

AUTHENTICATING SOCIAL MEDIA EVIDENCE AT TRIAL: INSTRUCTION FROM *PARKER v. STATE*

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On February 5, 2014, the Supreme Court of the State of Delaware articulated the standard against which trial courts must measure the sufficiency of a proffered authentication of social media evidence.¹ In resolving this matter of first impression in Delaware, the Court evaluated two contrasting approaches employed by courts of other jurisdictions and, ultimately, determined that the more flexible alternative comports with the requirements of the Delaware Rules of Evidence and the roles of judges and juries in Delaware.² As the Supreme Court did not limit the scope of its holding to criminal cases, this decision may also be relied upon to resolve authentication disputes in civil matters.

I. PROFFER OF SOCIAL MEDIA EVIDENCE TO SUPERIOR COURT

In *Parker v. State*, the defendant, Tiffany Parker (hereafter “Defendant” or “Appellant”), was charged with, *inter alia*, Assault Second Degree for punching the victim. At trial, the State sought to introduce Facebook comments, allegedly made by the defendant, regarding details of the physical altercation. The State elicited testimony from the victim that she was “told about a Facebook posting by the Defendant on the Defendant’s Facebook page [which] prompted her to look at [] and subsequently ‘share[]’ this post on her own Facebook page with her Facebook friends.”³ The defendant purportedly commented on this “shared” post by stating that the victim “hit her first.”⁴ Over the defendant’s objection as to authenticity, the Superior Court allowed the State to display a screenshot of the subject Facebook posts to the jury.⁵

Within its written decision resolving the defendant’s objection, the Superior Court acknowledged that Delaware, like many jurisdictions, had not yet developed a standard for the authentication of social networking sites such as Facebook, Twitter and MySpace.⁶ Notwithstanding, the Superior Court ruled that the Facebook post at issue was properly

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1. *Parker v. State*, 85 A.3d 682 (Del. 2014).
2. The Supreme Court adopted a broad definition of “social media” as “forms of electronic communications ... through which users create online communities to share information, ideas, personal messages, and other content ([such] as videos).” *Id.* at 685 (citations omitted). “Often these posts will include relevant evidence for a trial, including party admissions, inculpatory or exculpatory photos, or online communication between users.” *Id.*
3. *State v. Parker*, C. A. No. 1112001354, Mem. Op. at 1 (Del. Super. Oct. 9, 2012) (hereafter “*Parker Trial Op.*”).
4. *Id.* The State sought to introduce these posts, which were allegedly authored after the altercation, to demonstrate Defendant’s role in the incident and discredit Defendant’s self-defense argument. *Parker*, 85 A.3d at 683.
5. *Parker Trial Op.*, at 1. *The screenshot was redacted as to the comments of persons other than Defendant.*
6. *Id.* at 2, 4-5. The Superior Court also reviewed case law from jurisdictions that had developed such a standard, including the Maryland and Texas cases that the Supreme Court would examine on appeal. See *id.* at 3-4 (citing *Griffin v. Maryland*, 19 A.3d 415 (Md. 2011)); *id.* at 4-5 (citing *Tienda v. Texas*, 358 S.W.3d 633 (Tex. Crim. App. 2012)). See also *infra* at 3-9 (discussing Supreme Court’s evaluation of Maryland and Texas approaches).

authenticated based upon its “distinguishing characteristics,”⁷ where the content and context was sufficient circumstantial evidence that the posting was indeed what the State claimed that it was.⁸ The Court supported its ruling with the victim’s testimony as to how she (1) accessed the defendant’s Facebook posting, (2) “shared” the defendant’s posting directly, and (3) was able to view the defendant’s comments to that shared posting.⁹ The Superior Court included within its consideration that the “parties did not dispute that the posting was fabricated,” and, notably, that “[a]ny further inquiry was for the jury to decide.”¹⁰

The defendant appealed the resulting conviction based upon the alleged abuse of discretion of the Superior Court in admitting the Facebook evidence.¹¹

II. COMPETING AUTHENTICATION APPROACHES CONSIDERED BY THE SUPREME COURT

On appeal, each party asked the Supreme Court to recognize the approach to authentication of social media evidence that it advocated as the standard in Delaware. Specifically, the Appellant contended that the approach employed by courts in the State of Maryland should govern and, therefore, the Superior Court erred when it did not apply that standard in admitting the subject Facebook evidence. Conversely, the State contended that the comparatively flexible approach utilized by courts in the State of Texas should control and, therefore, the judgment of the Superior Court should be affirmed.

A. “The Maryland Approach”

The Delaware Supreme Court discussed the rationale employed by the Court of Appeals of Maryland in *Griffin v. Maryland* as an example of “The Maryland Approach” a comparatively higher standard for the authentication of social media evidence.¹²

7. The Superior Court applied the “distinguishing characteristics” rationale, which has been implemented to authenticate a handwritten letter sent from inside prison that included nicknames of the parties and references to the crime (*Parker Trial Op.*, at 5 (citing *Smith v. State*, 902 A.2d 1119, 1125 (Del. 2006)), as well as an e-mail based upon the sender’s purported e-mail address. *Id.* (citing *Paron Capital Mgmt., LLC v. Crombie*, Civ. A. No. 6380-VCP, 2012 WL 214777 (Del. Ch. Jan. 24, 2012)).

8. *Parker Trial Op.*, at 5 (citations omitted). This proposition, the trial court reasoned, was consistent with DELAWARE RULE OF EVIDENCE 901(B)(4). That rule provides that “[a]pppearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances” is an example of an acceptable authentication method. DEL. R. EVID. 901(B)(4) (“*Distinctive Characteristics and the Like*”).

9. *Parker Trial Op.*, at 5 (referencing *People v. Valdez*, 135 Cal. Rptr. 3d 628, 632 (Cal. Ct. App. 2011)).

10. *Id.* (citing *Tienda*, 358 S.W.3d at 646 (finding that the likelihood and weight of any alternative scenario that MySpace postings were “concocted” by someone else was for the jury to assess once a prima facie showing was made that the postings belonged to the purported creator)). See also *infra* at 5-8 (discussing how the Delaware Supreme Court recognized the *Tienda* matter as representative of “The Texas Approach”).

11. *Parker*, 85 A.3d at 682-83.

12. *Id.* at 686 (citing *Griffin v. Maryland*, 19 A.3d 415 (Md. 2011)).

In *Griffin*, the Maryland high court was presented on appeal with, *inter alia*, the issue of whether the “trial court err[ed] in admitting a page printed from a MySpace profile alleged to be that of [Griffin’s] girlfriend.”¹³ At trial, the prosecution sought to introduce Griffin’s girlfriend’s MySpace profile to demonstrate that, prior to trial, she had allegedly threatened another witness called by the prosecution.¹⁴ The prosecution neither asked Griffin’s girlfriend to authenticate the MySpace page as her own, despite having called her to the stand, nor sought to introduce electronic records that definitively showed that Griffin’s girlfriend had authored the post.¹⁵ Rather, the prosecution elected to attempt to authenticate the social media evidence through the testimony of its lead investigator.

Griffin objected to this attempt. Griffin’s counsel was then permitted to *voir dire* the investigator outside of the presence of the jury. This resulted in the trial judge’s decision to permit the investigator to testify in support of authentication of redacted portions of the MySpace profile.¹⁶ Following conviction, Griffin appealed and lost at the intermediate appellate level.¹⁷

The Maryland Court of Appeals, however, held that the prosecution failed to properly authenticate the MySpace post pursuant to Maryland Rule 5-901,¹⁸ that is, the prosecution did not adequately link both the profile and the “snitches get stitches” posting to Griffin’s girlfriend.¹⁹ The Maryland high court also found that the intermediate appellate court “failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the [subject] posting.”²⁰

The court then articulated the basic tenets of the Maryland approach. To properly authenticate social media posts in Maryland, the admitting party should either (1) ask the purported creator if she created the profile and added the post in question, (2) search the internet history and hard drive of the purported creator’s computer to determine whether that computer was used to originate the social networking profile and posting in question, or (3) obtain information directly from the social networking site to establish the identity of the creator and link the posting in question to the person who initiated it.²¹ The *Griffin* court explained that an underpinning of the Maryland approach is the concern that social media content may have been fraudulently created.²²

13. *Griffin*, 19 A.3d at 417.

14. *Id.* at 418. The specific MySpace profile was in the name of “Sistasouljah,” and contained various information describing Griffin’s girlfriend. It also displayed a photograph of an embracing couple and contained a post “Free Boozy!!! Just Remember Snitches Get Stitches!! U Know Who You Are!!” *Id.* (capitalizations altered from original). *See also infra* n.16.

15. *Griffin*, 19 A.3d at 419.

16. The investigator was permitted to testify as to the profile photograph “of a person that looks like [Griffin’s girlfriend]” and Griffin, content that referred to the defendant by his nickname (“Boozy”) and the comment that “snitches get stitches.” While maintaining its objection, defense counsel agreed to a stipulation in lieu of the investigator’s testimony.

17. The Maryland Court of Special Appeals affirmed the trial court, but that decision would be reversed. *Griffin v. Maryland*, 995 A.2d 791 (Md. Ct. Spec. App. 2010), *rev’d*, *Griffin v. Maryland*, 19 A.3d 415 (Md. 2011).

18. The specific subsections of the Maryland rule cited by the Maryland Court of Appeals (MD. RULE 5-901(a), (b)(1) and (4)) are substantially similar to Del. R. Evid. 901(a), (b)(1) and (4).

19. *Griffin*, 19 A.3d at 423.

20. *Id.* (citations omitted).

21. *Id.* at 427-28 (citations omitted).

22. *See, e.g., Griffin*, 19 A.3d at 422 (“The potential for fabricating or tampering with electronically stored information on a social networking site, thus, poses significant challenges from the standpoint of authentication of printouts of the site, as in the present case.”).

B. “The Texas Approach”

The Delaware Supreme Court recognized “The Texas Approach” as an alternative method of authenticating social media evidence at trial. Specifically, the Court recognized the matter of *Tienda v. Texas* as exemplifying this comparatively flexible alternative.²³

In *Tienda*, the Court of Criminal Appeals of Texas addressed the issue of whether sufficient evidence was presented to establish a *prima facie* showing that the social networking webpages proffered by the prosecution were authored by the defendant.²⁴ At trial, the prosecution sought admission into evidence of three MySpace profile pages, which contained postings relevant to the commission of the charged offense,²⁵ as being registered to and maintained by the defendant.²⁶ To accomplish that task, the prosecution called the decedent’s sister to sponsor the MySpace pages and related content as indicative of the defendant’s culpability.²⁷ Over the defendant’s authenticity objection, the trial court admitted into evidence the print-outs of the MySpace profile pages, as well as MySpace “subscriber reports” and accompanying affidavits.²⁸

The intermediate appellate court found sufficient “individualization” in the comments and photos on the MySpace profiles to satisfy Texas Rule of Evidence 901(b)(4),²⁹ then admitted the evidence as a “conditional fact of authentication” to support a “finding that the person depicted supplied the information.”³⁰ Upon higher appellate review, the Texas Criminal Court of Appeals affirmed the rulings of both the intermediate appellate and trial court that the social media evidence was sufficiently authenticated and properly admitted.³¹

23. *Tienda v. Texas*, 358 S.W.3d 633 (Tex. Crim. App. 2012) .

24. *See Tienda*, 358 S.W.3d at 634.

25. The State of Texas prosecuted the defendant, Ronnie Tienda, Jr., for the shooting-related murder of the victim, David Valadez.

26. *Tienda*, 358 S.W.3d at 634-35.

27. The content of the MySpace profile pages included quotes, such as, “You aint BLASTIN You aint Lastin” and “RIP David Valadez”, as well as a link to a song that was played at Valadez’s funeral. *See Tienda*, 358 S.W.3d at 643-46. Additionally, instant messages sent from the subject MySpace accounts “complained about the author’s electronic monitor, which was a condition of [Tienda’s] house arrest while awaiting trial.” *Id.* at 636. *See also id.* at 645.

28. *Tienda*, at 634-35. The subscriber reports are business records that contained information about the MySpace accounts in question. Specifically, these reports indicated that the subject accounts were created with identity information that included: name of “Ron Mr. T”; residence of “[D]allas”; and e-mail accounts including “ronnietiadajr@”. *Id.* at 635. The prosecution also introduced photographs that were “tagged” to the subject accounts that depicted a person who “at least resembled the defendant.” *Id.*

29. TEX. R. EVID. 901(b)(4) is analogous to DEL. R. EVID. 901(b)(4). Both rules provide that presenting indicia of distinctive characteristics is an acceptable method of authentication.

30. Interestingly, the Texas intermediate appellate court premised its decision upon the intermediate appellate decision in *Griffin*, which was subsequently reversed. *See Griffin v. Maryland*, 995 A.2d 791 (Md. Ct. Spec. App. 2010), rev’ d, *Griffin v. Maryland*, 19 A.3d 415 (Md. 2011). *See also supra* n.17.

31. *Tienda*, 358 S.W.3d at 647.

The high court in *Tienda* began its recitation of the applicable law with the proposition that “whether [] to admit evidence at trial is a preliminary question to be decided by the court.”³² It then explained that authentication, as a condition precedent to admissibility, required the proponent to make a threshold showing that would be sufficient to support a finding that the matter in question is what its proponent claims.³³ Whether that threshold has been met,³⁴ the court explained, is one of the preliminary questions of admissibility contemplated by Texas Rule of Evidence 104(a) and properly decided by the judge in performance of an evidentiary gatekeeping function.³⁵

After discussing the role of the judge in determining the authenticity of proffered social media evidence, the court underscored the flexibility of the Texas approach. Specifically, the court reasoned that social media evidence, like other forms of evidence, may be authenticated in a number of different ways, “including by direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence, or by circumstantial evidence.”³⁶ “As with the authentication of any kind of proffered evidence, the best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case.”³⁷ The court continued to explain that, despite the rapid pace at which electronic communications technology develops, “the rules of evidence already in place for determining authenticity are at least generally adequate to the task,”³⁸ and that “there is no single approach to authentication that will work in all instances.”³⁹

The court then compared its approach to the Maryland approach. After recognizing that information security on social media is a legitimate concern, the Texas court reasoned that such a concern “is an alternate scenario whose likelihood and weight the jury was entitled to assess once the [prosecution] had produced a prima facie showing that it was the appellant, not some unidentified conspirators or fraud artists, who created and maintained these MySpace pages.”⁴⁰ Ultimately, the court concluded that affirmance of the lower courts was appropriate “[b]ecause there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be – MySpace pages the contents of which the appellant was responsible [for]...”⁴¹

32. *Id.* at 637-38 (citing TEX. R. EVID. 104(a)). The Texas evidentiary rule is analogous to DEL. R. EVID. 104(a).

33. *Id.* at 638 (citing TEX. R. EVID. 901(a)). The Texas evidentiary rule is analogous to DEL. R. EVID. 901(a).

34. In other words, “whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence proffered is authentic.” *Id.* at 638 (citations omitted).

35. *Id.*

36. *Id.* (citing TEX. R. EVID. 901(b)(1), (3), (4)). The Texas rules of evidence are analogous to DEL. R. EVID. 901(b)(1), (3), (4).

37. *Id.* at 639 (citations omitted).

38. *Id.* at 638-39 (internal quotations and citations omitted).

39. *Id.* at 639 (citations omitted).

40. *Id.* at 646.

41. *Id.* at 647.

III. STANDARD FOR AUTHENTICATION OF SOCIAL MEDIA EVIDENCE IN DELAWARE

Upon evaluating these alternatives, the Delaware Supreme Court agreed with the Superior Court and concluded that the flexible rules of the Texas approach better comport with the Delaware Rules of Evidence and roles of judge and jury.⁴² In rejecting the Maryland approach, the Court acknowledged the concern that social media content could be falsified,⁴³ however, it concluded that the “existing Rules of Evidence provide an appropriate framework for determining admissibility.”⁴⁴

The Supreme Court highlighted the feature of flexibility in the Texas rationale because the best or most appropriate method of authenticating electronic evidence is often case-dependent.⁴⁵ In further validating this approach, the Court recognized that “[t]he premise of the Texas approach is that the jury – and not the trial judge – ultimately resolves any factual issue on the authentication of social media evidence.”⁴⁶

The Supreme Court clarified that in Delaware “social media evidence should be subject to the same authentication requirements under the Delaware Rules of Evidence Rule 901(b) as any other evidence.”⁴⁷ “The requirement of authentication ... as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁴⁸ The Court instructed that the methods of authenticating social media evidence are flexible:

[w]here a proponent seeks to introduce social media evidence, he or she may use any form of verification available under Rule 901 – including witness testimony, corroborative circumstances, distinctive characteristics, or descriptions and explanations of the technical process or system that generated the evidence in question – to authenticate a social media post.⁴⁹

42. *Parker*, 85 A.3d at 688 (acknowledging that the Superior Court “specifically rejected the Maryland approach and adopted the Texas rule.”).

43. The Delaware Supreme Court noted that the Maryland approach is comparatively less flexible, because “social media evidence is only authenticated and admissible where the proponent can convince the trial judge that the social media post was not falsified or created by another user.” *Parker*, 85 A.3d at 683.

44. *Id.* at 687.

45. *Id.* (citing *Tienda*, 358 S.W.3d at 639).

46. *Id.* See also *id.* at 684 (citing DEL. R. EVID. 104(a) (“Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of paragraph (b) of this rule. In making its determination it is not bound by the rules of evidence except those with respect to privileges.”)).

47. *Id.* at 687.

48. *Id.* (citing DEL. R. EVID. 901(a)).

49. *Id.* at 687.

Thus, the Court made clear that (a) the methods for authenticating social media evidence are flexible, pursuant to the existing evidentiary rules, and (b) the trial judge is the gatekeeper, who “may admit the social media post when there is evidence sufficient to support a finding by a reasonable juror that the proffered evidence is what its proponent claims it to be.”⁵⁰ Accordingly, the Supreme Court affirmed the judgment of the Superior Court.⁵¹

50. *Id.* at 688 (internal quotations and citations omitted).

51. The Supreme Court provided additional guidance in a footnote, stating that although “a photograph and a profile name alone may not always be sufficient evidence to satisfy the requirements of Rule 901, they are certainly factors that the trial court may consider.” *Id.* at 688, n.43.

