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September 28, 2016

The Honorable J.B. Jennings  
Maryland Senate  
141 North Main Street, Suite K  
Bel Air, Maryland 21014

**FOR REFERENCE- SENATE BILL 819**

Dear Senator Jennings:

You have inquired about whether current State law authorizes a law enforcement agency or a private company authorized by a governmental entity to use video technology to capture images of a driver unlawfully using a cellphone or electronic device while operating a motor vehicle, for the purpose of issuing a citation. You have also asked whether a law enforcement agency may authorize a private company to use such equipment, as an agent of the law enforcement agency, and to deliver evidence of an alleged violation to the agency for determining a violation.

No State law appears to either expressly authorize or prohibit the use of video technology by police in this manner. There does not appear to be any legal impediment to a law enforcement officer's use of video technology to capture images of a driver for the purpose of investigating and enforcing criminal and motor vehicle offenses. Various provisions of law, however, addressing the authority and procedures for the issuance of citations for motor vehicle law violations suggest that a citation for a violation must be served on the alleged violator based on an officer's probable cause determination at the time of the violation. Thus, absent enabling legislation to the contrary, a law enforcement agency is unlikely to be able to rely on video technology, or a private company's use of video technology, to make an after-the-fact probable cause determination of a violation for the purpose of subsequently issuing a citation.

Sections 21-1124 through 21-1124.3 of the Transportation Article ("TR") contain various prohibitions against operating a motor vehicle while using a handheld telephone, handheld wireless communications device, or text messaging device. Violations are misdemeanor offenses that are subject to criminal fines as well as possible administrative sanctions. Under TR § 26-201(a), a police officer may charge an alleged violator by traffic citation based on probable cause that the person committed the violation.

The existence of probable cause for a violation of a traffic offense involving the operation of a motor vehicle while using a handheld communications device would most likely be developed through an officer's personal observation of the driver. *See Delaware v. Prouse*, 440 U.S. 648,

659 (1979) (the “foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations”). Such enforcement, however, does not preclude a law enforcement agency from using other investigative tools, such as video technology, to assess whether a violation has occurred. To the extent a motor vehicle is being operated in a public location, a driver has a diminished expectation of privacy that would not protect the driver from plain view inspection of his or her activities by a law enforcement officer who is outside of the vehicle. *See Florida v. Riley*, 488 U.S. 445, 449 (1989) (police officers do not violate Fourth Amendment protection from unreasonable searches by viewing evidence that they can see “from a public vantage point where they have a right to be”). *See also Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion) (Recognizing diminished expectation of privacy in a motor vehicle, which “has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.”).

This right to plain view observation by police appears to extend to videotaping of activities that are done in public, including the inside of a motor vehicle. If a law enforcement officer has a legal right to occupy a location, the officer may be able to use equipment, including video recording equipment that augments the officer’s ability to conduct surveillance. *See McCray v. State*, 84 Md. App. 513, 519 (1990) (“any justified expectation of privacy is not violated by the videotaping of activity occurring in full public view”). *See also United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978) (“[p]ermissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities”). Thus, in my view, a law enforcement officer is not prohibited from employing video technology to determine if a driver operating a motor vehicle in public is violating a prohibition against operating a motor vehicle while using a handheld communications device.

Even if a law enforcement officer or agency may be able to employ video technology to enforce traffic laws prohibiting the use of handheld devices by drivers, law enforcement agencies appear to lack existing authority to enforce such laws through the use of video technology that captures images of alleged violations for subsequent review and determination of the occurrence of a violation and future issuance of a traffic citation. Under current law, a police officer with probable cause that an individual committed a traffic violation may charge the individual through a traffic citation, a copy of which must be provided to the alleged violator. TR § 26-201(a). Upon issuing a citation, an officer is required to ask the alleged violator to acknowledge receipt of the citation, subject to potential arrest upon refusal. TR § 26-203. Although not entirely without doubt, such requirements for notice and acknowledgement of receipt by the alleged violator suggests that, absent specific authority providing otherwise, the issuance of a traffic citation by law enforcement in this State must be made contemporaneously with an officer’s observation of a violation in a manner that allows the alleged violator to receive notice of the violation and acknowledge receipt of the issued citation in the presence of the issuing officer.

This apparent lack of police authority to remotely determine the existence of probable cause and issue a citation at a time or date subsequent to the alleged violation is supported by


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existing alternative statutory schemes established for automated or remote enforcement of other traffic offenses by way of issuance of a civil citation. A number of automated traffic law enforcement statutes have been enacted by the General Assembly, each of which involves the automated capture of a visual image of an alleged traffic violation, and provide for a civil citation that is subsequently mailed to the registered owner of the vehicle involved in the violation, unless a criminal citation is issued to the driver at the time of the violation. *See e.g.*, TR § 21-202.1 (traffic control signal monitoring system); § 21-704.1 (automated railroad grade crossings enforcement); § 21-809 (speed monitoring system); § 21-810 (work zone speed control system); and § 21-1414 (failure to pay electronic toll). In some instances, private contractors are specifically authorized to operate and administer the automated enforcement program as agents or employees of a law enforcement agency. *See e.g.*, TR § 21-809. There does not appear to be a legal impediment to the General Assembly similarly enacting legislation that enables enforcement by automated citation based on video images that capture evidence of a violation of operating a motor vehicle while using a handheld communications device.

In summary, while a law enforcement officer may employ video technology to capture images of a driver operating a motor vehicle in a public place for the purpose of investigating and enforcing criminal and motor vehicle offenses, State law authorizing the issuance of traffic citations suggest that a citation must be served on the alleged violator at the time of the violation. As a result, unless the General Assembly specifically authorizes automated citation enforcement, a law enforcement agency is unlikely to be able to rely on video technology, or use a private company as an agent to use video technology, to make an after-the-fact probable cause determination of a violation for the purpose of subsequently issuing a citation.

I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,

  
Jeremy M. McCoy  
Assistant Attorney General