University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American Judges Association

American Judges Association

2020

Rethinking Appellate Standards of Review for Video Evidence

Pierre H. Bergeron

Follow this and additional works at: https://digitalcommons.unl.edu/ajacourtreview

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Rethinking Appellate Standards of Review for Video Evidence

Hon. Pierre H. Bergeron

We live in an era of instant replay. Every sports fan, when witnessing a close play in a game, reflexively thinks, "I wonder what the replay will show?" And they can take comfort in the fact that the play will be showed in slow motion from multiple different vantage points as we all assess the correctness of the referee's call. I recall watching the 2019 NCAA men's basketball final (cheering on my law school alma mater, UVA), when a play near the end of the game occurred where a defender batted the ball out of bounds but the replay ultimately showed that it barely grazed the tip of the finger of the player dribbling the ball before it left the court. No human referee watching that play in real time would have ever noticed that, and it suggested this question to me—while the refs made the right call after the video review, at what cost? Do we now insist on absolute perfection in calls even when that requires superhuman abilities, and is it worth all the attendant delay in games and, frankly, in removing something for us to debate or talk about afterwards?[1]

I have thought about that play often as I debate (usually with myself) the wisdom of instant replay for sporting events, but I have come to realize that it also carries lessons for our appellate system and the overarching question of standards of review. In the judiciary, we have recognized that absolute perfection comes with a sometimes unacceptable cost—finality in proceedings. In other words, litigation has to end at some point, even if that means that we have to tolerate some imperfections and leave some litigants still arguing about the result after the dust settles from the trial proceeding. Trying to strike the right balance, we created various standards of review to let appellate courts know when to more closely review the trial court's actions (de novo) and when to be more deferential (abuse of discretion or clear error).

In our instant-replay culture, mindful of the ubiquity of video coverage of almost every move we make, the basketball example above more pointedly raises the question of what standard of review should appellate courts use when assessing video evidence. In days gone by, several witnesses might have testified at trial as to what they saw when the crime occurred, and appellate courts rightly deferred to the jury or trial judge in their assessment of credibility of these witnesses. But now, in many cases, we have video evidence of the crime (or other critical events) that we can watch. Juries, like sports' fans, expect to see the operative events in slow motion from multiple angles so that they can evaluate what happened. As video evidence becomes an almost indispensable element of the modern trial, what does that mean for the modern appeal?

As the perceptive reader might have guessed, courts do not speak with one voice on this subject. Some appellate courts apply a deferential standard of review to the trial court's findings, rooted in how appellate courts historically have reviewed evidentiary matters, whereas other courts gravitate towards de novo review, as a pragmatic response to the power of video evidence. I would submit, though, that more often than not, many courts do not squarely acknowledge the standard of review on this point and probably (maybe reflexively) default to a Potter Stewart-esque "know it when you see it" perspective.

The debate on this point is real and legitimate, but it is important to have it in the open. Our appellate courts should be asking the question of how *should* we review video evidence. We provide a summary below of the two main schools of thought on this topic, and the policy justifications animating them.

TRADITIONAL DEFERENCE

Courts applying deferential review to a trial court's evidentiary determinations regarding video recordings appear to do so on grounds that largely mimic accepted justifications for deferential review of a trial court's credibility and factual determinations generally. Because video-recorded evidence may be susceptible (as with other types of evidence) to varying interpretations, reviewing courts typically highlight the trial court's unique vantage point for resolving these conflicts. Courts also justify deferential review because it preserves a trial court's role within the judicial system as the factfinder. By contrast, de novo review of these issues could usurp the trial court's traditional role, potentially prying open Pandora's box. Finally, appellate courts remain leery about the danger of making litigants essentially retry issues on appeal, needlessly squandering judicial time and resources.

The Supreme Court of New Jersey recently rejected an appellate court's application of de novo review to the trial court's determination that a defendant invoked his right to silence for purposes of suppression of a video police interrogation. Although the trial court relied solely on its review of the video recording in reaching its determination, the appellate court saw the video differently, rejecting the trial court's findings and making its own factual determinations based on the defendant's demeanor. Two

Author's Note: *Hon. Pierre H. Bergeron Judge, Ohio First District Court of Appeals.* *I am indebted to my law clerks, Abbey Aguilera and Tori Gooder for their excellent assistance with this article.*

Footnotes

1. Higgins v. Kentucky Sports Radio, LLC., 951 F.3d 728, 735 (6th Cir. 2020) ("Criticizing umpires serves other purposes, perhaps even healthy ones. It allows fans to suppress two unwelcome thoughts: that their team deserved to lose or that a lot of chance drives the fortunes of a team in a single-elimination tournament. How much better, after a dispiriting end-of-season loss, to be consoled by the thought that your team was robbed.").

courts, two different perspectives, who wins? The New Jersey Supreme Court resolved that dispute by rejecting the appellate court's application of de novo review, which it considered "at odds with traditional principles limiting appellate review."[2] In reaching this conclusion, the court emphasized that "our system of justice assigns to our trial courts the primary role of factfinder" and that role is especially well-suited to trial judges because of their "ongoing experience and expertise in making factual rulings."[3] Moreover, the court pointed to the differing purposes that trial courts and appellate courts served within our judicial system, which it viewed as integral to preserving judicial economy and finality.[4]

The Indiana Supreme Court echoed similar reasoning in clarifying the standard of review for a trial court's interpretation of video evidence. Noting that "just like any other type of evidence, video is subject to conflicting interpretations,"[5] the court referenced heavily the fact that a trial judge views this evidence "through the lens of his experience and expertise."[6] There, the court ultimately determined that the trial judge's experience and expertise better equipped him to weigh the video recording and assign it weight in relation to other available evidence than a reviewing court, despite similar access to the video recording.[7] The court refined this position a few years later by recognizing "a narrow failsafe built into our [deferential] standard of review for video evidence."[8] Despite affirming deferential review as the correct standard for appellate review of video-recorded evidence, the court acknowledged that an appellate court need not blindly defer to the trial court when the video evidence indisputably contradicts the factfinder's conclusion "such that no reasonable person could view the video and conclude otherwise."[9] This suggests some malleability in the standard, but perhaps no more so than in any other case where the appellate court concludes that the trial court's appraisal of the evidence cannot be squared with the record.

The Florida Supreme Court embraced a similar exception, cautioning that complete deference may not be reasonable under all circumstances as it would sometimes produce absurd results: "[W]e cannot expect officers to retain information as if he or she were a computer. Therefore, a judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the officer's recollection."[10] Where the video evidence is not clear, or remains subject to varying interpretations, these courts would apply deferential review.[11]

"[D]eferential review for video evidence promotes the recognition of the differences in the roles [of] trial and appellate courts ..."

From a normative perspective, deferential review for video evidence promotes the recognition of the differences in the roles that trial and appellate courts are meant to fulfill within the judicial system. When relying on this justification, courts emphasize that appellate courts are not meant to make factual findings, but rather to determine whether factual findings comport with the record evidence. As the New Jersey Supreme Court put it, "the customary role of an appellate court is not to make factual findings but rather to decide whether those made by the trial court are supported by sufficient credible evidence in the record."[12] Thus, while video-recorded evidence may significantly reduce the number of factual determinations made by the trial court, this work still ultimately rests with them.[13]

Finally, reviewing courts' preference for deferential review of video-recorded evidence is also rooted in notions of judicial economy and the necessity of finality for litigants. As one Texas appellate court explained, deferential review of a trial court's determinations regarding credibility and weighing of the evidence allows for a single trier of fact, which in turn avoids costly and unnecessary repetition of the trial judge's work by an appellate court.[14] "[O]ur [judicial] system does not require parties to 'concentrate their energies and resources on persuading the trial judge' only to start over on appeal, treating the trial proceedings as a 'tryout,' and requiring parties to 'persuade three more judges at the appellate level.'"[15]

DE NOVO (OR AT LEAST SOMETHING CLOSE TO IT)

Generally, when selecting de novo review over a more defer-

2. State v. S.S., 162 A.3d 1058, 1060 (N.J. 2017).
3. *Id.*at 1060.
4. *Id.*
5. Robinson v. State, 5 N.E.3d 362, 366 (Ind. 2014).
6. *Id.* at 367 (acknowledging that while the video record may speak for itself, it is ultimately the trial judge's experience and expertise that ultimately determines how the evidence will be weighed); *see also* Love v. State, 73 N.E.3d 693, 697-98 (Ind. 2017) (reiterating the deferential standard articulated by Robinson v. State, 5 N.E.3d 362 (Ind. 2014)); Baiza v. State, 487 S.W.3d 338, 344-45 (Tex. Ct. App. 2016) (discussing appropriateness of deferential review in videotaped recordings because of the superior position of the trial judge to make credibility determinations).
7. *See Robinson*, *5 N.E.3d* at 366-67.
8. *Love*, 73 N.E.3d at 699.
9. *Id.*; *see also* Wiggins v. Florida Dept. Hwy. Safety and Motor Vehicles, 209 So.3d 1165, 1172-73 (noting that deference was not required where video evidence was "hopelessly in conflict" and would lead to an "absurd result"); *see S.S.,* 162 A.3d at 1060 (noting that deference to a trial court's factual findings is warranted in the absence of "clear error").
10. *See Wiggins*, 209 So.3d at 1172, 1174 ("This would be an absurd result that we cannot support."); *Love*, 73 N.E.3d at 699 (noting that deference absent indisputable contradiction between the fact finder's conclusion and the video presented a "workable approach").
11. *Love*, 73 N.E.3d at 699-700.
12. *S.S.*, 162 A.3d at 1060.
13. State v. Garcia, 301 P.3d 658, 663 (Kan. 2013) ("One can imagine that the videotaping of an interrogation might greatly reduce the number of facts that are disputed; it nevertheless remains the duty of the district court to do the factfinding, not the appellate courts.").
14. *Baiza*, 487 S.W.3d at 344.
15. State v. Castanedanieto, Nos. 5-18-00870-CR, 05-18-00871, 05-18-00872-CR, 2019 WL 4875340, *1 (Tex. Ct. App. Oct. 3, 2019), quoting Montanez v. State, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006); *see also State v. S.S.*, 162 A.3d at 1060 ("[N]otions of judicial economy and finality call for a standard of review where appellate courts defer to a trial court's factual findings[.]").

> **"[W]hen the appellate court sits in a similar position ... as the trial court below, the appellate court may independently evaluate the evidence ..."**

ential approach, appellate courts begin their analysis with a cautionary tale about providing deference to a trial court's factual determinations. Trailing closely behind this point is usually a caveat: when the appellate court sits in a similar position to review the content or significance of video evidence as the trial court below, the appellate court may independently evaluate that evidence under de novo review.[16] Now what appellate courts deem a "similar" position is up for debate, but ordinarily courts consider whether the trial court primarily relied upon the video evidence, whether controlling facts contained within the video are in dispute, and the thoroughness of the trial court's factual findings (some cases without factual findings pave the way for de novo review).

For instance, in ***State v. Binette***, the Tennessee Supreme Court applied de novo review to the trial court's factual findings underlying its conclusion that the officer possessed a reasonable suspicion to stop the defendant's car. At the suppression hearing, the defendant testified and the state played a video of the defendant's driving before the stop.[17] Because the trial court made no reference to the defendant's testimony in its findings below, the Supreme Court found that the trial court relied solely upon the video in making its findings.[18] And thus, because no issues of credibility existed, the court saw little problem with independently reviewing the video and drawing its own conclusions about the officer's stop.[19] Trial judges should be mindful of this, and if they are relying on credibility evaluations apart from the video evidence, they should clarify that, which might persuade the appellate court to afford greater deference.

The Colorado Supreme Court, on the other hand, in ***People v. Madrid*** considered more than just credibility issues when it applied de novo review to the trial court's factual findings regarding whether the officer interrogated the defendant before giving *Miranda* warnings and whether the defendant voluntarily waived his *Miranda* rights. In *Madrid*, the court reversed the trial court's suppression of statements the defendant made during a recorded police interview.[20] In applying de novo review, the court stressed it was in the same position to evaluate whether a *Miranda* violation occurred as the trial court below, highlighting case-specific facts to support this proposition.[21] First, the court noted that, despite the trial court observing both a video recording of the police interview and relevant police officers' testimony at the suppression hearing, no disputed facts existed outside the video bearing on the issue of suppression, and thus the trial court's decision solely turned on the video evidence.[22] And second, the court hinted that the lack of detailed factual findings from the trial court necessitated an independent review of the video anyway.[23] Therefore, relying on these two circumstances, the court accordingly applied de novo review to the trial court's findings of fact.

The South Dakota Supreme Court invoked similar principles in ***State v. Akuba***, reviewing de novo the trial court's factual findings concerning whether the defendant voluntarily consented to the search of his car.[24] At the suppression hearing, the state admitted a video recording of the officer and the defendant's conversation before the search, and both the defendant and the officer testified. In determining whether to apply de novo review, the court emphasized that no dispute of fact about the defendant's consent existed since the defendant never testified about coercion or that he failed to give consent and the officer only answered one question regarding consent—that the defendant indeed consented.[25] Moreover, just like in *Madrid*, the court here highlighted the lack of factual findings, noting that even if the court wanted to give deference to the trial court, it could not as

---

16. *See* State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000) ("The rationale allowing an appellate court to review such evidence de novo without a presumption of correctness is clear: the reviewing court is in the same position as the trial court and is just as capable of reviewing the evidence."); People v. Madrid, 179 P.3d 1010, 1014 (Colo. 2008) ("Thus, where the statements sought to be suppressed are audio- and video-recorded, and there are no disputed facts outside the recording controlling the issue of suppression, we are in a similar position as the trial court to determine whether the statements should be suppressed."); State v. Akuba, 686 N.W.2d 406, 418 (S.D. 2004), quoting State v. Tuttle, 650 N.W.2d 20, 35, n. 11 (S.D. 2004) ("The only other record evidence is the videotape, and 'because we had the same opportunity to review the videotape . . . as the trial court,' we review the issue of [defendant's] consent de novo."); Com. v. Novo, 812 N.E.2d 1169, 1173 (Mass. 2004), quoting Com. v. Prater, 651 N.E.2d 833, 839, n.7 (Mass. 1995) ("In this case, however, the judge's findings are based almost exclusively on the videotape of [defendant's] confession, and 'we are in the same position as the [motion] judge in viewing the videotape.").
17. *Binette*, 33 S.W.3d at 216.
18. *Id*. at 220 ("Indeed, absolutely no reference was made to [defendant's] testimony; the trial judge relied entirely on her own perceptions of what was depicted on the videotape.").
19. *Id*. at 217 ("[W]hen a trial court's findings of fact on a motion to suppress are based solely on evidence that does not involve issues of credibility, appellate courts are just as capable to review the evidence and draw their own conclusions."); *see also Novo*, 812 N.E.2d at 1173, quoting Com. v. Bean, 761 N.E.2d 501, 507, n. 15 (Mass. 2002) (holding that because the lower court almost exclusively relied upon video evidence to determine whether defendant's confession was voluntary, the court could independently review the "recorded confessions and make judgments with respect to their contents without deference to the fact finder, who 'is in no better position to evaluate the[ir] content and significance.'").
20. *Madrid*, 179 P.3d at 1013.
21. *Id*. at 1014.
22. *Id*. at 1013, 1016, quoting People v. Valdez, 969 P.2d 208, 211 (Colo. 1998) ("'[W]hen the controlling facts are undisputed, the legal effect of those facts constitutes a question of law which is subject to de novo review.'"); *see also* Bunnell v. State, 735 S.E.2d 281, 285 (Ga. 2013) ("When controlling facts discernible from a videotape are not disputed, our standard of review is de novo.").
23. *Madrid*, 179 P.3d at 1014, 1016 ("[B]ecause the trial court did not make detailed factual findings, we undertake an independent review of the facts[.]").
24. State v. Akuba, 686 N.W.2d 406, 418 (S.D. 2004).
25. *Id*.

the court below made no findings of fact to defer to.[26] And thus, despite other testimony offered at the hearing from both the defendant and officer, the court held it could review the issue of consent de novo since it possessed the same opportunity to review the videotape as the trial court below.[27]

It's important to point out that these courts are not embracing a sweeping de novo standard in all cases with video evidence. Much to the contrary, these opinions are limited to the particulars of the situations at hand, but they provide counsel with a roadmap for how to argue that de novo review should be adopted in those jurisdictions that remain on the fence.

WHERE DOES THAT LEAVE US?

I know there are at least a couple of cases during my tenure as an appellate judge when the video evidence swayed me from affirm to reverse (or vice versa). In these instances, the power of the video evidence was simply impossible to ignore, regardless of what standard of review governed. Even the staunchest supporters of deferential review would probably have allowed for such meddling with the trial results when the video paints a decisive picture.

Powerful policy justifications animate both sides of this debate. And, overall, there is some need for flexibility here. The Indiana Supreme Court in 2014 said that "[w]hile technology marches on, the appellate standard of review remains constant."[28] A few years later, however, it acknowledged that perhaps the normal standards of review were not quite up to the task, recognizing a "narrow failsafe built into our standard of review for video evidence."[29]

At some point, however, this might just morph into Potter Stewart land. And I say that not to be critical of the Indiana Supreme Court; much to the contrary, it is a recognition of the vexing nature of the problem. But the important takeaway is that, whatever side of this debate you prefer, or however you might fashion a new and improved standard of review, courts need to be candid about this standard-of-review point. After all, the standard of review in a lot of these cases can prove dispositive. The parties need to understand what they have to work with, and the trial courts likewise need to internalize what is being asked of them (for example, if the appellate court faults the trial court for a lack of findings). I look forward to seeing this debate unfold, and to potential innovative ways to approach this evidence that is becoming prevalent in the modern appeal.

Judge Pierre Bergeron was elected to Ohio's First District Court of Appeals in November 2018 after a career as an appellate litigator (which included two U.S. Supreme Court arguments). He contributes regularly to the AJA's Procedural Fairness Blog as well as to the Appellate Advocacy Blog. The Ohio Supreme Court recently appointed Judge Bergeron to its Wrongful Conviction Task Force, and he has written and spoken recently on issues related to judicial reforms.

26. *Id*. at 417-18 ("We have no findings of historical fact to which the clearly erroneous standard applies. Therefore, our task involves an application of the facts to the law, and that review is de novo.").
27. *Id*. at 418.
28. Robinson v. State, 5 N.E.3d 362,365 (Ind. 2014).
29. *Love,* 73 N.E.3d 693, 699.

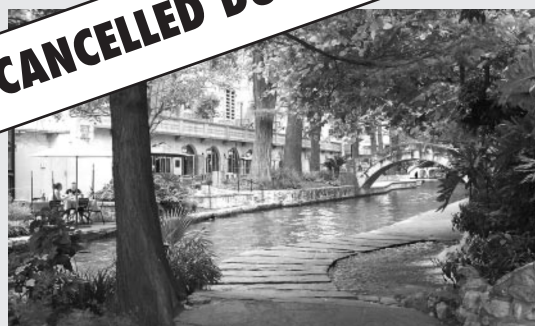
AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

2021 MIDYEAR MEETING

SAN ANTONIO, TEXAS

Sheraton Gunter Hotel
April 15-17
$179 sing

CANCELLED DUE TO COVID19



Desmarsol/Pixabay

2021 ANNUAL CONFERENCE

NEW ORLEANS, LOUISIANA

Hotel and Prices TBD

PDPhotos/Pixabay

THE AJA ANNUAL CONFERENCE: THE BEST JUDICIAL EDUCATION AVAILABLE ANYWHERE
For more information, go to http://amjudges.org/conferences.