

U.S. v. Lizarraga-Tirado

(9th Cir. 2015) __ F.3d __ [2015 WL 3772772]

Issue

Does a Google Earth satellite image constitute inadmissible hearsay? If not, does it become hearsay if it includes computer-generated markers, such as a “digital tack?”

Facts

Late one night, U.S. Customs and Border Protection (CBP) agents arrested Lizarraga-Tirado in the Arizona desert near the U.S.-Mexico border. He was subsequently charged with illegal reentry and, at trial, contended that he was actually in Mexico when he was arrested, and that the agents must have accidentally crossed into Mexico before arresting him. The agents testified they were very familiar with the area and were certain they had arrested him north of the border.

In addition, one of the agents testified that, at the scene of the arrest, she used a handheld Global Positioning System (GPS) device to determine their longitude and latitude. Later, she inputted these coordinates into the Google Earth internet application which provided her with a high-resolution image of the location. In addition, Google Earth had superimposed certain markers on the image. Specifically, there was a “digital tack” labeled with a set of coordinates, a nearby highway, a small town and, most importantly, a drawing of the U.S.-Mexico border. The image clearly showed that Lizarraga-Tirado was arrested in the U.S.

Lizarraga-Tirado urged the trial court to suppress the image, claiming it was inadmissible hearsay. But the court disagreed and, based on the image and the agents’ testimony, Lizarraga-Tirado was found guilty.

Discussion

On appeal to the Ninth Circuit, the issue was whether the image with markers constituted inadmissible hearsay. Briefly, hearsay is typically defined as an out-of-court assertion by a person—whether verbal, nonverbal, or written—that proclaims the truth of a disputed matter before the court. Consequently, Lizarraga-Tirado argued that the marked image constituted hearsay because it was essentially an out-of-court statement by Google Earth that he had been arrested north of the border.

THE IMAGE WITHOUT MARKERS: At the outset, the court ruled that the image *without* the markers did not constitute hearsay because it was the equivalent of a photograph. As the court explained, a photo is not hearsay because it makes no assertion of anything—it merely depicts “a scene as it existed at a particular time.” The same is true of a Google Earth satellite image without markers because it, too, merely depicts a scene and “makes no assertion.”

THE IMAGE WITH MARKERS: The “more difficult question” was whether the addition of the markers to the image converted it into an assertion; i.e., that Lizarraga-Tirado had been arrested in the United States. It would have been “classic hearsay,” said the court, if the CBP agent or other person had manually superimposed the markers on the image and then labeled them. But if they were automatically generated and inserted by Google Earth, it would not constitute hearsay because the marker would have been superimposed as a matter of course by a computer algorithm—not a person. As the court pointed out, “Though a person types in the GPS coordinates, he has no role in figuring

out where the tack will be placed.” Instead, Google Earth “analyzes the GPS coordinates and, without any human intervention, places a labeled tack on the satellite image.”

Consequently, the image with markers would not constitute hearsay if the markers were added by Google Earth and not the CBP agent or anyone else. Unfortunately, there was no testimony on this subject in the trial court. Nevertheless, the Ninth Circuit was able to figure it out by inserting the GPS coordinates into Google Earth and comparing the resulting image with the image obtained by the CBP agent. They were “identical.” Consequently, the court ruled that the image with markers was not hearsay.

Comment

The court pointed out that, if the defense makes such a hearsay objection, prosecutors would have the burden of establishing Google Earth’s reliability and accuracy. Although this could be accomplished through the testimony of a Google Earth programmer, the court added that it could also be accomplished by “a witness who frequently works with and relies on the program” or “through judicial notice of the program’s reliability.” POV

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