

Recent Case on Authentication of Surveillance Video

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More and more criminal cases involve video evidence, whether from patrol car dash cameras, store surveillance cameras, witness cell phone cameras, or, in the near future, wearable cameras. It's important to know the authentication requirements for such evidence. A recent court of appeals case sets a high bar for admissibility.

Facts. The case is [State v. Snead](#), and it arose when two men stole some shirts and sweatshirts from a Belk in Concord. The incident was caught on the store's surveillance video system. The defendant was charged with larceny and with conspiracy to commit larceny. The defendant was also charged as a habitual felon.

Trial proceedings. At trial, a regional loss prevention manager testified that, although he was not at the store in question when the theft took place, he had viewed the video. He also stated that he was familiar with the video recording system, which was an "industry standard" system that "water-marked" the recordings with time and date to prevent tampering. The video was admitted and played for the jury. The defendant was convicted, received a lengthy sentence, and appealed.

The appeal. He argued, in part, that the video recording had not been properly authenticated. The court of appeals agreed. It began by summarizing the relevant precedents:

The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes); (2) proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape; (3) testimony that the photographs introduced at trial were the same as those the witness had inspected immediately after processing (substantive purposes); or (4) testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.

State v. Cannon, 92 N.C. App. 246 (1988) (citations and internal quotation marks omitted), *rev'd on other grounds*, 326 N.C. 37 (1990) [parallel citations omitted].

When reviewing the foundation for admissibility of a video recording, our precedents have defined three significant areas of inquiry: "(1) whether the camera and [recording] system in question were properly maintained and were properly operating when the [recording] was made, (2) whether the video [recording] accurately presents the events depicted, and (3) whether there is an unbroken chain of custody." *State v. Mason*, 144 N.C. App. 20 (2001) [parallel citations omitted].

The court then explained why it viewed the recording in this case as inadequately authenticated. First, it emphasized that although the loss prevention manager had testified that the recording system was "working properly" on the date in question, he wasn't at the store on that day and wasn't in charge of maintaining the system. Second, the court noted that there was no evidence of the chain of custody of the video between the time it was burned to a CD and the time it was shown at trial. The loss prevention manager testified that the video shown at trial was the same one he had viewed shortly after the incident, but the court ruled that this was insufficient.

Analysis. The opinion sets a relatively high bar for the admission of video recordings. It strikes me as being difficult to reconcile with cases like *State v. Cook*, 218 N.C. App. 245 (2012), where the court ruled that a surveillance video recording was properly authenticated by a facilities manager who appeared not to have been on duty at the time the recording was made, who testified that he didn't "know anything" about how the recording system worked, and who acknowledged that the system was operated by a third party. The principal evidence of authenticity in the case was the manager's testimony that "he viewed the surveillance video as [a] technician made a copy of the footage immediately following the incident, and further testified that the footage presented in court was the same as that which he viewed when the copy was being made from the surveillance system's server a few days after the theft." Such testimony appears to be very similar to the testimony that the *Snead* court found inadequate, suggesting that the law in this area may still be evolving. (I doubt that it will evolve further in this particular case, though. The case is technically a win for the defense, but as explained below, the defendant will still receive a lengthy sentence, leaving little incentive for the State to appeal.)

Prejudice. The court then addressed whether the error was prejudicial. Because the defendant testified and admitted taking shirts from the store, it found that the defendant would have been convicted of larceny anyhow. But because the evidence that the shirts were worth more than \$1000 came from the loss prevention manager's testimony about the type and number of shirts taken – testimony that was based on the video recording – the court concluded that the defendant would not likely have been convicted of *felony* larceny, and therefore remanded for entry of judgment on misdemeanor larceny. (Based on the facts presented in the opinion, I wonder whether the defendant would have testified and admitted his involvement if the video recording had been excluded.)

In the big picture, the defendant's victory on the authentication issue and the larceny charge may not make much practical difference. His conviction of conspiracy to commit felony larceny and as a habitual felon were affirmed, ensuring a long sentence regardless of the disposition of the larceny case.