

POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization: #172--
The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	30 min
March 22, 2021	Motion to Suppress Surveillance Video (<i>Alexander</i>); Lay Opinion as to Identification in Videos	Malisha Jones	General

This P&A was originally shown in July 2019. The case of *People v. Alexander* concerns the use of photographs and video evidence at motions to suppress for the purpose of establishing probable cause for a defendant's arrest. In 2020, the California Supreme Court granted review in this case on a sentencing issue as to defendant Alexander. The matter was eventually returned to the Court of Appeal on the sentencing issue, and the Court of Appeal issued a nonpublished opinion, discussed below. The Court of Appeal's original analysis that videos and photographs can help provide probable cause for arrest remains the same as in the original opinion. As it is not pertinent here, the sentencing issue is not discussed.

People v. Alexander 2020 WL 7040967

In a Penal Code section 1538.5 hearing, an officer relied on identification from surveillance videos to help provide probable cause for the warrantless arrest of defendants. The defendants challenged the video evidence as hearsay and lacking authentication. In the context of a 1538.5 hearing, however, photographs or videos are only being offered to establish the information relied on by the officer in making the arrest.

A. Background

1. San Francisco Police Sergeant Thomas Maguire investigated a series of robberies in August and September 2012. The suspects were two African American males, one taller and thinner than the other. Maguire obtained police reports regarding all the incidents as well as surveillance videos of eight of the incidents. He viewed and compared the videos multiple times. Defendants Alexander and Farr were charged with multiple counts of second degree robbery. Prior to the filing of the amended information, defendant Alexander moved under section 1538.5 to suppress evidence discovered

pursuant to the warrantless arrest of himself and Farr, and Farr joined in the motion. The trial court denied the motion and the defendants pleaded guilty to negotiated dispositions.

2. At issue in the motion to suppress was the sufficiency of evidence to establish probable cause for the warrantless arrests of the defendants. At the motion to suppress, Sergeant Maguire testified in detail about his investigation of seven of the robberies. As to three of the robberies, still photos from the surveillance videos were admitted in evidence at the suppression hearing. As to two other robberies, Sergeant Maguire testified that he viewed the videos at the businesses. As to another robbery, he obtained the video and identified stills from the video at the suppression hearing. In another robbery, he viewed the video, went to the scene and spoke to witnesses, and identified stills from the video at the hearing. After the defendant's final robbery which led to their arrest, Maguire viewed the surveillance video of that robbery.

3. In the final robbery, Sergeant Maguire heard a broadcast reporting a robbery at a restaurant on Mission Street, in which the suspects were described as two African American men, one taller and one shorter. Maguire thought they might be the perpetrators in the robberies he was investigating. Sergeant Maguire went to the area of 7th Street and Market Street, because the dispatch said the victim's cell phones were stolen and stolen cell phones are often sold in that location. As he arrived in the area in an unmarked vehicle, he saw two men cross the street in front of him and "immediately recognized" them as the suspects in the robberies he had been investigating. The shorter man was wearing the same clothes and shoes he had worn in several other robberies captured on video. Sergeant Maguire called for backup and apprehended the defendants at gunpoint. The defendant Farr was carrying a bag containing the cell phones that had just been stolen in the robbery. At the suppression hearing, Sergeant Maguire identified five photographs of defendants taken at the time of their arrests.

4. At the motion to suppress all evidence obtained from the warrantless arrest, the trial court credited Maguire's testimony that he immediately recognized the defendants as the suspects he had viewed multiple times on multiple videos, and found that the still photos from the videos corroborated Maguire's testimony. The court concluded Maguire had probable cause to arrest.

B. Defendants' Argument on Appeal Regarding Hearsay

1. Defendants argued on appeal that the prosecution failed to prove that the surveillance videos described by Sergeant Maguire actually depicted the robberies he was investigating. They argued that the prosecution failed to meet its burden on that point because Maguire's testimony connecting the videos to the robberies was based on *hearsay*. As defendant Alexander asserted on appeal, "no person with personal knowledge of any incident testified that the video watched by Maguire accurately depicted it, and no person with personal knowledge testified how any incident was video recorded or how any video watched by Maguire was generated."

2. The Court of Appeal stated that the defendants were correct that the hearsay rule applies at motion to suppress. The Court of Appeal agreed that Maguire's testimony was not based on personal

knowledge. His belief that the videos depicted the robberies was based on the following: information received from witnesses to the robberies and other officers; videos associated with the cases in police records; videos received from the victims. However, the Court of Appeal stated, “*Sergeant Maguire’s testimony was not subject to exclusion under the hearsay rule because, even though it was based on (mostly implied) extra-judicial statements, the testimony was not hearsay because it was offered only to show the information he relied on in deciding to arrest appellants.* (Evid. Code, § 1200.) Sergeant Maguire’s testimony about how he obtained the surveillance videos and what he saw in the videos was not admitted to prove the videos depicted the robberies or to prove the content of the videos. Instead, the testimony was admitted to inform the trial court of the basis for Maguire’s belief he had probable cause to arrest defendants.

C. Defendant’s Argument on Appeal Regarding Authentication of the Videos

1. Defendants argued that the prosecution failed to demonstrate the surveillance videos that Sergeant Maguire described were authentic within the meaning of Evidence Code section 1400, which provides that “Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.” Video recordings are writings within the meaning of Evidence Code section 1400. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.) Authentication is essentially a subset of relevance. (*Ibid.*)

2. The foundation required for authentication requires there be sufficient evidence for the trier of fact to find the writing is what it purports to be. (*Goldsmith*, at p. 267.) “A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citation.] It may be supplied by other witness testimony, circumstantial evidence, content and location.” (*Goldsmith*, at pp. 267–268.)

3. The Court of Appeal here said the video was not being used to prove guilt, but was only admitted for the purpose of establishing the information Maguire relied on in arresting the defendants. “Sergeant Maguire testified under oath about surveillance videos of seven robberies. Maguire did not have personal knowledge of the robberies or how the videos were made, but there is little reason to doubt the videos depict the robberies under investigation. Although the testimony was not detailed, Maguire explained, or it can reasonably be inferred, that he obtained the videos from other officers, from case files, or from the establishments that were robbed. That the surveillance videos came from the robbery case files or were obtained from the *locations* of the robberies is circumstantial evidence that the videos depict the robberies under investigation.” As *Goldsmith* states, authentication can be supplied by location. (*Goldsmith*, at pp. 267–268.)

4. As to two of the robberies, Maguire testified that the events depicted in the videos matched the description of the incidents he had been given by witnesses. Thus the “content” of those two videos corresponded to the robbery, again relying on one of the factors in *Goldsmith*. (*Goldsmith*, at p 268.) “Photographs of stills from five of the videos were submitted into evidence; those images contained

timestamps corresponding to the dates of the robberies and corroborated Maguire's testimony by showing the videos he described did in fact exist. In other words, 'the content supplied further support for a finding that' the videos depicted the robberies under investigation. (*Goldsmith*, p. 271.)"

5. Thus the Court of Appeal concluded that "[w]hether or not Maguire's testimony would have been sufficient to authenticate the videos for admission at trial on the underlying charges, his testimony was a sufficient 'prima facie' showing of authenticity for purposes of the hearing on the motion to suppress."

D. Defendant's Argument on Appeal Regarding Probable Cause for Arrest

1. To support a determination of probable cause, the information relied upon by the arresting officer must be reasonably trustworthy or bear indicia of reliability. The Court of Appeal said, as it explained previously in the context of the authentication analysis, Sergeant Maguire's testimony established the videos were a trustworthy basis upon which to formulate probable cause for arrest. "Although his testimony was not detailed, the videos as described had sufficient indicia of reliability and there is little reason to doubt the videos depicted the robberies under investigation."

2. The Court of Appeal concluded: "Because the surveillance videos viewed by Sergeant Maguire bore indicia of reliability and because those videos provided a sufficient basis for him to recognize appellants, the warrantless arrest of appellants was objectively reasonable under the Fourth Amendment."

Identifications of Persons in Surveillance Videos: Lay Opinion

A. The Legal Overview

A lay witness may offer opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evidence Code section 800.)

The identity of a person is a proper subject of nonexpert opinion. (*People v. Leon* (2015) 61 Cal.4th 560.)

B. How the Case Law Has Developed

1. Where the Officer Had Contact With the Defendant

A law enforcement officer identifying a person from a photograph or video is offering a lay opinion. In *People v. Perry* (1976) 60 Cal.App.3d 608, 613, the defendant argued that identification had to be based on the officer's perception of a crime. The court disagreed, finding it proper for officers to predicate their opinion on "contacts with defendant, their awareness of his physical characteristics on the day of the robbery, and their perception of the film taken of the events." (*Ibid.*)

Similarly, in *People v. Mixon* (1982) 129 Cal.App.3d 118, the court upheld identification of the defendant in a robbery surveillance photograph by officers who had numerous contacts with him and were unequivocal in their identification. (*Id.* at pp. 130–131.)

In *People v. Leon* (2015) 61 Cal.4th 569, the officer was allowed at trial to opine that the defendant was the person in the surveillance video of a robbery. On appeal, the defendant argued that, unlike the *Perry* and *Mixon* cases, the officer did not have contact with the defendant *before* the crime. The Supreme Court said this was a distinction without a difference. The officer had contact with the defendant one day after the crimes occurred, which was the day the defendant was arrested. Any question about the extent the officer’s familiarity with the defendant’s appearance went to weight, not the admissibility of his identification.

2. *Where the Officer Had No Prior Contact With the Defendant*

In *People v. Larkins* (2011) 199 Cal.App.4th 1059, the defendant was convicted of various theft-related offenses arising out of six incidents occurring at different locations of a particular gym chain, occurring over a period of several months. The evidence included a surveillance video taken at one of the gyms. The gym’s loss prevention manager testified that the defendant, who was not a member of that chain of gyms, was the person seen in the surveillance video. The manager had never seen defendant in person. However, the manager testified that he was able to recognize the defendant because he had seen the defendant in 20 to 30 surveillance videos from other gym locations. On appeal, the defendant’s argued the manager’s testimony was inadmissible under *Mixon* and *Perry* because the manager had no “previously acquired familiarity” or “personal knowledge” of the defendant’s appearance. The Court of Appeal rejected the argument, noting that the manager had viewed 20 or 30 surveillance videos of the defendant and had also viewed the defendant’s driver’s license and booking photographs. The Court of Appeal distinguished *Perry and Mixon*, noting that those cases involved still photos. The court said in the video, the witness “could observe such distinguishing characteristics as the defendant’s posture, gait, and body movements. Thus, whatever the holdings of *Perry* and *Mixon*, they are logically inapplicable to videos.” (*Id.* at p. 1067.)

Although unpublished, the 2019 case of *People v. Terrell Jones* is helpful for informational purposes [2019 WL 1529549]. There were no eyewitnesses to the victim’s murder, but there was a private surveillance video that placed the defendant and another man at the scene and time of the murder. The defendant was wearing a distinctive sweatshirt, tan cargo pants and Puma classics shoes. The surveillance photo showed him walking into the alley where the shooting occurred, putting a gun under his sweatshirt. A detective, who had no prior contact with the defendant, began investigating the defendant’s Instagram accounts. She found photos of the defendant wearing the sweatshirt depicted in the surveillance video. She viewed a video on Instagram that incorporated seven photos of the defendant. Finally, the detective and another officer went to a location where they were able to videotape the defendant, which led the detective to conclude with certainty that the defendant was the person in the murder surveillance video. Police arrested the defendant at his apartment and searched his bedroom, recovering the sweatshirt and the cargo pants. Defendant’s argument on appeal was that because the detective “had no special knowledge of his appearance when the

shooting occurred, and because she had no contact with him before or near the time of the shooting, the detective's opinion was not necessary to help the jury understand that the detective believed the defendant was one of the shooters." The Court of Appeal rejected the argument, stating, "[T]he admissibility of the detective's lay opinion testimony did not hinge upon a showing that she had personal knowledge of the defendant's appearance, or had contacted him around the time of those alleged offenses." Relying on *People v. Larkins* [discussed above], the Court of Appeal stated that the detective had relied on prior videos depicting the defendant. Thus, the detective's lay opinion was rationally based on her perception within the meaning of Evidence Code section 800.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to the P&A author, Mary Pat Dooley, at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in

your possession in the Ala. Co. Dist. Atty computer banks.

If you wished to be added to or removed from the P&A mailing list, contact Mishel Jackson;
mishel.jackson@acgov.org