



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TIFFANY PARKER, )  
)  
Defendant Below, )  
Appellant, )  
)  
v. ) No. 38, 2013  
)  
STATE OF DELAWARE, )  
)  
Plaintiff Below, )  
Appellee. )

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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## **NATURE AND STAGE OF THE PROCEEDINGS**

Tiffany Parker was indicted on one count of assault second degree and one count terroristic threatening. (A-4). After jury trial in this matter before the Honorable Calvin Scott, Jr., Parker was acquitted of terroristic threatening and found guilty on the charge of assault second degree. (A-54). Parker was sentenced to five years at level V; suspended for five years at level 4; suspended after six months for eighteen months at level 3. (See Sentencing Order, attached hereto as Exhibit B).

Parker filed her timely Notice of Appeal and this is her Opening Brief.

## **SUMMARY OF THE ARGUMENT**

1. The trial court erred when it admitted, over objection, social-networking evidence without proper authentication. The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to the conclusion that the printout admitted by the State required a greater degree of authentication than what was advanced here. The Facebook entries, allegedly authored by Parker, were highly inflammatory and irreparably damaged her chances of receiving a fair trial. Thus, admission of such evidence requires Parker's conviction to be reversed.

## STATEMENT OF FACTS

On December 2, 2011, at approximately 11:40 a.m., Officer Matthew Reiss of the Wilmington Police Department responded to a call for an assault involving two females on the 1000 block of Clifford Brown Walk in the city of Wilmington. (A-28). Upon Officer Reiss's arrival, the complainant, Sheniya Brown, and Tiffany Parker, the Appellant, were both placed into custody so that an investigation could be conducted to determine what transpired. (A-28).

Brown and Parker were seen yelling at each other over prior Facebook emails that had been sent concerning a mutual love interest. (A-18, 21-22, 31). Eventually a physical altercation broke out between the two. (A-32). As the fist fight broke out, it was unclear who threw the first punch. (A-18). Parker and Brown both testified at trial and had conflicting testimony as to the events of the confrontation. (A-21-22, 32). Brown testified that it was Parker who was the first aggressor and Parker testified that Brown struck first and she was forced to employ self-defense. (A-22, 32). Brown was pregnant at the time of the altercation. (A-20).

Brown admitted that when the fight was initially broken up, she picked up a brick and tried to throw it at Parker. (A-23). Parker was then taken to a barber shop by a passerby while Brown went back to her residence. (A-23, 33). A

witness testified that when Brown arrived back at her house, she had come back out with a knife looking for Parker. (A-18).

**I. THE TRIAL COURT ERRED IN ADMITTING WITHOUT PROPER AUTHENTICATION AND FOUNDATION WHAT THE STATE CLAIMED WERE STATEMENTS FROM PARKER'S FACEBOOK PROFILE.**

**Question Presented**

Did the Trial Court err in admitting without proper identification what the State claimed was a printout from Parker's Facebook profile? (A-8).

**Standard and Scope of Review**

This Court reviews challenges to the admissibility of evidence for abuse of discretion.<sup>1</sup>

**Argument**

The State did not appropriately, for evidentiary purposes, authenticate the page entries allegedly printed from Parker's Facebook profile, because the State failed to offer any extrinsic evidence describing the entries, as well as indicating how the pages in question were obtained and adequately linking both the profile and the posting to Parker. Under the facts and circumstances of this case, the trial court abused its discretion in admitting the Facebook evidence pursuant to Delaware Rules of Evidence ("D.R.E.") 403 and 901(a). Thus, this Court must reverse Parker's conviction and order a new trial.

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<sup>1</sup> *Floudiotis v. State*, 726 A.2d 1196 (Del.1999).

Prior to trial, the State sought to introduce Facebook entries that Parker allegedly authored after the incident at issue to demonstrate her role in the altercation and in an effort to disprove her self-defense argument. (A-10). The exhibit was a printed screenshot of what was purportedly Parker's Facebook profile with entries consisting of statements referencing the altercation.<sup>2</sup> Defense counsel objected on the ground of authentication deficiencies. (A-8). The trial court denied the objection and granted the State's request to admit the entries on the condition that Brown testify about her knowledge of Facebook. (A-11).

Through Brown's testimony, the State introduced the Facebook entries. (A-25). The State used only Brown's testimony to authenticate the entries and establish that Parker posted the comments on her own Facebook page. (A-11). Brown testified that she checked out the Facebook page and "shared" what she saw on Parker's page on her own profile. (A-25). The sharing of Parker's Facebook entries merely copied the comments and then republished them on Brown's Facebook page. (A-11, 25). Brown went on to testify about the contents of the entries such as describing the picture of the person who purportedly made the post and the time and date of the postings. (A-25). Based

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<sup>2</sup> State's Trial Exhibit 5.

on Brown's brief authentication of the Facebook posting, the State was able to admit the entries into evidence for the jury to consider. (A-25).

The screenshot from Appellant's Facebook page was not properly authenticated and thus should not have been admitted into evidence. The emergence of social media, such as text messaging and networking sites like Facebook, may not require the creation of new rules of authentication concerning authorship. However, the circumstantial evidence that authenticates a communication is unique to each medium. Because social media websites like Facebook are inherently susceptible to falsification, particular care should be taken with authentication.

Consistent with D.R.E. 901(a)<sup>3</sup>, the admission of social-networking evidence at trial requires counsel to provide a foundation for that evidence.<sup>4</sup> Although the precise question raised here has not been addressed by this Court, federal courts and sister jurisdictions have written on this subject. In *Griffin v. State*, the Maryland Court of Appeals held that pictures and biographical information on a social networking website were insufficient to authenticate the

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3 (a) General Provision. The requirement of authentication or identification 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.

4 *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D.Md.2007).

profile printout of a State's witness.<sup>5</sup> In its holding, the court emphasized the frequency and ease by which such profiles are improperly created or hacked, thus posing significant challenges in authenticating printouts of the site, as in the present case.<sup>6</sup>

The *Griffin* court established a higher standard for authentication of evidence obtained from social networking websites, as opposed to more traditional electronic mail. The *Griffin* court also observed that the printout could have been properly authenticated by any of the following methods, none of which the State attempted in the instant case, 1) searched witness's computer to examine the internet history and hard drive to determine whether the posting had originated from the computer; or 2) subpoena information regarding the profile from Facebook directly.<sup>7</sup>

In *Com. v. Williams*, the Supreme Judicial Court of Massachusetts determined that there was insufficient evidence to authenticate MySpace

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<sup>5</sup> 19 A.3d 415, 423-424 (Md. 2011).

<sup>6</sup> *Id.* at 420-422; *See also State v. Eleck*, 23 A.3d 818, 824 (Conn.App. 2011) (printout of instant message exchange from defendant's Facebook page not properly authenticated just because the messages appeared to come from the purported sender's Facebook account; the messages fail to "reflect distinct information that only [the sender] would have possessed regarding the defendant or the character of their relationship"); *Hollie v. State*, 679 S.E.2d 47, 50 (Ga. 2009) (though email showed on its face that it originated from purported sender's email address, "this alone does not prove its genuineness"); *United States v. Drew*, 259 F.R.D. 449 (D.C.D.Cal.2009)(showing the relative ease with which anyone can create fictional personas or gain unauthorized access to another user's profile).

messages, and they should not have been admitted.<sup>8</sup> The court noted: “Although it appears that the sender of the messages was using [the defendant's] MySpace Web ‘page,’ there is no testimony ... regarding how secure such a Web page is, who can access a Myspace Web page, whether codes are needed for such access, etc. [and] analogizing a Myspace Web page to a telephone call, a witness's testimony that he or she has received an incoming call from a person claiming to be ‘A,’ without more, is insufficient evidence to admit the call as a conversation with ‘A.’ ”<sup>9</sup> While the foundational testimony established that the MySpace messages were sent by someone with access to the defendant's MySpace Web page, the testimony did not identify the person who actually sent the communication, nor was there expert testimony that no one other than the defendant could communicate from that Web page. Therefore, the court held that testimony regarding the contents of the MySpace messages should not have been admitted.

Here, the trial court erred by ruling that a lay witness, who could merely testify about the Facebook posting process, was enough to authenticate Facebook entries. While the Superior Court determined that the entries allegedly

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<sup>7</sup> *Id.* at 427-428.

<sup>8</sup> 926 N.E.2d 1162 (Mass. 2010).

<sup>9</sup> *Id.* at 1172.,,

printed from Parker's Facebook profile contained sufficient indicia of reliability, since Brown, a general user, was familiar with the posting process, the court failed to acknowledge the possibility or likelihood that another user could have created the profile or authored the posted entries. The trial court abused its discretion in admitting the social-media evidence pursuant to D.R.E. 403 and 901(a) because the printed screenshot of Parker's Facebook profile and entries coupled with Brown's testimony on how she copied and "shared" it, were not sufficient distinctive characteristics to authenticate its printout given the prospect that someone other than Parker could not have only created the site, but also posted the comments.

In the case at bar, Appellant was prejudiced by the Superior Court's errant ruling because the Facebook entries supposedly authored by Parker were a principal component of the State's case. Since both Parker and Brown testified, the case was a credibility contest. The entries implicating Parker could have been the crucial factor allowing the jury to infer her guilt. The trial court should have granted the defense objection to the admission of the entries for lack of authentication. Thus, reversal is required.

**CONCLUSION**

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that Tiffany Parker's conviction and sentence must be reversed.

Respectfully submitted,

/s/ Santino Ceccotti  
Santino Ceccotti, Esquire

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