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Tale of the Tape: Recorded Interrogations Level the Playing Field, Despite Initial Fears

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By Noah Schaffer

"I was wrong," admits Hampden County District Attorney William M. Bennett of his initial reaction to the Supreme Judicial Court's 2004 decision in *Commonwealth v. DiGiambattista*.

The ruling, largely seen as a boon to the defense bar, found that confessions to police that are not tape-recorded should be viewed with "great caution" by jurors.

Like many other prosecutors, Bennett says that when *DiGiambattista* came down, he was opposed to the idea of recording confessions.

"I felt that to record all the statements would result in a number of defendants refusing to give statements," he explains. "They might be willing to speak to the police, but they'd be hesitant and reluctant to be recorded. I was wrong."

Two-and-one-half years later, practitioners say that defense lawyers are not the only ones to benefit from *DiGiambattista* and that the ruling actually has leveled the playing field.

In fact, Bennett and several other DAs say the taped confessions have proven so beneficial for the prosecution that they've spent tens of thousands of dollars equipping police departments with recording equipment.

And while defense lawyers maintain that *DiGiambattista* can be used to aid their clients' cases in many ways (see sidebar, "On the record: what to look for," below), the decision's legacy may be more about the fairness it has brought to disputes involving what transpired during police interrogations.

"It has made life easier for all concerned," says John A. Baccari of Wakefield, the defense lawyer who won the *DiGiambattista* case before the SJC.

Recording Recommended, Not Required

In *DiGiambattista*, the SJC found that a defendant who confessed to burning down a house was entitled to a jury instruction that his unrecorded confession might not have been voluntary in light of "trickery" used to obtain it.

But what really caught the attention of the criminal-law bar was a section of the decision that announced a new rule: Defendants could obtain jury instructions stating that confessions that are not tape-recorded should be viewed with "great caution" by jurors.

The late Justice Martha B. Sosman, who wrote the opinion, stated that "the lack of a recording has resulted in the expenditure of significant judicial resources (by three courts) ... in an attempt to reconstruct what transpired during several hours of interrogation."

Defense attorneys immediately hailed the decision, hoping that, in its aftermath, juries would cast doubt upon claims of confessions made by police departments that did not make recordings. Prosecutors fretted that juries would discount otherwise credible police testimony, and that recordings of so-called "partial confessions"—where a defendant admits to participating in the events of a crime but not the actual offense being tried—would confuse jurors.

Even one year after the decision, *DiGiambattista* was still being hailed by the defense bar as a "powerful weapon" (see "Defense lawyers reap benefits of ruling on taped confessions," Sept. 5, 2005).

"We were worried in the beginning that [suspects] would shut up and not confess if they were being recorded," recalls John M. "Jack" Collins, general counsel for the Massachusetts Chiefs of Police Association.

Although it has helped some defendants, the results have not been as one-sided as prosecutors initially feared.

The End of 'Bogus' Claims

Berkshire County District Attorney David F. Capeless says police departments that were reluctant at first are now pleased that claims of improperly obtained confessions can be proven by turning on a tape. He says police "have long been annoyed" by claims of misconduct during the interview process.

"Having the recorded statement has proved very effective at trial," notes Bennett. "It eliminates the suggestions that the police aren't telling the truth, that [the defendant] never said it, or that there are circumstances under which the statement was given."

Plus, he says, "It has made a big difference in our ability to get a number of convictions, because it gives a lot of credibility to the prosecution of the case, and it is in the defendant's own words."

According to Collins, of the police chiefs association, "Before, there were a lot of bogus claims. Now, when someone claims that they were surrounded by four officers standing over them and that the door was bolted, you can look at the video and see that they were being questioned by one person sitting behind a desk."

Several district attorneys tell *Lawyers Weekly* that to encourage and streamline the recording of confessions, they have picked up the tab for the equipment that sits in police departments.

Capeless reports that his office spent \$75,000 from forfeited funds seized from a major drug-ring bust to outfit every full-time police department in his county with audio/visual recording equipment.

"We put full installations in 23 police departments, the sheriff's office, the two State Police barracks, the Massachusetts College of Liberal Arts [campus] police and our offices," says Capeless, who notes each installation cost \$2,200.

"It allowed us to fully comply with *DiGiambattista*, but in addition to the installations, we also gave every department training in the procedures to be used in doing the recording," the Berkshire DA notes. "We trained them in how to maintain the original DVD discs for themselves while sending copies to the defense counsels."

While Capeless, Bennett and Essex County District Attorney Jonathan W. Blodgett say they've offered assistance to police departments looking to all statements, attorneys in other jurisdictions say they've found that not all departments tape equally.

"It really depends upon the department," says Boston defense lawyer Timothy R. Flaherty. "I've found that circumstances like the severity of the crime, the professionalism of the department and the nature of the police investigation guide whether the statement will be recorded, more than the holding in *DiGiambattista*."

The Boston Police Department's homicide division, for instance, seems to record statements with more regularity than a local police department investigating a series of breaking and enterings would, according to Flaherty.

"I don't know if the instruction of *DiGiambattista* is really widespread knowledge [across] police departments, beyond a small handful of seasoned investigators who handle major felonies and understand the importance of *DiGiambattista*," he says. "For the rest, it is haphazard. I don't think there are more recordings statewide."

Defense attorney Brian J. Buckley of Worcester says he finds that when police question an individual today, they generally record the proceeding. "How they record it is probably a

function of the town's or city's finances."

Baccari, the lawyer who handled the *DiGiambattista* case, remarks that while some of his colleagues *have* seen an uptick in recorded confessions, "thankfully, [my clients] have been keeping their mouths shut."

Murder Confession Tossed

For those who have not kept quiet, recorded confessions are still proving helpful to some defendants.

Buckley says that, without *DiGiambattista*, it is less likely that his client, Shamar Q. White, would have had his alleged confession to murder suppressed in a case that is heading to trial this month.

Earlier in the case, Judge Peter W. Agnes Jr. said a videotape of the statement showed that Worcester police detectives had failed to honor White's right to an attorney and to remain silent, and that prosecutors had failed to prove that the confession was "the product of a free and voluntary act, and not the result of coercion."

In another case, Buckley recalls, a client had been offered a deal by police in which he could avoid charges if he answered their questions.

"Very grudgingly, the defendant finally supplied some information on his own terms," Buckley says, "and he provided the information they wanted. Then [the police] turned around and brought charges, despite their promise."

He says that when he moved to dismiss the case, a District Court judge asked to see the tape of the interview.

"They brought in a computer, and the judge watched the [recording]. It went on for 40 minutes, and he ruled from the bench to dismiss the case," remembers Buckley.

In a third case, Buckley says an audio recording of a confession proved an "absence of will" on the part of an anxiety-attack-prone defendant being questioned. Buckley initially filed a motion to suppress but then was offered a "very good plea," which his client accepted.

Before *DiGiambattista*, "you were left with your client's version versus the police's version," says Buckley. "So how does a judge decide what is an accurate record of what happened from beginning to end? In a homicide investigation, where police want to get to the bottom of a case and the defendant knows there are consequences to what they do or don't say, there are some high-tension moments. Whose memory accurately reflects it?"

While tape-recordings may have served his clients well, Buckley admits that, for other defense attorneys, "there are cases for which the audio/visual record seals the doomed fate of their client and ends the need for a lengthy motion-to-suppress process."

Blodgett goes as far as to say that, since *DiGiambattista*, he is not aware of a single successful motion to suppress that has resulted from an increase in the tapings of confessions in Essex County.

"It has shown judges and juries that the police are good at what they do," he says. "It has improved the quality of justice."

Capeless says he, too, has seen a decrease in motions to suppress being allowed.

Ultimately, says Buckley, taping "helps everyone get to the bottom of important issues in cases. When police have done their job and observed the Constitution, it's a boon to the prosecution. And when they haven't, it levels the playing field for the defendant."

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On the Record: What to Look For

Even prosecutors admit that, since the Supreme Judicial Court's 2004 ruling in *Commonwealth v. DiGiambattista*, there's more to recording confessions than just getting statements on tape.

"We explained to the police departments that this is to record the interview process, not just the confession," says Berkshire County District Attorney David F. Capeless.

In fact, he says, when recorded evidence results in a motion or verdict for the defense, his department often uses the video as an opportunity "for retraining."

"When we installed the equipment, we did training not just about how to use it, but also the procedures and protocols — the warnings that need to be given, the agreements to be recorded, the releases, and what to do with the finished product," Capeless says.

The reason training is needed is because defense lawyers are picking apart nearly every aspect of the taping process in order to find something to help their clients, typically in a motion to suppress.

"There's always the question of what was signed before the recording was made," says Anne C. Goldbach, an attorney in the Boston office of the Committee for Public Counsel Services and the president of the Massachusetts Association of Criminal Defense Lawyers. "Were our clients asked to sign any sort of waiver or form before making a recorded statement?"

Goldbach says issues may arise regarding "what was said or not said before the tape was turned on, and whether the tape was turned on or off during the recording. If there's some question about when the tape was started or stopped or whether something [is missing], one could always consult a forensics expert to analyze the tape."

Defense attorney Timothy R. Flaherty of Boston says that taping statements helps motions to suppress "because you'll have some real evidence about whether the police complied with Miranda warnings" and whether the defendant truly volunteered the information.

Goldbach adds: "There may be issues of limited understanding because of intoxication, mental health or disability issues."

Videotaped confessions can also show exactly what happened in the often-murky area of whether a defendant requested a lawyer before confessing.

"There may be situations where a client makes some mention of perhaps talking to a lawyer, but does not say the direct words: 'Stop. I want to speak to a lawyer,'" says Goldbach. "So there may be an issue of whether or not the person had the right to confer with counsel, whether the questioning should have stopped when the client made mention of consulting a lawyer."

While some defense attorneys examine tapes looking for evidence to support a motion to suppress, Flaherty says in one of his cases he *wants* his client's statement to be played at trial.

"I have one right now where it was a college student making a statement, and the student very much understood his rights," says Flaherty. "In the interview, you can see he was verbally accosted by the cop ... they mocked and attacked him and threatened him with [being expelled from] the college if he didn't change his story. But he stuck to his original version. That's overwhelming evidence in support of the defendant; I'm not going to move to suppress that tape."

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