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More on the Future of Present Sense Impressions

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October 3, 2011

More on the Future of Present Sense Impressions

I previously [blogged](#) about the challenges presented to the present sense impression hearsay exception by new methods of electronic communication. The exception is also under siege on another front – from the increased use of recording devices by police departments. With the inevitable march of technology, once can imagine a time when everything a police officer observes and says while on duty will be recorded. Fans of the movie [Aliens](#) can think of the space marines who blast their way into the Aliens' den while feeding live video and audio to a command post (staffed by [Paul Reiser](#)!?!).

An inevitable evidentiary issue that arises from such a possibility is what to do with the recorded officer's own narrative description of the things he or she perceives. An interesting preview of the courts' answer can be found in the Texas case of *Fischer v. State*, 252 S.W.3d 375 (2008). There, the Texas Court of Criminal Appeals rejected the prosecution's effort to introduce an officer's recorded real-time narration of a DWI stop. Over a vigorous dissent, the Court struggled to explain why the officer's statements, such as that he smelled "the strong odor of alcoholic beverage" on the suspect's breath, did not fall within the present sense impression exception. *Id.* at 376-77.

Here is the pertinent text of the hearsay exception:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

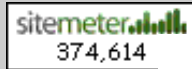
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(1) Present sense impression.A

statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Reading the thorough opinion, you get the sense that the Court just didn't like the idea of allowing police officers to generate evidence this way. The Court explains at one point that, in the context of a DWI stop: "Calculation and criminal litigation shimmer in the air." *Id.* at 384. It is hard not to agree with the Court that something seems amiss if a police officer anticipating litigation can consciously generate admissible recorded statements. Indeed that intuition seems to animate the post-*Crawford* Confrontation Clause jurisprudence (which not coincidentally will block such police-generated statements offered against a criminal defendant unless the declarant testifies). But that something seems amiss (or shimmering air) is not that solid a ground for departing from the text of a hearsay rule, and one expects that other courts will disagree with the Texas Court ruling described above. As police officers (and private citizens) increasingly record themselves and their observations, courts will either have to come up with a better explanation for why such running narratives are not "present sense impressions" or begin allowing them into evidence over a hearsay objection.

- Jeff Bellin

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