

Say Cheese!¹
Photographing People In The Line of Duty
Legal Question of The Week
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With families and friends getting together for the holidays, several things are sure to be on the increase, such as domestic assaults, waist sizes, and picture taking. Of these, you might think that the topic of domestic assaults might lend itself to a good legal update. However, any attorney can write about domestic law – it takes a GREAT legal mind² to write a legal update about picture taking! Today’s question deals with when it is mandatory, permissible, or illegal to take someone’s picture in the line of duty.³

The vast majority of pictures that are taken in the course of police business are booking photos. A person has been arrested and his picture and fingerprints are taken during the booking process. There are times when you MUST have a person processed, there are times when you MAY have a person processed, and there are times when you CANNOT have a person processed.

When you are REQUIRED to process:

1. Adult (16 and older) arrested and charged with a felony. (G.S. 15A-502(a1))
2. Adult cannot be identified by valid form of identification and charged with either:
 - a. An offense involving impaired driving, or
 - b. Driving While License Revoked if it is revoked for an impaired driving revocation. (G.S. 15A-502(a2))
3. Juvenile (under 16 years old) who committed a “nondivertible offense” when the juvenile was 10 years old or older. Nondivertible offenses are listed in G.S. 7B-1701 as follows:

¹ In researching today’s topic, I found that the reason that photographers have their subjects say “cheese” is because most people twist their mouths into a smile-like shape to say that word. Wikipedia points out that “additionally, the absurdity of saying ‘cheese’ for no apparent reason can incite glee in some people.” Feeling down? Give it a try!

² Unfortunately, none of them were available, but I’ll give it a try anyway.

³ In other cultures, as you might expect, they use other phrases in place of “say cheese.” In Iran, for example, they have you “say apple.” In Demark, it’s “say orange.” They don’t actually say “apple” or “orange,” of course. That would be silly. They say the word in their language that means “apple” or “orange.”

- a. Murder⁴
 - b. Rape or Sex Offense
 - c. Arson
 - d. Any felony violation of the N.C. Controlled Substances Act
 - e. First Degree Burglary
 - f. Crime against nature
 - g. Any felony involving willful infliction of serious bodily injury
 - h. Any felony committed by use of a deadly weapon
4. All other situations covered by your agency's general orders. In High Point, G.O. 3.10(C) makes it mandatory to process adults charged with the following:
- a. Death By Vehicle (G.S. 20-141.4)
 - b. Hit and Run (G.S. 20-166)
 - c. Failure to report an accident resulting in injury, death, or at least \$1000 in property damage (G.S. 20-166.1)⁵

When you CANNOT process (absent consent):⁶

1. Juveniles under the age of 16 may not be processed unless they have been charged with a non-divertible offense as listed above.⁷
2. A person to whom you are merely issuing a citation may not be processed (unless they fall into number 3 below). (G.S. 15A-502(a))
3. Class 2 or 3 misdemeanors under Chapter 20 of the General Statutes (Motor Vehicle Law) EXCEPT you may take a photograph only when:
 - a. The charge is a moving violation (even if issuing a citation), and
 - b. The person does not produce a valid driver's license upon request, and
 - c. The officer has a reasonable suspicion concerning the person's true identity.⁸

When you MAY process:

Any adult arrest not covered in the above categories.

⁴ In addition to dairy (cheese) and fruits (apple and orange), vegetables are also used in some cultures. In China, they encourage you to say "eggplant," while in Spain, the usual word is "say potato."

⁵ IMPORTANT NOTE: In writing this section, I noticed that G.O. 3.10(C)(3)(i) makes it mandatory to process for a violation of G.S. 20-102.1, "False Report of Theft Or Conversion of Motor Vehicle." This is a mistake as a violation of G.S. 20-102.1 is a Class 2 misdemeanor under Chapter 20 and therefore falls in the area of charges for which you CANNOT process. The correction is being made as we speak.

⁶ An adult can generally consent to be photographed (and fingerprinted) even if he otherwise couldn't be processed. A juvenile's picture should NOT be taken even if consent is given. More on this in a bit.

⁷ One exception: Juveniles who have been charged as adults because they are emancipated or have been previously convicted in Superior Court and juveniles whose cases have been bound over to Superior Court may be processed. By the way, in Sweden, they want you to "say omelette."

⁸ There are some special rules regarding pictures taken in this situation found in G.S. 15A-502(b1). The picture shall only be taken of the operator of the vehicle, only from the neck up, shall be taken at either the location where citation is issued or the jail if arrest is made, shall be retained by the law enforcement officer or agency until the final disposition of the case, shall not be used for any purpose other than to confirm the identity of the alleged offender, and shall be destroyed by the law enforcement officer or agency upon a final disposition of the charge. Geez, I haven't seen this many ground rules since I went on my first date. Surprisingly, many of them were the same – from the neck up, no purpose other than to confirm identity, or be destroyed by a law enforcement officer, something like that.

Up to this point, we have been discussing the formal processing of an arrestee including photographing and fingerprinting. But some of you have asked me if it is okay to take photos of people you come into contact with on the street for intelligence purposes or otherwise. In reality, this requires answering two questions:⁹ (1) Is it permissible to take the picture, and (2) what can I use the picture for?

Generally, a person does not have an expectation of privacy in what they willingly expose to the public view. As a result, there are no constitutional restrictions on taking a picture of the face of someone who is in a public place. Obviously, the analysis changes if the person is in a place where they would have a reasonable expectation of privacy. G.S. 15A-502(d) in the “processing” statute which we have been discussing states that it “does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.”

For adults in a public place, there is no problem with taking a picture as they walk by or with their consent. If they are being detained by you, you should not extend the length of the detention in order to snap the photo but can take it as they are leaving or ask for consent once you have told them they are free to go. Keep in mind that if you are planning on using the photograph in a later identification procedure, you must follow the law set out in G.S. 15A-284.52.¹⁰ In addition, you may face the difficulty of using such a photograph in a lineup because the background and lighting conditions will cause the photograph to look differently, giving rise to an argument that the lineup was improperly suggestive.

Photographs of juveniles present far bigger problems. G.S. 7B-2103 states that “nontestimonial identification procedures shall not be conducted on any juvenile without a court order.” Taking the photograph might be okay, but as soon as you show the photograph to someone for identification purposes you are conducting an illegal nontestimonial identification procedure. G.S. 7B-2109 states that willfully conducting nontestimonial identification procedures on juveniles without a court order is a Class 1 misdemeanor. It won’t matter whether the juvenile consented, whether it was the single photo or you showed it as part of a photo lineup, or whether you thought it was an adult.¹¹

So my advice to you is this:

You may legally take a picture of an adult in a public place. You must be careful what you use the picture for and comply with lawful identification procedures. Do not take pictures of people under sixteen years of age unless you are processing them for an arrest which falls into the permissible categories discussed above. There’s just too much risk of something very bad coming back to bite you.

⁹ See how I just turned one question into two? This is a lawyer trick – I now get to charge you double for answering two questions and pretending I’ve worked twice as hard.

¹⁰ This was the subject of a brilliant legal update written by yours truly in March of this year and you should review it if needed. In Thailand, subjects being photographed say “Pepsi.” Yes, that Pepsi.

¹¹ See, e.g., State v. Norris, 77 N.C. App. 525 (1985).

Now that we have that topic fully developed,¹² let's take a few questions from the audience.

Q: Brian, I know after Arizona v. Gant I can't search a vehicle incident to the arrest of the driver. If I arrest the passenger, can I search the area where the passenger was seated incident to that arrest?

A: Not without some other justification. If you have probable cause to believe that there is evidence or contraband in the vehicle, you can search not only the area the passenger was seated in but any place in the vehicle that might contain that evidence. If you have "reason to believe"¹³ that the vehicle contains evidence relating to the crime for which you placed the occupant under arrest, you may search the vehicle. But you may not perform any type of search of the vehicle interior simply because you have arrested an occupant.

Q: While we wait for "24" and "LOST" to start their new seasons, is there anything worth watching on television?

A: I'm glad you asked. ABC seems to be finding a niche with several good science-fiction shows like "V" and "Flash Forward." "Survivor" has also been particularly good this year thanks to a guy named Russell, who I think is a raving lunatic but is one of the best players I've seen in recent years in a pretty unorthodox way.

Q: I understand that we can make a warrantless arrest for a misdemeanor that occurs "in the officer's presence." What does "in the officer's presence" really mean?

A: There is no definition given for this phrase in the statute or in case law as far as I can tell. But I believe that it would be interpreted to mean that the crime occurred when the officer was in very close proximity. I do not believe that the officer would necessarily have to see it happen. For example, if you turned your back and an assault occurred behind you, I believe you would still be able to make a warrantless arrest.

Q: How did you feel watching the Yankees win the World Series this year?

A: Disgusted. I was not so much disgusted that they won, but disgusted that a team that spent so much money to buy all of those players that most major league teams couldn't afford would lose a single game all season. Disgusting.

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¹² Some of you don't get this joke but won't admit it to your buddies.

¹³ Remember that no one knows precisely what this standard means as of yet. My favorite foreign version of "say cheese" comes from most Latin American countries who tell you to "say whiskey." The folks in Latin America really know how to make you smile.