

Review of Recent Juvenile Cases (2012)

by

The Honorable Pat Garza

Associate Judge

386th District Court

San Antonio, Texas

MySpace postings admitted against defendant.[Tienda v. State](12-2-1)

On February 8, 2012, the Texas Criminal Appeals held that there were enough circumstantial indicia of authenticity regarding MySpace postings to support a prima facie case that would justify admitting the evidence and submitting the ultimate question of authenticity to the jury.

¶ 12-2-1. **Tienda v. State**, ---S.W.3d---, 2012 WL 385381 (Tex.Crim.App., 2/8/12).

Facts: David Valadez and his two passengers were the targets of a multiple car shootout while driving southbound in Dallas on I-35E towards I-30. The shooting was apparently the product of some tension displayed between two rival groups at a nightclub earlier that evening, where members of the appellant's group were “throwing” gang signs and “talking noise” to Valadez and his friends. Shortly after Valadez and his passengers left one nightclub to head to another “after hours” club, Valadez's car unexpectedly came under gunfire from a caravan of three or four cars also traveling southbound on I-35E towards I-30. The appellant was a passenger in one of the cars in the caravan.

Testimony at trial as to the appellant's specific involvement in the shooting varied widely. The witnesses agreed that the appellant was at least present during the shooting; however, there was inconsistent testimony as to who fired the first gunshots, whether the appellant was seen merely holding a gun or actually firing a weapon, which car the appellant was riding in, and from which car the fatal shots were fired. During the exchange of fire, Valadez was shot twice, causing him to lose control and crash his vehicle into the highway's center concrete divider. Valadez died as a result of the gunshot wounds shortly after being taken to a nearby hospital. Although cartridge casings consistent with at least two weapons were found at the scene of the shooting, the bullet recovered from the deceased's body could not be matched to a particular weapon, as no firearms were ever recovered.

During preparation of the State's case against the appellant, the deceased's sister, Priscilla Palomo, provided the State with information regarding three MySpace profile pages that she believed the appellant was responsible for registering and maintaining.^{FN3} After subpoenaing MySpace.com for the general “Subscriber Report” associated with each profile account, the State printed out images of each profile page directly from the MySpace.com website, and then marked the profile pages and related content as State's exhibits for trial. The State used Palomo as the sponsoring witness for these MySpace accounts at guilt/innocence, and, over the appellant's run-

ning objection as to the authenticity of the profile pages, the State was permitted to admit into evidence the names and account information associated with the profiles, photos posted on the profiles, comments and instant messages linked to the accounts, and two music links posted to the profile pages.

The State had Palomo explain how she came across the profiles and brought them to the attention of the prosecutor. The trial judge sustained the appellant's first authentication objection when the prosecutor began asking Palomo questions about the specific content of the MySpace profiles prior to introducing any exhibits into evidence. After a brief sidebar conference at the bench with defense counsel off the record, the prosecutor marked the relevant MySpace profile printouts as numbered State's exhibits and had Palomo identify the printouts as the profiles she had found on MySpace. The prosecutor also offered into evidence the subscriber reports and accompanying affidavits subpoenaed from MySpace. The judge then admitted the printouts of the profiles, over the appellant's objection that the State still had not laid the proper predicate to prove that the profiles were in fact what the State purported them to be, namely, declarations that the appellant himself had posted on his personal MySpace pages.

According to the subscriber reports, two of the MySpace accounts were created by a "Ron Mr. T," and the third by "Smiley Face," which is the appellant's widely-known nickname. The account holder purported to live in "D TOWN," or "dallas," and registered the accounts with a "ron-nietendajr@" or "smileys_shit @" email address. The State introduced multiple photos "tagged" to these accounts because the person who appeared in the pictures at least resembled the appellant. The person is shown displaying gang-affiliated tattoos and making gang-related gestures with his hands.

The main profile pages of the MySpace accounts contained quotes boasting "You aint BLASTIN You aint Lastin" and "I live to stay fresh!! I kill to stay rich!!" Under the heading "RIP David Valadez" was a link to a song that was played by Valadez's cousin at Valadez's funeral. Another music link posted to one of the profiles was a song titled "I Still Kill." The instant messages exchanged between the account holder and other unidentified MySpace users included specific references to other passengers present during the shooting, circumstances surrounding the shooting, and details about the State's investigation following the shooting. The author of the messages made specific threats to those who had been "snitchin" and "dont run shit but they mouth," assigning blame to others for being the "only reason im on lock down and have this shit on my back." The author also generally boasted to another user that "WUT GOES AROUND COMES AROUND" and "U KNO HOW WE DO, WE DON'T CHASE EM WE REPALCE EM." The author accused: "EVERYONE WUZ BUSTIN AND THEY ONLY TOLD ON ME." Several of the instant messages also complained about the author's electronic monitor, which was a condition of the appellant's house arrest while awaiting trial.

The State elicited additional testimony concerning the MySpace pages through a Dallas Police Department gang unit officer, Detective Daniel Torres, during guilt/innocence and through Valadez's mother during punishment. The officer testified regarding the common use of social

networking media, such as MySpace, by gangs to stay in touch with members and to “promote” their gangs by bragging about participation in gang-related activities. At punishment, Valadez's mother was permitted to testify about how “devastated” she and her family were when they found the appellant's music link on his profile page with the title “RIP David Valadez,” which in her eyes was the appellant's way of bragging about killing her son through the song that was played at his memorial. The appellant repeatedly objected, during both stages of trial, on the basis of improper authentication, hearsay, and relevance.

Through cross examination of Palomo, defense counsel elicited testimony regarding the ease with which a person could create a MySpace page in someone else's name and then send messages, purportedly written by the person reflected in the profile picture, without their approval. Defense counsel emphasized that any case-specific facts that were referenced in the MySpace messages associated with these accounts were not facts solely within the defendant's knowledge, but were known to the deceased's family, friends, and practically any other third party interested in the case. Although the gang officer, Torres, testified to having prior experience using MySpace to investigate gang-related activity, when asked on cross examination whether he had any particular knowledge regarding how a MySpace account is created, he stated: “None, whatsoever.” The officer acknowledged that anyone could create a MySpace page, but he had never created one himself.

During the appellant's guilt/innocence closing argument, counsel again emphasized the ease with which a MySpace account could be created or accessed without someone's approval and highlighted the State's failure to prove that the accounts were created by the appellant through any technological or expert evidence, for example, by tracing the IP address listed in the subscriber report to the appellant's personal computer. In sum, defense counsel argued that the MySpace evidence was never authenticated and was not credible evidence that the jury should consider in supporting a guilty verdict. The State's closing arguments during both phases of trial included multiple MySpace references and specific quotes from the profile pages. The jury found the appellant guilty and assessed punishment at thirty-five years in prison.

On appeal, the appellant argued that the trial court erred in overruling his objections to the MySpace evidence. The court of appeals found sufficient “individualization” in the comments and photos on the MySpace pages to satisfy the factors laid out in Texas Rule of Evidence 901(b)(4) and admit the evidence as a “conditional fact of authentication” to support a “finding that the person depicted supplied the information.” In so ruling, the court of appeals relied for authority solely upon the opinion of an intermediate appellate court in Maryland that has since been reversed, as the appellant emphasizes now in his brief on the merits before this Court, by that state's highest appellate court. We granted the appellant's petition for discretionary review to determine whether the court of appeals erred in holding that the trial court did not abuse its discretion in finding that the MySpace profiles were properly authenticated.

Held: Affirmed

Opinion: In this case, the internal content of the MySpace postings—photographs, comments, and music—was sufficient circumstantial evidence to establish a prima facie case such that a reasonable juror could have found that they were created and maintained by the appellant. That circumstantial evidence included:

- The first MySpace business record I.D. is # 120841341. The official MySpace Subscriber Report lists the User as “First Name: ron; Last Name: mr.t” with an email address of “smileys—shit@.” [Witnesses testified that the appellant's nick-name is “Smiley.”] The city is listed as “D TOWN.”
- The Subscriber Report for MySpace User # 300574151 lists the owner as “First Name: ron; Last name: Mr. T” with an email address of “ronnietendajr @.” As with the first MySpace listing, the city for this listing is “D*Town.” The zip code is 75212.
- The Subscriber Report for MySpace User # 435499766 lists the owner as “First Name: SMILEY; Last Name: FACE” with an email address of ronnietendajr@. The city for this listing is “dallas” and the zip code is 75212.
- The first MySpace page of User # 120841341 offered into evidence contains a photograph of the appellant under the title “SMILEY FACE.” The photograph shows the appellant pulling a shirt up over the bottom half of his face. The tattoos on his arms, however, are clearly visible. There is a date stamp on the photograph of “03/01/2007 17:09.”
- To the right side of the appellant's photograph on that MySpace page is the following:

“You aint BLASTIN You aint Lastin”

Male
21 years old
D Town, Texas
United States
Last Login: 9/4/2007 ^{FN39}
- Below the appellant's photograph and the caption on that MySpace page is the legend “RIP David Valadez” and a music button which, according to Priscilla Paloma, played the song that was played at David Valadez's funeral.
- On the MySpace page for User # 300574151, there is a photograph of the appellant, bare-chested, with his gang tattoos—including “Tango Blast” written across his chest.
- The MySpace page is titled “MR. SMILEY FACE” even though the Subscriber Report list the User's name as “ron Mr. T” and his email address as “ronnietendajr@.”

- Beside the appellant's photograph on that MySpace page is the following:

“I LOVE DRAMA SO
MUCH CUZ MY LIFE
IS SO ROUGH!!!
ANYTHING ELSE
WOULDN'T SEEM
NORMAL!!!

Male

22 years old

D*Town, Texas

United States

Last Login: 5/19/2008

- Below the appellant's photograph and the caption on that MySpace page is the music button for the “50 Cent I Still Kill by dj Bali” sound clip.

- Below that caption is the following:

MR. SMILEY FACE'S INTERESTS

General AINT PROUD OF MY PAST BUT IM LIVIN N DA PRESENT N ALWAYS PLANIN
4 DA FUTURE!!! NS XV111 ST

- Also on the MySpace Profile page for User # 300574151 is a later photograph of a bare-chested appellant, again showing his tattoo “Tango Blast.”

- That photograph carries the heading: Mr. ONE OF A KIND.

- Beside the appellant's photograph on that MySpace page is the following:

“DIS IS WHO I AM!!!
DON'T LIKE IT FUCK
YOU!!!”

Male

22 years old

D*Town, Texas

United States

Last Login: 9/5/2008

- On the right hand side of the page is the following statement: Mr.ONE OF A KIND I LIVE TO STAY FRESH!! I KILL TO STAY RICH!! N OTHER WORDS IMA GO TO WAR BOUT MY SHIT!!

- The MySpace User # 300574151 message page contains numerous messages to other MySpace users. Only the 53 messages sent between 2:00 p.m. and 9:44 p.m. on September 21, 2008, were introduced into evidence. The messages that indicate that it is the appellant himself who is the creator, owner, and user of this MySpace account include the following:

- At 2:09 p.m. the User sent a message to User # 73576314: “SHIT CAN U BELIEVE I ALREADY BEEN ON DIS MONITOR A YEAR NOW AND SHIT AINT NO TELLING WHEN A NIGGA GONE GET OFF DIS HOE”

- At 2:17 p.m. the User sent a message to the same User: “SHIT IT AINT ME IT THE STATE SETTIN IT OFF AND SINCE I HAVE SNITCHES ON ME THEY TRYNA GET A NIGGA LOCKED UP”

- Also at 2:17 p.m., the User sent a message to User # 103410565: “U KNO ME AND U MY NIGGA SO U WANT TO FUCK HIM UP U KNO HOW WE DO, WE DONT CHASE EM WE REPALCE EM”

- At 2:21 p.m. the User sent another message to User # 103410565: “IS IT DAT FRIENDLY ASS NIGGA IN ALL DEM PIX AND SHIT JUS PLAY IT COO WUT GOES AROUND COMES AROUND YA FEEL ME”

- At 2:22 p.m. the User sent a message to User # 73576314: “MAN JESSE BOY HECTOR SNITCHIN ON ME I AINT TRIPPIN ON BEEF BUT TELLIN A WHOLE NOTHER BALL GAME DAT I DONT PLAY”

- At 2:27 p.m. the User sent a message to User # 12231226: “SHIT ON STILL ON A MONITOR SO I AINT BEEN NO WHERE IN A BOUT A YEAR NOW AND MY B DAY WAS O THA12TH U FO GOT BOUT ME”

- At 2:35 p.m. the User sent a message to User # 73576314: “YEA Y U THINK IM ON DIS MONITOR MY NIGGA SHIT HATIN ASS NIGGAS WNNA TALK ALL DAT GANGSTA SHIT AND WEN THE GOIN GET TUFF DEM NIGGAS DON'T RUN SHIT BUT THEY MOUTH”

- At 2:42 p.m. the User sent a message to the same User: “YEA SHIT EVERYONE WUZ BUSTIN AND THEY ONLY TOLD ON ME”

- At 2:50 p.m. the User sent another message to the same User: “YEA SHIT U KNO I KEEP GANGST EVEN AFTER HECTOR SHOT AT NEW AT RUMORS WE STILL DIDNT TELL AND I KNO JESSE TOLD HIM WE WAS THERE CUZ WE SAW THEM AT THA CLUB BUT ITS COO IF I GET OFF MAN@!!!!”

This combination of facts—(1) the numerous photographs of the appellant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring; (2) the reference to David Valadez's death and the music from his funeral; (3) the references to the appellant's "Tango Blast" gang; and (4) the messages referring to (a) a shooting at "Rumors" with "Nu–Nu," (b) Hector as a "snitch," and (c) the user having been on a monitor for a year (coupled with the photograph of the appellant lounging in a chair displaying an ankle monitor) sent from the MySpace pages of "ron Mr. T" or "MR. SMILEY FACE" whose email address is "ronnietendajr@"—is sufficient to support a finding by a rational jury that the MySpace pages that the State offered into evidence were created by the appellant. This is ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them.

It is, of course, within the realm of possibility that the appellant was the victim of some elaborate and ongoing conspiracy. Conceivably some unknown malefactors somehow stole the appellant's numerous self-portrait photographs, concocted boastful messages about David Valadez's murder and the circumstances of that shooting, was aware of the music played at Valadez's funeral, knew when the appellant was released on pretrial bond with electronic monitoring and referred to that year-long event along with stealing the photograph of the grinning appellant lounging in his chair while wearing his ankle monitor. But that is an alternate scenario whose likelihood and weight the jury was entitled to assess once the State 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.

The court of appeals in this case relied upon the opinion of an intermediate court of appeals in Maryland in a case presenting similar facts. But that intermediate appellate court's opinion has since been reversed on discretionary review. In *Griffin v. State*, involving a prosecution for murder and assault, the State proffered a printout of portions of a MySpace profile purporting to be that of Griffin's girlfriend. Although the girlfriend testified at trial, the State did not attempt to authenticate the MySpace profile as genuinely hers through her testimony. Instead, the lead investigator in the case testified that the MySpace profile identified itself as being that of "Sistasouljah," having the same date of birth as the girlfriend. Also posted on the profile was a photographic image of the defendant with his girlfriend. The State argued that the date of birth and the photograph provided sufficient indicia of authentication to justify admission of other postings on the MySpace profile that amounted to veiled threats against the State's principal witness against the defendant. The Maryland Court of Appeals disagreed. "Anyone can create a MySpace profile at no cost," the Court observed, and "anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password[.]" Relying for "assistance" in its analysis upon *Lorraine*, the Maryland Court of Appeals concluded:

The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to our conclusion that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator

and her visage in a photograph on the site in order to reflect that [the defendant's girlfriend] was its creator and the author of [the threatening language posted thereon].

Accordingly, the Maryland Court of Appeals held that the trial court had abused its discretion to find that the State had laid an adequate prima facie foundation for admission of the MySpace profile postings.

Along the way, the Maryland Court of Appeals recognized that such postings may readily be authenticated, explicitly identifying three non-exclusive methods. First, the proponent could present the testimony of a witness with knowledge; or, in other words, “ask the purported creator if she indeed created the profile and also if she added the posting in question.” That may not be possible where, as here, the State offers the evidence to be authenticated and the purported author is the defendant. Second, the proponent could offer the results of an examination of the internet history or hard drive of the person who is claimed to have created the profile in question to determine whether that person's personal computer was used to originate the evidence at issue. Or, third, the proponent could produce information that would link the profile to the alleged person from the appropriate employee of the social networking website corporation. The State of Maryland failed to take advantage of any of these methods in *Griffin*. And it is true that the State of Texas has likewise failed to utilize any of them in the appellant's case. Nevertheless, as we have explained, there are far more circumstantial indicia of authenticity in this case than in *Griffin*—enough, we think, to support a prima facie case that would justify admitting the evidence and submitting the ultimate question of authenticity to the jury. We hold that the court of appeals did not err to conclude that it was within the trial court's discretion to admit the MySpace postings, notwithstanding that the persuasive authority it relied upon for that proposition has since been overruled.

Conclusion: Because 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—we affirm the trial judge and the court of appeals which had both concluded the same.