



CRIMINAL JUSTICE

The newsletter of the Illinois State Bar Association's Section on Criminal Justice

Case notes

ILLINOIS SUPREME COURT

ACTUAL PHYSICAL ACT NOT REQUIRED TO CONSTITUTE A CHARGE OF OBSTRUCTION OF JUSTICE.

Frequently, persons are charged with obstruction of justice 720 ILCS 5/31-1(a) (West 2006) where the basis of the obstruction is a false response to questioning by police officers. In these situations, the gravamen of the offense is words not physical acts. In *The People of the State of Illinois v. Christine Baskerville et al.*, 2012 Ill. LEXIS 316 (February 2012) the Illinois Supreme Court was asked to resolve the issue of whether a physical act is required to sustain or support a conviction for obstruction of justice. The supreme court in Baskerville held that "knowingly furnishing a false statement to police may constitute obstruction of a peace officer under 31-1(a) where the statement interposes an obstacle that impedes or hinders the officer and is relevant to the performance of his authorized duties."

The following facts were adduced at trial: On the evening of April 16, 2007, LaSalle County Sheriff's Deputy John Dyke witnessed one Christine Baskerville driving a van, which was also witnessed by Craig Conley, a patrolman for Lake Holiday Security. Both gentlemen recognized Baskerville from previous dealings with her, and because Dyke believed Baskerville's license to be suspended, he returned to his vehicle to follow her and thus called into his dispatcher to verify his suspicion. As both vehicles arrived at Baskerville's driveway, Dyke received confirmation that Baskerville's license was indeed suspended. Dyke then witnessed Baskerville exit her vehicle and proceed toward her home, at which point his request for her to return to her vehicle was ignored, with Christine Baskerville disappearing into her home.

An undetermined amount of time later, Joseph Baskerville, the husband of Christine,

emerged from the home to speak with Dyke. Dyke's testimony indicates that initially, upon hearing the reason for Dyke's presence, Joseph Baskerville stated that he in fact had been driving the vehicle, and that his wife Christine was not at home. When asked by Dyke to retrieve Christine from the home, Joseph Baskerville re-entered his home, emerged again, informing Dyke this time that he had been home, did not know what was going on, and that Dyke could come in and search the home. Dyke refused the offer of entry to the home.

According to the testimony of Joseph Baskerville, two of his daughters, and a family friend, the defendant presented a defense wherein he alleged that he had been at home prior to Dyke arriving, sleeping on the couch. He further testified that Christine was not home when he fell asleep and that he was awoken by his daughter who informed him that the police were outside the house.

The trial judge found the defense witnesses testimony to be inconsistent, thus finding Christine and Joseph Baskerville both to be guilty of obstructing a peace officer pursuant to section 31-1(a), and both were sentenced to 90-day and 150-day terms of imprisonment respectively.

On appeal, majority of the appellate court, relying on *People v. Raby*, 40 Ill.2d 392 (1968) concluded that the charge of obstruction of justice requires a physical act and that providing false information is not a physical act. The appellate court thus reversed the defendant's conviction.

The Illinois Supreme Court granted the State's petition for leave to appeal. Defendant sought cross-relief, challenging the sufficiency of the evidence to support a conviction.

On appeal the Illinois Supreme Court reduced their decision to its lowest common denominator, the definition of the word "obstruct." In this regard, the court initially quoted the language of the statute:

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A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer*** of any authorized act within his official capacity commits a Class A misdemeanor.

720 ILCS 5/31-1(a) (West 2006),

The court then stated, “we are asked to construe the meaning of ‘obstruct’ ...in the context of this statute.” After pointing out that the Defendant conceded that he provided false information to the officer, the court began its analysis.

The court began by stating that their primary objective was to ascertain and give effect to the intent of the legislature. Recognizing that the term “obstruct” is not defined in section 31.1, the court turned to Webster’s Third New International Dictionary. Applying the dictionary definition, the court concluded that the term “obstruct” encompasses physical conduct as well as conduct “the effect of which impedes or hinders progress.” The court thus concluded “(f)urnishing false information could thus be included within that definition, as it can undoubtedly interfere with an officer’s progress.”

The Illinois Supreme Court distinguished its’ previous decision in *Raby*, pointing out that there, the defendant was charged with resisting arrest and that in *Raby*, the court was primarily dealing with the constitutionality of the statute and first amendment concerns.

The court recognized that indeed, most of the prior case law dealt with situations involving physical conduct, however they pointed out that in “*People v. Weathington*, 82 Ill.2d 183 (1980), we recognized the possibility but, left unanswered the question of whether conduct falling between mere argument and a physical act could ever constitute obstruction under section 31-1(a).”

Accordingly, the court noted that section 31-1 does not particularize specific types of conduct that may fall within the purview of the statute. The legislature has chosen broad terms. The legislative focus is on the tendency of the conduct to interpose an obstacle that impedes or hinders the officer in the performance of his duties. Although it can be a physical act, it is not essential. Thus, the court determined that providing false information to an officer may in fact constitute obstruction when the misinformation interposes an obstacle that impedes or hinders the officer and is relevant to the performance

of his duties.

The court however, after analyzing the sufficiency of the evidence concluded that defendant’s false statement did not hinder or impede the officer’s progress inasmuch as the defendant consented to a search and officer Dyke declined. Hence, regardless of the defendant’s representation, the representation did not impede the officer’s progress in conducting his investigation. Specifically the court stated in this regard, “Dyke was free to enter the home and was not hindered in doing so.”

Accordingly, the Illinois Supreme Court affirmed the appellate court’s reversal of the defendant’s conviction.

—Andrea Mesko

SEX OFFENDERS ARE SUBJECT TO INDETERMINATE TERMS OF PAROLE AT THE SOLE DISCRETION OF THE PRISONER REVIEW BOARD

In *People v. Thomas S. Rinehart*, 2012 Ill. LEXIS 34 (January 20, 2012) the central issue before the Illinois Supreme Court was whether the 4th District Appellate Court erred in holding that section 5-8-1(d)(4) of the Unified Code of Corrections (730 ILCS 5/5-8-1) requires the trial court to set a determinate Mandatory Supervised Release (MSR) (formerly “parole”) term within the statutory range. Section 5-8-1(d) of the Unified Code of Corrections requires that “every sentence shall include as though written therein a term [of MSR] in addition to the term of imprisonment” 730 ILCS 5/5-8-1(d) (West 2006). Section 5-8-1(d)(4) also provides that the MSR term for certain sex offenses, including criminal sexual assault, “shall range from a minimum of 3 years to a maximum of the natural life of the defendant.” 730 ILCS 5-8-1(d)(4) (West 2006). However, that section does not indicate whether the trial court should choose a term within that range, or whether the term is the range itself.

The pertinent facts in the case are as follows: In 2006, the defendant lived with his girlfriend and her children, one of which was a then-17-year-old girl with developmental disabilities. In August of that year, the defendant borrowed his girlfriend’s minivan to help friends move from Charleston to Mattoon, Illinois. The 17-year-old girl rode alone with the defendant on one trip. Several weeks later, the girl reported that the defendant had forced her to have sex in the back of the minivan on the day they moved.

Subsequently, the police arrested the defendant, and charged him with criminal sexual assault. The case proceeded to a jury trial. The jury found him guilty, and the trial court sentenced him to 28 years’ imprisonment, but not to a specific MSR term. Instead, the court stated:

I further order that the defendant will serve a period of [MSR] after serving his sentence as mandated by statute. Counsel, [it is] a little bit unclear to me what that period would be. There’s been some recent legislation that would suggest to me that the applicable time upon the defendant for this offense is not less than three and could be up to natural life, as the statute indicates, regarding the mandatory supervised release period. I don’t think I have to make that as part of my finding. It’s what the Department of Corrections will impose upon him, but there is a minimum three-year mandatory supervised release period. As I understand the statute, it could be beyond that period.

The written sentencing judgment, however, did not specifically mention MSR. After the receipt thereof, the Illinois Department of Corrections calculated the defendant’s sentence to include an indeterminate MSR term of three years to natural life. The defendant appealed, arguing *inter alia* that the trial court erred in not sentencing him to a determinate MSR term within the statutory range.

The appellate court concluded that the Unified Code of Corrections contained a determinate sentence structure, and that an indeterminate MSR term was inconsistent with that structure. Additionally, the appellate court noted that the Code grants the trial court, not the Prisoner Review Board, the power to impose an MSR term. According to the appellate court, “Because section 5-8-1(d)(4) contains an MSR term range for criminal sexual assault, the court also possesses the duty to exercise its discretion and impose MSR within that range. The trial court, and not DOC, is in the best position to assess and weigh the factors relevant to determine whether a defendant should serve three years’ MSR, natural life, or a term in between.” The appellate court acknowledged that *People v. Schneider*, 403 Ill.App.3d 301 (2nd Dist. 2010), reached the opposite result, but declined to follow that case. The appellate court thus affirmed the defen-

dant's conviction, but vacated his MSR term, and remanded with directions to set an MSR term within the statutory range. The State subsequently petitioned for leave appeal the appellate court's ruling, and the Illinois Supreme Court granted the State's petition for leave to appeal.

The Illinois Supreme Court deemed the resolution of the issue to be one of statutory construction. Section 5-8-1(d)(4) was part of Public Act 94-165 (eff. July 11, 2005), which amended various sections of the Code, including section 3-3-2, and added section 3-14-2.5. Section 3-3-2(a)(3.5) provided that the Prisoner Review Board shall "hear *** and *** decide[] the conditions of mandatory supervised release and the time of discharge from mandatory supervised release, *** impose sanctions for violations of mandatory supervised release and revoke mandatory supervised release for those serving extended supervised release terms pursuant to paragraph (4) of subsection (d) of Section 5-8-1." 730 ILCS 5/3-3-2(a)(3.5) (West 2006). Public Act 94-165, the Court opined, created a comprehensive scheme regarding MSR for certain sex offenses, which marked a philosophical and procedural change in how parole operates for defendants convicted of such offenses. The legislature abandoned the structure of determinate MSR terms accompanying other offenses and adopted a structure of indeterminate or "extended" MSR terms for sex offenses precisely because it viewed sex offenses differently, due to the risk of recidivism. See 94th Ill. Gen. Assem., House Proceedings, March 10, 2005, at 82-83 (statements of Representative Gordon) (this legislation "creates lifetime supervision for high-risk sex offenders"). Furthermore, the court reasoned, under section 3-14-2.5(b), a sex offender's parole officer must prepare a progress report every 180 days, and under section 3-14-2.5(d) the offender may request discharge from MSR upon the recommendation of the officer. These provisions—the Court found—contemplate indeterminate MSR terms, not determinate terms. The Supreme Court thereby held that the appellate court was incorrect in vacating the defendant's indeterminate MSR term and vacated the appellate court's order on the issue of MSR. The defendant's MSR term was then ordered to be served for an indeterminate three years to natural life.

The Illinois Supreme Court's decision will likely create a wave of collateral attacks on judgments of conviction by defendants

who entered into fully-negotiated plea agreements. Specifically affected are those defendants who were sentenced to determinate terms of MSR by courts that had been following the 4th District Appellate Court's erroneous interpretation of the statute. After all, when the parties enter into a plea agreement, the proper remedy is "either the 'promise must be fulfilled' or the defendant must be given the opportunity to withdraw his plea." *People v. Whitfield*, 217 Ill.2d 177, 202 (2005) (quoting *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)).

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DEFENDANT'S TESTIMONY THAT HE WAS NOT EXPERIENCED WITH POLICE QUESTIONING DID NOT OPEN THE DOOR FOR IMPEACHMENT THROUGH PRIOR JUVENILE ADJUDICATION

The defendant, Victor Villa, was convicted after a jury trial, of aggravated battery with a firearm and aggravated discharge of a firearm under accountability theory. He was sentenced to concurrent terms of imprisonment of 14 years and five years, respectively. Defendant's motion to reconsider his sentence was denied and defendant appealed to the Third District Appellate Court. The appellate court affirmed the trial court. 403 Ill. App.3d 309. Petition for Leave to Appeal was granted.

In *People v. Victor Villa*, 2011 Ill. LEXIS 1832 (2011), the main issue before the Illinois Supreme Court was whether the trial court committed reversible error by allowing the State to impeach defendant, who testified at trial, with his prior juvenile adjudication of burglary. Prior to trial, defendant's motion for *in limine* to bar State from using defendant's prior juvenile adjudication for impeachment was denied. The trial court determined that the burglary adjudication, related to defendant's truth and veracity and that its probative value outweighed any prejudice.

At trial, the defendant testified on his own behalf. During the direct examination, the defendant's lawyer questioned the defendant as to why he signed a police statement with false information. The defendant testified as follows:

I don't know. You know, I honestly didn't know what to say. I was scared. You know, I just—all I can say is I was

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scared. I've never been in a situation like this before. You know, I gave—I gave them that statement because, you know, they were saying that I was looking at prison time and stuff like that. I've never been in prison or nothing like that.

In rebuttal, the State argued that defendant's testimony falsely implied that he had no experience with the criminal justice system, thus opening the door to admission of his juvenile adjudication. The State referred to the juvenile adjudication twice during its closing argument and twice more during rebuttal argument, asserting that the burglary adjudication was a basis for concluding that the defendant's trial testimony was not truthful. The jury was instructed on the legal theory of accountability and found defendant guilty of both offenses.

On appeal, defendant argued that the trial court erred in allowing him to be impeached with prior delinquency adjudication or, alternatively, that he was denied effective assistance of counsel where counsel did not proffer a "proper objection" to that evidence. The appellate court affirmed the trial court. The Supreme Court reversed and remanded for a new trial.

In *Villa*, the Illinois Supreme Court, in an opinion written by Justice Theis, explained that evidence that is ordinarily inadmissible may become admissible if the defendant opens the door to its introduction. The court addressed the admissibility of juvenile adjudications in criminal proceedings by analyzing the landmark decision of *People v. Montgomery*, 47 Ill.2d 510 (1971), and section 5-150(1)(c) of the Juvenile Court Act of 1987. In *Montgomery*, the court held that a juvenile adjudication is not permissible against a testifying defendant. The court also noted that the Juvenile Court Act evolved from explicitly prohibiting the admission of a juvenile adjudication against a defendant to explicitly allowing the admission of juvenile adjudications for impeachment of the defendant pursuant to the rules of evidence for criminal trials.

The court then considered whether defendant had opened the door to the admission of his prior juvenile adjudication. The principal issue became whether defendant was attempting to mislead the jury about his criminal background. In *People v. Harris*, 231 Ill.2d 582 (2008) the court ruled that because the defendant had opened the door by attempting to mislead the jury about his criminal

background, the trial court was within its discretion to permit the State to impeach the defendant with his prior felony juvenile adjudications.

In *Villa*, the Illinois Supreme Court concluded that defendant had not attempted to mislead the jury: the second remark of the recantation testimony was true, and the first did not speak to criminal history, but only to the issue of whether the defendant was experienced with police questioning. It did not open the door to impeachment with a juvenile adjudication and, therefore, the admission was erroneous. Nor were the comments harmless, given that the only evidence implicating defendant were the statements he sought to recant.

The majority opinion of the court on this particular issue was specifically adopted by Justice Burke in his concurring opinion on the 5-150(1)(c) issue. Justice Kilbride and Justice Freeman concurred only in the result. Justice Thomas dissented.

—Jesus Ricardo Rivera, Attorney
Chicago

STATE PROPERLY LAID FOUNDATION FOR ADMISSION OF VIDEO RECORDING INTO EVIDENCE UNDER THE "SILENT WITNESS" THEORY

In 2005, several thefts occurred at the office of the Dean of Students at Deerfield High School. The Dean had been collecting money for a fundraiser, and had placed the money in a bank pouch and secured the pouch in his office desk. Money disappeared several times from the pouch over weekends when the Dean's office door had been locked.

Following the thefts, a detective from the Deerfield Police Department set up a surveillance camera in the Dean's office on December 1, 2005. The equipment consisted of a motion-activated, wireless, digital camera concealed within a clock radio and a digital video recorder (DVR). The detective had only recently begun using the equipment. He testified that an employee at the store where he purchased the equipment had demonstrated how to set up and use the equipment. The detective further stated he read the instructions that came with the equipment. The detective explained how the equipment worked.

The detective testified that he placed the clock radio on the Dean's desk, in front of the drawer from which the money had been re-

moved. The detective tested the equipment by turning everything on and making sure there was a good picture coming from the camera. The detective stated that when any moving object came into the viewing area of the camera, the recording process would start.

On December 12, 2005 the detective returned to the Dean's office after the Dean advised him \$20.00 was missing from the pouch. At this time, the DVR transmitter and camera were all still activated. The DVR had been triggered. The detective, the Dean and the school's facility manager viewed the DVR recording. The Dean and facility manager identified the defendant as the individual in the recording. Defendant worked at the school as a night watchman.

On December 16, the school's facility manager, principal and assistant superintendent met with the defendant. During the interview, defendant admitted to stealing money from the Dean's office on December 10. The defendant also admitted to taking cash on three to four other occasions.

According to a Deerfield Police Report summary, authored by the detective, on December 16, 2005, the detective "made a copy of the video surveillance on the hard drive, specifically the segment where defendant was in the Dean's office, onto a VHS tape." The detective removed the tape's recording tab, and locked the VHS tape in his desk, "to be later locked in an evidence locker." The police report further stated that the detective viewed all the footage recorded by the DVR from December 9 to December 12, and that no one other than defendant went into the Dean's office.

The detective interviewed the defendant on January 4, 2006. During this interview, according to the detective, defendant admitted to stealing money from the Dean's desk on December 10.

Prior to trial, defendant filed a motion *in limine* to bar the State from using the VHS tape at trial, arguing that the State would be unable to lay a foundation for the VHS tape because it contained a 30-second skip. The trial court denied this motion. The record did not include the reason for the denial.

When the State sought to admit the VHS tape at trial, the defendant objected on foundational grounds, arguing that the video skipped forward 30 seconds, and the State failed to explain why the gap existed. Defense counsel also argued that the State had not shown that the camera was working

properly. The trial court advised the State to lay a better foundation. The detective then testified the camera was still working on December 12 as it had been on December 9. Defense counsel again objected, stating there were five elements for admission: "capability of the device for recording, competency of the operator, proper operation of the device, preservation of recording with no changes, additions or deletions, and identification of the speakers." Defense counsel took issue with the competency of the detective, since he was not present when the device recorded, and with the absence of proof that the motion sensor was operating properly. The trial court again advised the State to lay more foundation.

The detective then testified that he plugged a portable 13-inch monitor into the feed from the DVR to determine if the devices were working properly, allowing him to see what the camera was seeing. Placing the camera on the Dean's desk, the detective directed the Dean to walk in front of the camera to check that the motion sensor was working. The DVR turned on. According to the detective, this proved that the connection was working. Defense counsel again objected, arguing there was no proof the sensor was working between Friday, December 9th and Monday, the 12th. The trial court overruled the objection.

The State then played the video. The video, which was part of the record on appeal, contained two successive segments separated by a 29 second gap, depicting a man in the Dean's office on Saturday, December 10. During the viewing of the videotape, defense counsel again objected, arguing that the State failed to show the recording was preserved without any changes, additions or deletions and that the 29-second skip in the tape from the end of the first segment to the beginning of the second segment, suggested that a portion of the tape was missing. The detective testified, in part, as follows:

...if the camera stops sensing motion, recording stops. As soon as it senses motion again, it started again"...the camera only records when there is motion detected and the camera is set to record long enough to capture everything, I didn't have it set long enough to record a longer period of time.

In finding defendant guilty, the trial court acknowledged the missing segment and

commented, in part, as follows: "...I don't see any intentional destruction of evidence. He explained it was the motion sensor"

Defendant then filed a motion to reconsider or, in the alternative, for a new trial, arguing that the State had failed to lay a proper foundation and the VHS tape should not have been admitted into evidence. The court denied defendant's motion.

Defendant then appealed. The appellate court reversed and remanded. The appellate court noted that under the "silent witness" theory, photographic or videotape evidence may be admitted without an eye-witness to establish the accuracy of the images depicted if there is sufficient proof of the reliability of the process that produced the photograph or videotape. The appellate court then held that the State failed to lay a proper foundation for admission of the VHS tape because it failed to establish the reliability of the process that produced the tape. Specifically, according to the appellate court, the State failed to establish a proper chain of custody, failed to establish that the camera was working properly and the original DVR recording had been preserved, and failed to give an explanation of the process of copying the recording on the DVR to the VHS tape. The appellate court found that the State failed to establish even the probability that the VHS tape had not been tampered with.

The Supreme Court granted the State's petition for leave to appeal. Ill.S.Ct.R.315

On appeal, to the Illinois Supreme Court, in *People v. Taylor*, 965 N.E.2d 431 (2011), the State argued that the court should review the trial court's decision to admit the VHS tape under an abuse of discretion standard. Defendant argued that the court should review the trial court's decision to admit the VHS tape *de novo* because the legal admissibility of evidence on foundation grounds is subject to a *de novo* standard of review. The Illinois Supreme Court agreed with the State and reviewed the trial court's decision to admit the VHS tape under the abuse of discretion standard.

The State first argued that the defendant had forfeited any challenge to the admission of the VHS tape on the grounds that (1) the VHS tape was a duplicate recording; (2) the State failed to explain the process used to create the duplicate; (3) the State failed to show a chain of custody, and (4) the State failed to preserve the original recording. According to the State, defendant did not object on these

grounds at trial or in his post-trial motion. At trial, defendant objected to the VHS tape on the following grounds: (1) there was a 30-second jump with no explanation; (2) the camera was not working properly; (3) the evidence did not show that the detective was competent to operate the equipment; and (4) the State failed to preserve the recording without changes, additions or deletions as shown by the 30-second jump. Defendant argued, however, that if the court concluded he did, in fact, forfeit some of the challenges he raised in his appeal, the court should review them under the plain-error doctrine. The Illinois Supreme Court then evaluated whether error occurred in this case.

Writing for the court, Justice Burke noted that most jurisdictions now allow photographs and videotapes to be introduced as substantive evidence so long as a proper foundation is laid. Such evidence is generally admitted under the "silent witness" theory. Under this theory, a witness need not testify to the accuracy of the image depicted in the photographic or videotape evidence if the accuracy of the process that produced the evidence is established with an adequate foundation. In such a case, the evidence is received as a so-called "silent witness" or as a witness which "speaks for itself"

The supreme court acknowledged that it had not addressed the foundational requirements for establishing the accuracy of a process that produces surveillance camera recordings. The court noted that while most courts have set forth various factors to consider when assessing the process that produced a recording, these factors are not deemed exclusive foundation requirements.

The Illinois Supreme Court noted that the appellate court in the case at bar looked to several factors in determining whether a proper foundation had been laid for the admission of the VHS tape: (1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process. The supreme court agreed that these factors may be considered when determining whether the process by which a surveillance videotape was produced was reliable. The court emphasized, however, that this list of factors is nonexclusive, and maintained that each case must be evaluated on its own and

depending on the facts of the case, some of the factors may not be relevant or additional factors may need to be considered. The court reasoned that the dispositive issue in every case is the accuracy and reliability of the process that produced the recording.

Although the supreme court agreed with the appellate court's choice of factors to consider, the court disagreed with the appellate court's conclusion that the evidence failed to demonstrate the VHS tape was admissible. The appellate court concluded that the State failed to establish the camera was working properly; failed to give an explanation of the process of copying the recording from the DVR to the VHS tape; failed to establish a sufficient chain of custody; failed to preserve the original; and failed to establish there were no alterations, deletions, or changes made to the original. The supreme court disagreed with the appellate court's analysis and found that the State laid a sufficient foundation for admission of the VHS tape. The supreme court reviewed the testimony produced at trial

The detective testified that an individual from the store from where he purchased the surveillance system instructed him on how to use the system. In addition, he read the instructions which came with the equipment. Although the camera was set to record for 15 seconds, the Illinois Supreme Court concluded that the fact the camera recorded for fewer than 15 seconds is not fatal to a finding that the camera was working properly. "While the camera may not have worked perfectly, it clearly worked." The supreme court disagreed with the appellate court's conclusion that the State failed to establish the camera was working properly. The supreme court concluded that the State adequately demonstrated the camera and system were able to record and were generally operating properly.

The supreme court disagreed with the appellate court's conclusion that the VHS tape was inadmissible because the State failed to give an explanation of the process of copying the recording from the DVR to the VHS tape. The Illinois Supreme Court noted that the police report summary stated that the detective "made a copy of the video surveillance on the hard drive, specifically the segment where defendant was in the Dean's office, onto a VHS tape." The appellate court refused to consider this police report because, in its view, it was not "evidence." The supreme court maintained that it is widely

recognized that when the trial court addresses preliminary questions, like the admissibility of evidence, it is not constrained by the usual rules of evidence: "The Court may consider hearsay or other evidence that would not be admissible if offered to the jury." The supreme court concluded that the appellate court erred in not considering the police report, stating that the appellate court should have considered the report in determining the admissibility of the video tape, and erred when it stated there was no explanation of the copying process.

The supreme court disagreed with the appellate court's finding that the VHS tape was inadmissible because the State failed to show a sufficient chain of custody. The supreme court noted that according to the Deerfield police report, after the detective made the VHS tape copy, he locked the VHS tape in his desk "to be later locked in an evidence locker." The supreme court again maintained that the appellate court erred in refusing to consider the police report. The court stated that if there are other factors demonstrating the authenticity of the recording, a strict proof of chain of custody is not necessary. *Garvey v. Chicago Rys. Co.*, 339 Ill.276, 291(1930). The court had also ruled, *albeit* in a different context, that gaps in the chain of custody go to the weight of the evidence, not its admissibility. *People v. Alsup*, 241 Ill.2d 266, 275 (2011); *People v. Williams*, 238 Ill.2d 125, 150 (2010).

The Illinois Supreme Court also disagreed with the appellate court's finding that the VHS tape was inadmissible because the State failed to preserve the original DVR recording. The court noted that "writings" and "recording" are commonly identified as "letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation." *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 577 (D.Md. 2007). "Photographs" include "still photographs, X-ray films, video tapes, and motion pictures." *Lorraine*, 241 F.R.D. at 577. See also Ill. R.Evid. 1001(2). An "original" of a "writing" or "recording" consists of "the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An 'original' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data

accurately, is an 'original.' *Lorraine*, 241 F.R.D. at 577.

The supreme court reasoned that the appellate court's finding that the VHS tape was not an original could not be reconciled with these definitions. They concluded that the VHS tape was made by copying the data stored on the hard drive of the DVR and, therefore, satisfied the definition of "original." The supreme court maintained that the State was not required to bring the DVR system into court to show the surveillance video.

Finally, the Illinois Supreme Court disagreed with the appellate court's conclusion that the State failed to establish that no alterations, deletions or changes had been made when the original DVR recording was copied to the videotape. They reasoned that such a requirement is overly restrictive; given the particular circumstances of any case, alterations, deletions, or editing may be necessary. The court reasoned that the more important criteria is that the edits cannot affect the reliability or trustworthiness of the recording; the edits cannot show that the recording was tampered with or fabricated. The supreme court concluded that there was no evidence that the VHS tape was the result of tampering or fabrication.

The Illinois Supreme Court found that the totality of the evidence presented demonstrated that the State laid a proper foundation for admission of the VHS tape. The supreme court concluded that the trial court did not abuse its discretion in admitting the VHS tape and, thus, there was no plain error. The supreme court reversed the judgment of the appellate court, and affirmed the judgment of the circuit court.

—David B. Franks
Lake in the Hills

ILLINOIS APPELLATE COURT

PURSUANT TO COMMUNITY CARETAKING FUNCTION, POLICE MAY USE EMERGENCY LIGHTS, RUN VEHICLE INFORMATION WITH DISPATCHER AND CONDUCT A ROADSIDE INTERVIEW WITH STOPPED VEHICLE WHERE DRIVER AND PASSENGER SWITCHED SEATS EVEN WITHOUT OBSERVING ANY TRAFFIC VIOLATION

In *People v. Dittmar*, 2011 Ill.App. (2nd) 091112, the defendant was arrested by Stephenson County Sheriff's Deputy for DUI on September 1, 2008. On May 19, 2009, the defendant filed a motion to quash his arrest and suppress evidence. On August 14, 2009,

the trial court heard the motion and granted the motion to suppress evidence and quash evidence and rescinded the statutory summary suspension.

The defendant testified that in the early morning hours of September 7, 2008, he was in his vehicle when a patrol car pulled up behind him and activated his emergency lights.

The parties stipulated to the testimony of the deputy and the video of the stop, which was that a convertible was oncoming and traveling at a slow rate of speed. The turn signal was activated and the vehicle pulled to the shoulder of the road.

The officer turned around and observed the driver and passenger switching seats.

The officer pulled behind the stopped vehicle, activated his emergency lights, gave the dispatcher the make, model and license plate number of the car.

He approached the vehicle asking each of the occupants for a driver's license. The defendant was asked to do a Field Sobriety Test. After defendant failed the initial test and refused to take the remainder. He was arrested.

Defendant argued to the trial court that, once the officer activated his emergency lights, he effected a seizure of defendant. Once seized, defendant argued, the encounter was by definition not a community-caretaking encounter. For support, defendant cited this district's comment in *City of Highland Park v. Lee*, Ill.App.3d 48,54 (1997), that [o]nce a seizure has occurred an officer is not acting in his community caretak[ing] function, even if his original intention had nothing to do with the detention or investigation of a crime. Defendant further argued that the officer lacked reasonable and articulable suspicion of criminal activity. Defendant cited *People v. Gray*, 305 Ill.App.3d 835, 838-39 (1999), for its holding that, without more, a driver's act of switching places with a passenger does not supply grounds for a seizure. Defendant did not question that the officer's interaction with defendant gave the officer probable cause to arrest him for DUI.

The State replied that, because defendant's vehicle was already stopped, the officer's pulling behind the vehicle and activating his emergency lights could not have effected a seizure. The State alternatively argued that any seizure was justified as an exercise of community caretaking, because the officer had cause to attempt to make sure that the individual[s] [were] okay on the side of the road. The State contended that the officer's use of his emergency lights was consis-

tent with a community-caretaking purpose because it served to alert passing drivers to the cars stopped on the roadway shoulder.

The trial court, citing *People v. Luedemann*, Ill.2d 530, 558 (2006), found that defendant was seized once the officer activated his emergency lights. Without elaborating, the court also found that the officer lacked reasonable and articulable suspicion of criminal activity. As for the State's proffered community-caretaking rationale, the court said:

Now I also comment that the Court believes that [officer] acted properly to check on the car that had pulled over to the side of the road in the early morning hours; however[,] based on the Supreme Court's opinion in *Luedemann*, activating the overhead lights on the squad made the stop a seizure, thus implication of [defendant's] 4th Amendment rights.

The court granted defendant's motion to quash his arrest and suppress evidence.

The State filed a motion to reconsider. The State now concedes that defendant was seized when the officer, his emergency lights activated, pulled behind defendant's stopped vehicle. Citing several decisions, including *Luedemann*, *People v. McDonough*, 395 Ill.App.3d 194 (2009), *aff'd*, Ill.2d 260 (2010), *People v. Robinson*, 368 Ill.App.3d 963 (2006), and *People v. Laake*, Ill.App.3d 346 (2004), the State argued that the seizure was justified on community-caretaking grounds. The trial court denied the motion to reconsider. The State filed a certificate of impairment and a timely notice of appeal.

The appellate court found the standard of review to be *de novo* because there were no undisputed facts.

The appellate court agreed with the State that the officer's actions were justified as a community-caretaking endeavor and held that the officer's seizure of the defendant was a legitimate community-caretaking exercise and reversed the trial court's granting the motion to quash arrest.

In *People v. McDonough*, 239 Ill.2d 260, 272 (2010), the supreme court identified a two-prong test for judging whether an encounter qualifies as a community-caretaking endeavor:

First, law enforcement officers must be performing some function other than the investigation of a crime. [Citations.] In making this determination, a court views the officer's actions objectively. [Citation.] Second,

the search or seizure must be reasonable because it was undertaken to protect the safety of the general public. [Citation.] Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances. [Citation.] The court must balance a citizen's interest in going about his or her business free from police interference against the public's interest in having police officers perform services in addition to strictly law enforcement.

The court noted that use of emergency lights is not *per se* an act of crime detection. Also, that the officer informing the dispatcher of make, model and license plate number of defendant's car was consistent with public safety purpose. The court found that it was a reasonable public safety endeavor to check a stopped vehicle and that the public interest served by the officer's actions outweighed any intrusion.

—James Stern
Belleville,
St. Clair County ■

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