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Police Liability and Litigation
with Terrence P. Dwyer, Esq.

Legal considerations in the use of digital video in criminal cases

Law enforcement's challenge with the proliferation of potential video evidence is in obtaining and preserving the images captured for future evidentiary value

The law is often said to be staid and formalized, rigid in its formulation and slow to evolve. Advances made in science and technology, no quicker in evolution, seem to always bring new challenges to the legal profession. Technology has clearly changed law enforcement over the last 20 years. It has become an integral part of a police officer's daily work life, from use of social network sites to keep citizens aware of what is occurring in the community to the use of sophisticated recording devices for undercover operations.



With the advent of new technology in law enforcement, such as the use of digitally recorded video from dashboard mounted cameras in patrol cars, comes the challenge of preserving captured video of an incident and having it admitted into evidence at a subsequent criminal trial. Similar concerns exist for the use of digitized images from surveillance cameras. These are the more common examples of investigative use of digital video and subsequent evidentiary use. As the technology advances and becomes more accessible to the general public certain evidentiary concerns need to be considered.

Over the past decade we have become a surveillance society. The events of 9/11 — along with concerns for responding to crime in our communities — have spawned an increase in government and business use of surveillance cameras. Chicago, for instance, has utilized a Department

of Homeland Security grant to increase its city surveillance and projects a camera on every street intersection by 2016.

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Rules of Evidence

Some basics in the law of evidence need to always be considered with the use of digital video images:

- 1.) Preservation** — the duty to properly keep and maintain memory cards and other temporary storage devices on which images are recorded
- 2.) Authenticity** — that the digitally recorded evidence is a true and accurate reflection of what the proponent of the evidence claims it to be
- 3.) Policy** — have a formalized agency policy for evidence collection and preservation which includes digital and electronic evidence (video captures, e-mails, computer data)
- 4.) Admissibility** — showing that the purported evidence is relevant to the ultimate fact to be proved and the extent to which it weighs on the probability of that fact. Generally if the evidence passes the first three steps its admissibility will be assured.

The stumbling blocks to the admissibility of digital evidence are the typical trial objections attorneys will make to newly introduced evidence, mainly that of either undue prejudice, hearsay, the best evidence rule or a lack of foundation for the introduction of the evidence. These are legal arguments which are left to the prosecutor to defend against in submitting the evidence at trial. Law enforcement's role in the process is to ensure that in getting the digital evidence to court all the proper steps and precautions have been taken in securing and preserving that evidence.

Recent Examples

In order to get a more practical view of the potential problems associated with digital video, I called on Tom Martin, retired Senior Investigator of the New York State Police Troop K Forensics Investigation Unit and present owner of Crime-Scene Forensics, LLC. Martin has travelled across the U.S. over the past several years training law enforcement in forensics and testifying in state and federal courts, including numerous cases relying on digital video evidence. As an initial bit of anecdotal information, Martin indicated that there was an increased use at criminal trials of digital evidence, especially video images, due to the present pervasiveness of surveillance cameras.

"Always look for cameras, no matter the crime," was Martin's advice. "You just never know where you might find them."

A recent case highlighting this point was the New Mexico state trooper caught on-duty having sex with a female on the hood of a car. Though presumed to be in a remote location the officer was caught on a recently installed video surveillance system intended to catch vandals.

Apart from the increased use of video surveillance at trial Martin indicated there have generally been few

problems with admissibility of vehicle mounted dashboard cameras. Following typical chain of evidence guidelines — where the video came from, how recorded, who maintains the equipment — leads to admissibility.

Issues with dashboard cameras that do occur are generally technical problems, such a “power dumps” — or electric surges — causing a loss of video image.

Martin recounted a case he worked wherein during a police response to an emergency call a vehicle pulled out from a side street in front of the responding officer’s vehicle. The operator of the other vehicle died from the impact. Video from the police dashboard camera caught everything except the part where the motorist pulled in front of the police vehicle. The loss of this key bit of video can not only frustrate an investigation but later in a civil court provide for a negative inference since a plaintiff’s attorney can argue that the video would not have been favorable to the police version of events and was likely erased.

Admissibility Issues

This is but one of a few potential problems encountered with the admissibility of digital video which underscored Martin’s main points about digital video evidence, understanding the equipment and the technology. A law enforcement officer or other witness who takes the stand to testify concerning the collection and preservation of digital video images must know the equipment and explain how it operates and how it is maintained. Equally important is the technical aspect, a more scientific approach to the image captures, which may involve testimony from the manufacturer.

Martin pointed to a brutal quintuple homicide in which a key piece of evidence was the capture by a patrol vehicle’s automated license plate reader (APLR) of the suspects’ vehicle in the vicinity of the crime scene in the middle of the night.

In that case, because of the novelty of the technology at the time, the prosecutor had to bring in a manufacturer representative from Texas to explain to the jury the operation of the system and its interface with other electronic systems, such as GPS, and how the image along with other data is stored then retrieved from the system. After laying the proper evidentiary foundation, admissibility was granted.

The real challenge to the admissibility of digital video evidence is not as disputed with surveillance video as it is with video simulation. Video surveillance has been around for some time and courts have become familiar with the technology. The rules of evidence provide a more difficult route for reliability and admissibility with video simulation evidence.

Martin, a proponent of video simulation who has used it extensively in his career, said such evidence can be fantastic for assisting a jury in understanding a case but it must meet strict guidelines. Video animations or simulations cannot contain any speculation as to what may have occurred; they must be based solely upon the available facts. Further they have to be non-descript in their presentations, generic animation figures in a scene should not resemble a suspect. Evidence like this would be deemed suggestive therefore being prejudicial to the defendant and inadmissible. Simulation evidence which exhibits the inner workings of a gun when the trigger is pulled presents less of a problem for admissibility than a simulation of a crime. The latter, Martin explained, may veer into the realm of speculation which opens the case to possible appeals. Once there is deviation from any of the factual evidence the video simulation loses its evidentiary integrity.

Digital video evidence is an integral part of any investigation. It is the silent witness that is difficult to impeach. Proper collection, preservation and subsequent authentication of digital video evidence, as with any other item of evidence, will ensure it is admitted at trial.

About the author

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