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WEARE

Activist pushes suit against police

Video taper claims wrongful arrest

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A Free State activist from West Lebanon can pursue a civil suit against Weare police officers and the town, but a federal judge limited the scope of the case in a decision issued Monday.

Carla Gericke, elected in 2011 president of the Free State Project that encourages liberty activists to move to the Granite State, was arrested in March 2010 after a traffic stop in Weare.

After the stop, she alleges, the officers maliciously arrested her as retaliation for her attempt to video record the traffic stop, in violation of her First Amendment rights.

Gericke claimed the officers didn't have probable cause for charging her with violating the wiretapping law, and Judge Steven McAuliffe agreed in his decision issued Monday.

According to court documents:

At about 11:30 p.m. on March 25, 2010, Gericke was driving behind a car that Weare police Sgt. Joseph Kelly pulled over and stopped at the scene. Gericke and her passenger, who were friends with the driver and his passenger, pulled up behind the cruiser and stopped. After Kelly asked her to leave, she parked in a nearby lot, pointed a video camera at Kelly and yelled that she was recording him.

"Curiously," McAuliffe wrote, "Gericke also testified that she knew her video camera was not working at the time. Nevertheless, she kept it pointed at Kelly."

With four people at the scene, and discovering that the first driver was carrying a Glock pistol, Kelly called for help from other officers, who arrived at about the same time as a third car of supporters for Gericke.

Sgt. Brandon Montplaisir, one of the backup responders, approached Gericke, who returned to her car. He asked for her license and registration, which she refused to provide, saying she didn't believe it was a legal order, since she wasn't driving the car but was parked off the road.

After several requests, and after Gericke handed Montplaisir a State Farm insurance card instead of a license or registration, he told her she was under arrest for disobeying a police officer.

Later, she was also charged with obstructing government administration and violating the state wiretapping laws.

All of the charges were later dropped before the scheduled evidence hearing.

Gericke alleges the officers had no credible reason to believe she had violated the wiretapping laws, and in his decision McAuliffe agreed, saying they had no reason to believe the police's actions at the time were private.

"They were performing official duties, they were in a public place and Gericke was openly videotaping (or purporting to video tape)," he wrote.

But citing a 2011 court decision establishing that police officers can't use wiretapping laws to challenge members of the public who have peacefully recorded them while on duty, McAuliffe wrote that the question ultimately hinges on whether Gericke was disruptive at the scene.

In the case *Glik vs. Cunniffe*, a Boston man sued the city after being arrested for filming officers making an arrest on the Boston Common. The case established precedent for protecting the right to "peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties," McAuliffe wrote.

In the *Weare* case "however, the officers did face a potentially dangerous situation: a late night traffic stop involving multiple vehicles, six citizens (some of whom were quite vocal, even confrontational, in expressing their opposition to the officers), and at least one firearm," McAuliffe wrote.

The officers claim they are entitled to qualified immunity, because they had acted in their official capacity, using the best of their knowledge at the time.

"A defendant does not lose the protection of qualified immunity if he acts mistakenly," as in arresting someone for violating the wiretapping law without cause, McAuliffe wrote, "as long as his mistake was objectively reasonable. . . . To demonstrate that they are entitled to qualified immunity, defendants must show that Gericke's conduct somehow distracted Sgt. Kelly . . . or that it otherwise contributed to the dangerous nature of the late-night traffic stop."

The officers "say Gericke was disruptive to the point of interfering with (their) ability to perform their official duties. . . . Gericke, on the other hand, asserts that she was a model of civility and calmness," McAuliffe wrote.

The matter is an issue for a jury to decide, he wrote.

McAuliffe did dismiss several of Gericke's complaints against the officers and the town.

After her arrest and booking on the three charges, the officers confiscated her camera and Gericke asked for a receipt. In her suit, she claimed they charged her with violating the wiretapping law as retaliation for that request. McAuliffe dismissed the complaint based on the chronology.

He also dismissed her complaint that police Chief Gregory Begin maintained a policy or custom that allowed the officers to violate her rights. In testimony, Begin said the department doesn't

have an official policy on video recording beyond his personal belief that as long as the photographer is not interfering, he or she should not be arrested.

McAuliffe dismissed similar complaints against the town and the police department.

The town has 30 days to file an appeal of the order, and while no decisions have been made yet, an appeal is still being considered, said town attorney Charles Bauer.

"We think the court got it right on dismissing four of the six counts, but with all due respect, I think the judge was wrong on not dismissing the other two," Bauer said.

Gericke's attorney, Stephen Martin of Concord, said they are happy with the decision, don't plan to appeal and are preparing for a jury trial scheduled for March.

"We're obviously disappointed that the counts were struck down (but) I wouldn't say I was surprised," Martin said. "But the thrust was the First Amendment complaint and that stayed. . . . Carla is looking forward to vindicating her constitutional rights."

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