

IN THE COURT OF APPEALS OF MARYLAND

NO. 59

SEPTEMBER TERM, 1995

DEPARTMENT OF PUBLIC SAFETY &
CORRECTIONAL SERVICES

V.

GREGORY COLE

Murphy, C. J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker

JJ.

DISSENTING OPINION BY BELL, J.

FILED: March 12, 1996

In a well-reasoned opinion by Judge Marvin H. Smith, a former judge of this Court, the Court of Special Appeals held that the authentication of a video tape required "that a person with first-hand knowledge of the subject of the movie or video tape testify that it is a fair and accurate portrayal of the subject." Department of Public Safety v. Cole, 103 Md. App. 126, 134, 652 A.2d 1159, 1162 (1995) (quoting 5 Lynn McLain, Maryland Evidence § 403.6 at 322 (1987)). To like effect, McLain and the intermediate appellate court cited Tobias v. State, 37 Md. App. 605, 378 A.2d 698 (1977); 2 John W. Strong, McCormick on Evidence, § 214 (4th ed. 1992); 3 Charles C. Scott, Photographic Evidence, § 1294 (2nd ed. 1969); Joseph F. Murphy, Jr., Maryland Evidence Handbook § 1102 (2nd ed. 1993). Noting that, in the instant case, the video tape was admitted over the petitioner's objection, without any effort at authentication, not to mention compliance with the "modern trend," McLain at 322, the court concluded that admission of the video tape was error. It thereupon affirmed the judgment of the Circuit Court for Washington County, which had reversed the ruling of the Administrative Law Judge in that regard. The Court of Special Appeals ordered the case remanded for further proceedings, including an attempt to authenticate the video tape.

The majority does not disagree with the authentication method addressed by the intermediate appellate court. Nor does it suggest that the video tape was authenticated in compliance with this method. The majority relies, instead, on an alternative method of

authentication, the "silent witness" approach, to reverse the Court of Special Appeals and affirm the decision of the Administrative Law Judge.

Under the "silent witness" approach,

photographic evidence may draw its verification, not from any witness who has actually viewed the scene portrayed on film, but from other evidence which supports the reliability of the photographic product.

2 McCormick on Evidence § 214 at 15. That "other evidence" is the required "adequate foundation assuring the accuracy of the process producing [the video tape]." 3 Wigmore on Evidence § 790 at 219-20 (Chadbourn rev. 1970). The "silent witness" evidence must, of course, be a "reasonably accurate and honest representation ... of the facts it purports to represent," whether or not it is of the kind that is susceptible to eyewitness verification.¹ See Sisk v. State, 236 Md. 589, 592-93, 204 A.2d 684, 685 (1964). Therefore, the foundational predicate must also satisfy this prong of the test.

In the instant case, the petitioner denied that he committed

¹An x-ray picture is an example of "silent witness" evidence that is not susceptible to eyewitness verification. 2 McCormick on Evidence § 214 at 14-15 (John W. Strong ed., 4th ed. 1992). See also People v. Bowley, 382 P.2d 591, 594-95 (Cal. 1963). Where that is true, the foundation must address the accuracy of the process producing it, as we have seen. See 2 McCormick on Evidence, § 214 at 15; 3 Wigmore On Evidence, § 790, at 219-20 (Chadbourn rev. 1970); People v. Doggett, 188 P.2d 792, 795 (Cal. App. 1948) (photographs not testimonially authenticated admitted on basis of expert photographer's testimony that they were not composites or otherwise altered).

the acts of excessive force with which he was charged, although he did acknowledge that he was depicted on the video tape. Nevertheless, no such foundational predicate for the introduction of the video tape was even attempted to be laid. No testimony was offered as to how the video tape process works, see 2 McCormick on Evidence, § 214 at 15 (authentication based on reliability of the process will require a foundation that "resemble[s] that required for the admission of the products of other scientific processes", i.e., that the application of the present instance was a valid one); 3 Wigmore on Evidence § 790 at 220 (Adequate foundation assuring the accuracy of the process that produced the video tape must be established), that the camcorder used was operating properly, see Fisher v. State, 643 S.W.2d 571, 573 (Ark. App. 1982) (noting that the owner testified to adjusting the unattended camera, checking to see that it was working properly and turning it on prior to the incident being recorded), or that the finished product had not been tampered with. See People v. Doggett, 188 P.2d 792, 795 (Cal. App. 1948).

Acknowledging that a foundation must be laid, the majority holds that the testimony of Warden Galley was sufficient to support the introduction of the video tape. According to the majority, his competence to testify concerning the routine practices of the prison and, in particular, about cell extractions, including the fact that they are ordinarily video taped, sufficed. More particularly, the warden testified that the practice included

labeling the video tape with the date, time, and the names of the inmates and officers involved, and storing the video tape in a separate envelope in a security vault, access to which is subject to a chain of custody form. This testimony, the majority says, satisfied the "silent witness" test.

I cannot agree. The warden laid the foundation for deciding that the extraction in this case was video taped. Whether the process which produced that video tape was accurate, or not, was in no way addressed. Indeed, the record is devoid of any evidence or testimony that the camcorder used to record the extraction was working properly. Nor is there is any indication that the video tape was not tampered with. The majority's bald statement that "the possibility of tampering with or distortion of the videotape was extremely remote," ___ Md. at ___, ___ A.2d at ___ [slip op. at 13], does not make it so. This is particularly so when the subject of the video tape denies engaging in the conduct depicted.²

The majority points out that this is an administrative proceeding. That fact does not relieve the State of its obligation

²The majority states that "there was no suggestion that the video camera was working improperly or that the tape was altered." ___ Md. ___, ___, ___ A.2d ___, ___ (1996) [slip op. at 13]. It is true that no explicit argument was made to that effect; however, implicit in the petitioner's denial of wrongdoing is that the video tape is inaccurate. That, it seems to me, places on the proponent of the evidence the obligation of establishing its accuracy. No attempt was made to do so. Warden Galley was in no position to do so.

of laying a proper foundation.³ In this administrative hearing, no evidence whatsoever was presented tending to support the trustworthiness and reliability of the critical video tape. Indeed, no attempt was made to present such evidence.

In my view, the Court of Special Appeals appropriately resolved the issue. Accordingly, I dissent.

³I also reject the alternative ground for decision advanced by the majority. In my view, characterizing a video tape as a "business record" does not relieve the proponent of the evidence of the obligation of authenticating that video tape. As I read the majority opinion, that is precisely what it intends. It thus assumes the point in issue - the accuracy of the process and the reliability of the depiction. That is not, however, the appellate or review function.