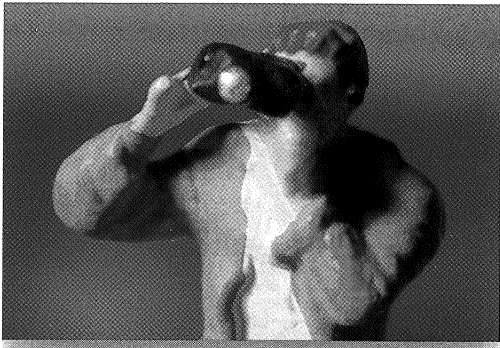


Video Alibi

Video surveillance has also been used to attempt to prove that the accused did not commit the crime **By Elliott Goldstein**

The security industry focuses a lot of its attention on video surveillance by the police and crown prosecutors, and we do it regularly here in this column. But as security professionals, you should also know about those instances when surveillance tapes have played an important role in assisting the defence.



A REAL STEAL

In the 2003 case of *Hill v. Hamilton-Wentworth Regional Police Services Board et al.*,¹ the plaintiff sued for damages for malicious prosecution, negligence and breach of his Charter rights. The facts of the case are, to say the least, unusual.

Hill was charged with a number of bank robberies in Hamilton, Ontario. He was convicted of one count of robbery and sentenced to three years in prison. Hill appealed and was ultimately acquitted, but not before spending 20 months in prison. He then sued the police and their employer, the Police Services Board.

At one of the bank robberies, on January 5, 1995, a surveillance photograph was obtained that showed the robber in profile. However, it was not sufficiently clear to permit a viewing of facial hair or moustache. This was relevant because the police believed that the bank robber had grown a goatee over the course of the robberies.

When arrested, Hill was photographed and his arrest photo showed a moderate goatee. Strangely, the robberies continued after Hill was arrested. This eventually led the police to another man.

A police officer viewed the surveillance photograph and claimed he recognized the perpetrator as someone he had arrested in the past. The officer believed that robbery video picture was of Hill. As it turned out, the man in the video was not Hill. The true perpetrator was Frank Sotomayer, a man who resembled Hill. Sotomayer was also charged and eventually convicted of some of the robberies.

The Ontario Court of Appeal overturned the trial judgment and ordered a new trial for Hill. "At the second trial, the surveillance video of the robbery was enhanced and an expert testified that the culprit did not have a goatee. ... Hill was acquitted."

Unfortunately for Hill, his lawsuit against the police was dismissed by the Ontario Superior Court of Justice, which held that two of the elements of the claim of malicious prosecution were not established in the case. One, Hill did not convince the court that the criminal proceedings were instituted without reasonable and probable grounds. Two, the police did not act with malice.

MORE THAN MURDER

In the 2003 case of *R. v. Ranger*,² the Ontario Court of Appeal heard the appeal of Ranger's criminal conviction for murder of his former girlfriend and her sister ("the Ottey sisters"). The appeal court overturned the conviction and ordered a new trial. One of the successful grounds for appeal was the trial judge's instructions to the jury relating to the Crown's theory of "false alibi," based on surveillance videotape evidence.

When reading the facts that follow, it's important to remember that the accused was trying to prove his innocence by using the surveillance videotape recorded at a shopping mall. That is, the accused was using his appearance on the surveillance videotape to establish an alibi.

On appeal, the accused argued that during the trial the Crown counsel greatly undermined the significance of this alibi evidence by referring to it in his jury submissions as evidence of a "false" alibi. The accused also argued that the trial judge erred in his charge to the jury by failing to correct the damage resulting from the Crown's speculative theory of false alibi.

The learned judge of the Court of Appeal commented on these arguments as follows:

"The appellant (Ranger) relies on the fact that he and a friend Ricardo Bernardo, were captured on a security video at the Scarborough Town Centre (Toronto) at 8:08 on the morning of the homicides as compelling evidence of innocence. The appellant's position at trial was that the Scarborough Town Centre evidence established that there was an exceptionally small, if not non-existent, window of opportunity for him to have killed or helped to kill Marsha and Tamara Ottey. Taking the evidence at its highest, the appellant would have had between 16 and 26 minutes to enter the Ottey house, kill each sister by stabbing them numerous times, find the personal items of Marsha that were taken, ransack the house, clean himself up from the stabbings, drive to the Scarborough Town Centre, park his car, and make his way to the food court, where he was captured on a security videotape. ... During these submissions, the Crown argued that the appellant had deliberately created a false alibi by going to the

Scarborough Town Centre minutes after the murders precisely for the sole purpose of being captured on a security video, ... The trial judge referred to the Crown's false alibi theory on two occasions during his charge to the jury."

The Court of Appeal found the accused's arguments compelling and agreed that they constituted grounds for ordering a new trial. The court made the following remarks on video alibis:

"An attempt by an accused to create a false alibi can constitute an affirmative

counsel to suggest in his closing submissions that this alleged attempt to create a false alibi could be considered by the jury as evidence against the accused. This suggestion was highly prejudicial because of the importance of the Scarborough Town Centre evidence to the defence. This evidence provided a basis on which the jury could conclude that the appellant did not have a reasonable opportunity to kill the Ottey sisters as contended. Hence, in this context, I agree with the appellant's submission that the exculpatory value of the

presented that supports a finding of fabrication (that is, the accused deliberately sought to get himself recorded on the surveillance video to create a false alibi).

In the *Ranger* case, there was no such evidence. The suggestions of the Crown counsel were prejudicial to the accused and the trial judge's instructions to the jury made matters worse, hence the acquittal and the ordering of a new trial.

Surveillance videotapes bring about many convictions. But they can be, and have been, used by the defence to bring about acquittals and win appeals. ★

Before you suggest a "surveillance video" alibi is false, there must be evidence presented that supports a finding of fabrication

piece of circumstantial evidence against him or her. However, a jury cannot be so instructed unless there is evidence capable of supporting a finding of fabrication. In this case, there is no dispute that there was no evidence to support the Crown's theory that the appellant (*Ranger*) had deliberately sought to get himself filmed on the security video in order to create a false alibi. Hence, there was no basis for Crown

Scarborough Town Centre evidence was significantly undermined by the Crown's speculation of false alibi. In my view, the trial judge's instructions to the jury did not remove the prejudice created by the Crown's submissions. Rather, they served to exacerbate the problem."

What the Ontario Court of Appeal says is that before you suggest a "surveillance video" alibi is false, there must be evidence

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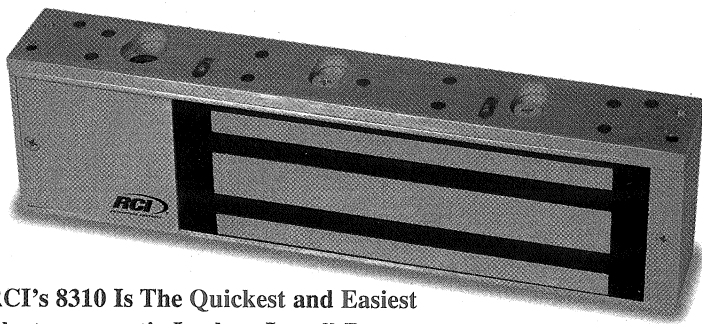
Author's Notes

1 66 *Ontario Reports* (3d) 746 (Ont. S.C.J.). All quotations regarding *Hill v. Hamilton-Wentworth Regional Police Services Board et al.* are from this case unless otherwise indicated.

2 67 *Ontario Reports* (3d) 1 (Ont. C.A.). All quotations regarding *R. v. Ranger* are from this case unless otherwise indicated.

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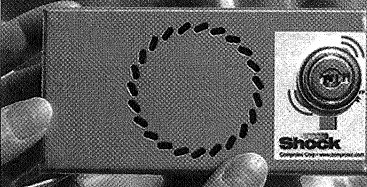
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