132.-1.4(b)(1).
23. It should be noted that no evidence was presented at the hearing, so much of the argument is based on assumptions. Doubtlessly, the Court believes the video was installed by the Archdale Police Department for the purpose of monitoring violations of the law as set out in NCGS 132-1.4(b)(2). But whatever the purpose of Archdale in installing the camera, the video under consideration is clearly a record which was compiled by the State Bureau of Investigation for the purpose of solving a violation of the law.
24. The fact that the District Attorney out of an abundance of caution moved the Court under the terms of NCGS 132-1.4(e) to seal the video and the Court issued an order, does not alter or modify how the video is classified by NCGS 132.
25. The Court finds and concludes that the video is a record of a criminal investigation as defined by NCGS 132-1.4(a) and NCGS 132-1.4(b)(1) and therefore not a public record as set out in NCGS 132-1.
26. The Court finds and concludes that none of the provisions of NCGS 132-1.4(c) apply to the video under consideration, thus the State of North Carolina is not required to establish under NCGS 132-1.4(e) the need to seal the video.
27. The Court finds the Intervenor failed to show that the absence of the mention of video in the statute or the failure of a human being to turn on and aim the camera somehow takes the video outside the provisions of NCGS 132-1.4(a) as defined in NCGS 132-1.4(b)(1).

28. The Court is left to consider NCGS 132-1.4(a) which provides that a court of competent jurisdiction may order the release of criminal records of an investigation.
29. The Court will treat the motion to vacate as a motion to release pursuant to NCGS 132-1.4(a).
30. This provision does not set out a procedure to follow or define the party with the burden of proof or the standard of proof.
31. As NCGS 132-1.4(a) contemplates the Court ordering the release of records which the statute has defined as not being public records and the statute using the verb “may”, the Court finds the release to be in the discretion of the Court and the proper standard is a balancing test of public and judicial interest similar to the standard that is included in NCGS 132-1.4(d).
32. The Court has reviewed in camera both videos in their entirety. The video does not contain the shooting of Mr. Smith, but does portray the interaction between Mr. Smith and the officers immediately prior to the shooting and actions taken by the officers after the shooting.
33. The State of North Carolina contends that as video is not considered by NCGS 132 that the Court is without the authority to release the video under the statute.
34. This Court finds NCGS 132-1.4(a) does two things: a. Defines the video as records of a criminal investigation and therefore not public records. b. Authorizes a court of competent jurisdiction to release records of criminal investigations.
35. The Court finds and concludes that this Court is authorized to release the video as set out in NCGS 132-1.4(a).
36. After an in camera inspection of the video this Court finds by a preponderance of the evidence and concludes that the release of the video will undermine an ongoing criminal investigation, will jeopardize the right of the State to prosecute a potential defendant and will jeopardize the right of a potential defendant to receive a fair trial.
37. The Court finds based upon past observation of similar events in this Judicial District that it is likely that a decision will be issued as to whether to prosecute a defendant for Mr. Smith’s shooting within 3 to 4 months, possibly less.

38. The need for a complete investigation into the death of a young college student shot on the side of the road in the middle of the night or the right of the State of North Carolina to potentially prosecute someone for the death of another without having that right jeopardized or the right of a potential defendant to a fair trial when facing severe penalties are paramount and far outweigh the need of the public to review the actions of its agencies. This is especially true when the material sought is not fungible and the investigation is likely to end soon with a decision from the District Attorney to be made shortly thereafter. Whereupon the public will be allowed to review the material either after its release at trial or following a decision not to prosecute. The potential harm to the administration of justice in releasing the video at this time is substantial while the potential harm to the public in delaying the release of the video is minimal.

From the facts set out above, the COURT CONCLUDES AS A MATTER OF

LAW:

1. The video under consideration are records of criminal investigations as defined in NCGS 132-1.4(a) and (b)(1) and therefore not public records as defined in NCGS 132-1.
2. There is no exception in NCGS 132-1.4 (c) which makes the video a public record.
3. The video is a record of a criminal investigation and is subject to release under NCGS 132-1.4(a).
4. Release of the video will jeopardize the right of potential defendants to a fair trial and the right of the State to prosecute potential defendants and will undermine an on-going investigation.
5. The right of the public to review this information before the conclusion of the judicial process is outweighed by the considerations in Fourth Conclusion of Law.
6. The request to vacate the earlier order and to release the video should be denied in the discretion of the Court.

IT IS THEREFORE ORDERED:

1. The Intervenor's motion to intervene is allowed.
2. The Motion to vacate the order to seal the video and to release the video under NCGS 132-1.4(a) is denied.
3. The Guilford County 911 service shall provide the Intervenor and all other media outlets the unedited 911 call between Mr. Smith and Guilford County 911. Those requesting the 911 call shall bear the cost.
4. The State Bureau of Investigation shall maintain the video. Should the District Attorney determine not to prosecute anyone for Mr. Smith's shooting. The Bureau shall make available copies of the video to the public for the cost of copying. Should the District Attorney go forward with a prosecution in this matter, this order shall remain in effect until the videos are presented as evidence or the trial concludes whichever occurs first.

By Order of the Court, this the _____ day of September, 2009.

Vance Bradford Long
Senior Resident Superior Court Judge
Judicial District 19B