

Police seizure of video called legal

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Author: KELLY THORNTON; LORIE HEARN

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While San Diego police continued searching for the missing videotape that could exonerate or incriminate officers accused of beating a Clairemont man, department officials sought legal advice yesterday to determine if the seizure of the tape was legal.

Police Chief Jerry Sanders said he was assured that confiscating the videotape at the Metallica concert Sunday at Brown Field was lawful because it was taken as potential evidence of a crime.

"I think there are various opinions going around about what we can or can't do," Sanders said. "Our legal advisers say we can. . . . We will establish a policy that's clear-cut after we finish investigating."

Meanwhile, internal affairs officials are trying to determine what happened to the tape, which mysteriously disappeared from the command post at the Otay Mesa concert.

Witnesses say the tape would show five officers needlessly pummeling a man who lay motionless face down on the ground; officers involved in the confrontation say they were just restraining a man who attacked two cops.

Police reports, which do not mention the videotape, say the fracas began when 24-year-old Robert Nunez was scaling a fence to enter the concert illegally, evading the \$24.50 cost of a concert ticket.

The reports say that a motorcycle officer pulled Nunez off the fence and that Nunez hit him and another officer.

During the confrontation, the report said, the officers had to punch Nunez to restrain him. Nunez was arrested on suspicion of two counts of battery on a police officer, resisting arrest and trespassing.

It was the latter portion of the melee that was videotaped by Aldo Ortegon, 26, a bystander who was using his camera to tape the sounds of the concert.

Local legal experts backed up the opinion of the department's legal advisers on the seizure of the videotape.

If the police took it with the honest belief that it showed evidence of a crime, the confiscation probably was legal, according to local attorneys who are knowledgeable about search-and-seizure laws.

And whether the tape recorded an officer being assaulted by Nunez or officers hitting Nunez, it would be evidence of a potential crime, said Tom Adler, a criminal defense lawyer who has handled many high-profile cases of alleged police brutality.

But the tape's disappearance, the lawyers said, changes the complexion of the incident.

"To say it is suspicious is to use a kind adjective," Adler said.

The police have a right to collect evidence but not to lose it, said lawyer Michael Crowley, suggesting that police are being disingenuous in saying they confiscated the tape as evidence in the first place.

"I think they just got rid of it," he said pointedly. "I don't think they even had to look at it. I hate to say that. . . . I know there are a lot of good officers out there."

Jordan Budd, staff counsel for the local chapter of the American Civil Liberties Union, said police have the duty to preserve evidence.

"The notion of police seizing a piece of evidence and then leaving it lying around an office so it can disappear is, at a minimum, inexcusably sloppy police work," Budd said.

Adler and Crowley said loss of evidence is rare, but in their experience, when evidence is lost, it's almost always something helpful to a defendant.

Budd called the matter "extremely troubling" because the tape does not just pertain to guilt or innocence of a man charged with a crime, but "it is evidence that could indict the performance of law enforcement officers."

"The longer it remains missing, the more damning it becomes," he said.

Meanwhile, detectives were searching the field again yesterday where the confrontation occurred, as well as sifting through trash from the concert and looking in all the patrol cars that were there, Sanders said.

The homes of the officers involved have not been searched; nor was Sanders aware of any plans to do so, he said, adding: "I don't know that we could do that legally."

Ortegon said that when police noticed he was videotaping them, three officers surrounded him and demanded the tape. He said he handed over the tape because he was scared and wanted to comply with the law.

Jose Castaneda, a 27-year-old chef at the Mission Bay Yacht Club, said that when police tried to seize the tape from Ortegon, there were at least 50 people urging him to keep it.

"Everyone was yelling at him not to give them the film," Castaneda said. "I knew right away the tape was going to be lost because we got these guys on film beating up this guy."

The department's internal investigation may result in disciplinary action if officers violated procedures for handling evidence. The policy is specific on how evidence should be marked and packaged, but somewhat vague on misplacing evidence or leaving it unattended, stating only:

"When handling property of an evidentiary nature, extreme care should be exercised not to contaminate or destroy valuable evidence."

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Abstract (Document Summary)

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