

OP. NO. 05-049

CIVIL REMEDIES AND PROCEDURE: EVIDENCE – LAWS, PUBLIC RECORDS, AND COPIES OF ORIGINAL RECORDS AS EVIDENCE.

Authenticated copies of judicial records are admissible into evidence; copy of authenticated copy is not sufficient.

The Honorable Robert N. Joyce, Jr.
Commonwealth's Attorney for Rockbridge County & the City of Lexington
July 21, 2005

Issue Presented

You ask whether a facsimile copy of a certified copy of a court record may be admitted into evidence under § 8.01-391, which addresses copies of originals as evidence.

Response

It is my opinion that authenticated copies of judicial records are admissible into evidence; however, a copy of an authenticated copy renders the authentication a copy, and it is not sufficient to establish compliance with § 8.01-391.

Background

You present a situation where a Commonwealth's attorney moved to enter into evidence two prior convictions of a defendant charged with felony enhanced petit larceny pursuant to §§ 18.2-96 and 18.2-104. The records of the prior convictions were not certified copies of the original conviction orders, but facsimile copies of the copies that had been properly authenticated as true copies by the clerk of the general district court wherein the convictions arose.

From the facts you present, it appears that the facsimiles displayed a copy of the stamp of certification and signature of the clerk, rather than the original certifications. You relate that the defendant objected to the admission of these documents.

Applicable Law and Discussion

The statute that deals with the admission of judicial records as evidence is § 8.01-389(A), which provides that "[t]he records of any judicial proceeding and any other official records of any court of this Commonwealth shall be received as prima facie evidence provided that such records are authenticated and certified by the clerk of the court where preserved to be a true record."¹

A defendant's objection to the admission of the facsimile copy of an authenticated copy of an order of prior conviction is governed by the terms of § 8.01-391, which provides that:

C. If any court or clerk's office of a court of this Commonwealth, of another state or country, or of the United States . . . has copied any record made in the performance of its official duties, such copy shall be admissible into evidence as the original, whether the original is in existence or not, provided that *such copy is authenticated* as a true copy by a clerk or deputy clerk of such court.

....

F. Copy, as used in this section, shall include photographs, microphotographs, photostats, microfilm, microcard, printouts or other reproductions of electronically stored data, or copies from optical disks, electronically transmitted facsimiles, or any other reproduction of an original from a process which forms a durable medium for its recording, storing, and reproducing. [Emphasis added.]

Since, the General Assembly has mandated requirements for authenticating a record, a writing may not be admitted into evidence until these requirements have been met.² Nothing in the language of § 8.01-391 suggests that a copy of an authentication is sufficient. The statute sets forth the mediums by which a "copy" may be produced and clearly states that such copy must then be properly "authenticated."

"Generally, the words and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest."³ The term "authenticate" means "[t]o prove the genuineness of (a thing)" or "[t]o render authoritative or authentic, as by attestation or other legal formality."⁴ The term "authentication" means "the act of proving that something (as a document) is true and genuine, esp[ecially] so that it may be admitted as evidence; the condition of being so proved."⁵

"Authentication is merely the process of showing that a document is genuine and that it is what its proponent claims it to be,"⁶ and a judicial record may be authenticated by the written certification of the clerk of the court holding the record.⁷ Authentication is "a prerequisite to admission of a copy" because, without authentication, "a court presented with a document ... would have no means of judging its genuineness."⁸

While it does not appear that a Virginia court has expressly addressed the issue you present, the courts repeatedly have applied a strict compliance standard to the authentication of documents as evidence. For example, the Court of Appeals of Virginia has held that an order purporting to be from the clerk's office was not properly authenticated as required by § 8.01-389(A), and it was inadmissible because the order contained no evidence that the signator was authorized by law to act in the place of the clerk of court.⁹ In another case, the Court of Appeals has found that a photocopy of a certificate admitted as evidence that contained a notary public's attestation that did not aver that the notary was the custodian of the original, or that she had the original in her custody, was not a true copy pursuant to § 8.01-391(B).¹⁰ Finally, the Court of Appeals has found that an unauthenticated photocopy of a certificate of laboratory analysis was not admissible because no proof was offered to show that the copy was genuine.¹¹ While the testifying detective stated that the copy being offered was the same as a copy sent to him by the laboratory, he admitted that he had no personal

knowledge of the original certificate, and there was no evidence that either copy was a true replica of the original.¹²

Similarly, the Supreme Court of Virginia has held that documents introduced into evidence were not admissible because they had not been properly authenticated pursuant to the requirements of § 8.01-390¹³ where, although the documents bore a stamp on each page certifying that the page was a true copy, nothing showed that the certifying officer was the documents' custodian.¹⁴

It would be inconsistent to require that a record be authenticated by the written certification of the clerk of the court holding the record and then allow a copy of a written certification to prove the genuineness of the document. The original physical certifications by the clerk of the court not only serve to verify that the original document is an accurate record of the proceedings, but to verify the accuracy of the copy of that record.

In the case you present, the transmission of the authenticated document via facsimile resulted in the generation of a new copy that is not physically authenticated. A copy of a certification does not enable the court to determine whether the certification itself is authentic and, therefore, whether the copy delivered to the court is an accurate replica of the original. Even if the document bears a copy of the "official stamp" of a clerk's office, the court has no way of determining whether an attestation that is not original was genuinely affixed by the clerk or whether it was altered by means of today's modern technology. Therefore, the requirement of authentication as a condition precedent to admissibility is not satisfied by a copy of an authenticated document. Such a copy does not contain the original certificates of attestation, nor does it provide an evidentiary basis sufficient to support a finding that it is what its proponent claims or came from the source claimed.¹⁵

As previously noted, Virginia courts have not specifically addressed the issue you present. The Supreme Court of Indiana, however, has decided an analogous issue where the prosecution moved to introduce into evidence copies of various Ohio documents, including an indictment, a judgment, and other writings referring to a conviction in Ohio.¹⁶ The defense objected and asserted that the purported certification merely was a copy; and, therefore, the documents failed to contain an original signature, seal, or certification. The Indiana Supreme Court held that while copies of public records can themselves be admissible if their authentication is properly certified, "the certifications themselves do not constitute public records and photocopies are not acceptable"¹⁷ if a genuine issue is raised as to their authenticity.¹⁸

Similarly, in another Indiana Supreme Court case, the prosecution moved to introduce into evidence a copy of a judgment and order of probation from a Texas conviction.¹⁹ The defendant objected because the attached certification was a copy that had been produced by a fax machine.²⁰ The Indiana Supreme Court held that while copies of the documents themselves can be introduced, the certification itself must be an original.²¹

Conclusion

Accordingly, it is my opinion that authenticated copies of judicial records are admissible into evidence; however, a copy of an authenticated copy renders the

authentication a copy, and it is not sufficient to establish compliance with § 8.01-391.

¹Va. Code Ann. § 8.01-389 (LexisNexis Repl. Vol. 2000).

²See *Proctor v. Commonwealth*, 14 Va. App. 937, 938, 419 S.E.2d 867, 868 (1992).

³*Woolfolk v. Commonwealth*, 18 Va. App. 840, 847, 447 S.E.2d 530, 534 (1994).

⁴Black's Law Dictionary 142 (8th ed. 2004).

⁵*Id.*

⁶*Owens v. Commonwealth*, 10 Va. App. 309, 311, 391 S.E.2d 605, 607 (1990).

⁷*Id.* (holding that written attestation by court clerk that document was certified copy of court record was sufficient to "authenticate and certify" document within meaning of § 8.01-389).

⁸*Williams v. Commonwealth*, 35 Va. App. 545, 554, 546 S.E.2d 735, 740 (2001) (quoting *Ingram v. Commonwealth*, 1 Va. App. 335, 340, 338 S.E.2d 657, 660 (1986)).

⁹*Carroll v. Commonwealth*, 10 Va. App. 686, 690-91, 396 S.E.2d 137, 140 (1990). In *Carroll*, the order contained the following: "A COPY TESTE: WALTON F. MITCHELL, JR., CLERK[,] CRAIG COUNTY CIRCUIT COURT[,] BY /s/ Peggy B. Elmore." *Id.* at 689, 396 S.E.2d at 139.

¹⁰*Untiedt v. Commonwealth*, 18 Va. App. 836, 839, 447 S.E.2d 537, 538-39 (1994). In *Untiedt*, the photocopy of the certificate was attested by the clerk of the circuit court, was embossed with the notary public seal of "Jodi C. Davis," contained a typewritten statement, "I certify that this is a true copy," and the attestation was signed by Davis as notary public. *Id.* at 837, 447 S.E.2d 538.

¹¹*Proctor*, 14 Va. App. at 938-39, 419 S.E.2d at 868 (interpreting filing of evidence under § 19.2-187).

¹²*Id.*

¹³*Taylor v. Mar. Overseas Corp.*, 224 Va. 562, 565-66, 299 S.E.2d 340, 342 (1983). This case was decided under § 8.01-390, which provided that: "[c]opies of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, shall be received as prima facie evidence provided that such copies are authenticated to be true copies both by the custodian thereof and by the person to whom the custodian reports." *Id.* at 564-65, 299 S.E.2d 341 (quoting § 8.01-390). Section 8.01-390 subsequently was revised to require that the copy be authenticated as a true copy "either by the custodian of said record and or by the person to whom the custodian

reports." See 2000 Va. Acts ch. 334, at 476, 476 (amending and reenacting § 8.01-390); see also § 8.01-390 (LexisNexis Repl. Vol. 2000).

¹⁴*Taylor*, 224 Va. at 565, 299 S.E.2d at 342. In *Taylor*, the document contained the following: "T. Wood[,], Captain, U.S. Coast Guard[,], Officer in Charge[,], Marine Inspection." *Id.* (alteration in original).

¹⁵Moreover, while copies of records of convictions are clearly admissible if properly authenticated as to their accuracy by the clerk of the court, the authentications on the orders in question do not constitute "records" in of themselves and cannot be admissible on that basis. The term "records" includes "any memorandum, report, paper, data compilation, or other record in any form, or any combination thereof." Section 8.01-389(D).

¹⁶*Kelly v. State*, 561 N.E.2d 771, 774 (Ind. 1990).

¹⁷*Id.* at 773.

¹⁸*Id.* at 774. The Indiana Code section under which the *Kelly* case was decided, provides that: "[t]he records and judicial proceedings of the several courts of record ... shall be admitted in the courts within this state as evidence, by attestation or certificate of the clerk or prothonotary, and the seal of the court annexed, together with the seal of the chief justice or one or more of the judges, or the presiding magistrate of any such court, that the person who signed the attestation or certificate was, at the time of subscribing it, the clerk or prothonotary of the court, and that the attestation is in due form of law; and the records and judicial proceedings, authenticated as aforesaid, shall have full faith and credit given to them in any court within this state, as by law or usage they have in the courts whence taken." *Id.* at 772-73 (quoting Ind. Code § 34-1-18-7). The court also relied upon Indiana Trial Rule 44, which specified the required manner of proof of an official record and provided in relevant part:

"(A) Authentication.

"(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof ... when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Such publication or copy need not be accompanied by proof that such officer has the custody. Proof that such officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office." *Id.*

¹⁹*Harwood v. State*, 582 N.E.2d 359, 360 (Ind. 1991).

²⁰*Id.*

²¹*Id.*

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