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Evidence--Evaluative Reports within Business Records--A Confrontation Problem--State v. Rhone

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EVIDENCE—EVALUATIVE REPORTS WITHIN BUSINESS RECORDS— A CONFRONTATION PROBLEM

State v. Rhone [1]

On the evening of May 13, 1974, a patrolman of the St. Louis Police Department observed a burglary in progress in a supermarket. Another officer responded to a report of the burglary and observed the defendant Rhone descending from the roof of the market. The defendant was apprehended, searched, and found to be in possession of a .38 caliber handgun which had been taken from inside the supermarket. As the defendant was being taken into custody, a second man was arrested on the roof of the market. The arresting officer also discovered a hole which had been cut in the roof in order to gain entry into the building. A police laboratory technician later arrived at the scene. He collected particles of tar, tarpaper, wood, and insulation from around the hole in the roof and put them into a package later delivered to the police laboratory. At the laboratory Lloyd Hill compiled a report of the results of microscopic and spectographic comparisons he performed on the clothes worn by the defendant on the night of the burglary. Hill concluded in his report that the glass fibers and tar material found on the defendant's clothing came from the scene of the crime.

At trial, the state called Edith Struckhoff to testify as custodian of the police laboratory records. Her testimony was employed to qualify Hill's report under the Uniform Business Records as Evidence Act.[2] Struckhoff also testified as to Hill's qualifications as an expert. She stated that Hill had been working in the police department laboratory as a criminologist for about a year, and that in order to be employed by the laboratory as a criminologist, one must have a degree in that field. Struckhoff then was allowed to read from the report concerning the comparison tests made by Hill. It was brought out on cross-examination that Struckhoff had no personal knowledge of anything reflected in the report and that she did not know how the tests were conducted. The laboratory report was received into evidence over the defendant's objec-

1. 555 S.W.2d 839 (Mo. En Banc 1977).
2. Section 490.680, RSMo 1969 provides:
A record of an act, condition or event shall insofar as relevant, be competent evidence *if the custodian or other qualified witness testifies to its identity and the mode of its preparation,* and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. (Emphasis added).

tions that the testimony was hearsay, that he would be deprived of his constitutional right to cross-examine a witness against him, and that the person who performed the test had not been properly qualified as an expert. The defendant was convicted of burglary in the second degree. The St. Louis District of the Missouri Court of Appeals affirmed the conviction. Upon application of the defendant, the cause was transferred to the Missouri Supreme Court where the conviction was also affirmed.

The only contention on appeal was that the trial court erred in allowing Struckhoff to testify as to the contents of the laboratory report because Hill was not shown to be an expert on the subject matter of the report. The court first cited *Allen v. St. Louis Public Service Co.*[3] as authority for the proposition a report in the form of an opinion is admissible under the Uniform Business Records as Evidence Act. The court then addressed the question whether entries representing opinion evidence are admissible under the Act in the absence of a showing that the person making the entries is qualified as an expert. In the absence of prior Missouri law the *Rhone* court concluded that opinions contained in business records are admissible only if the declarant is an expert making a statement concerning a matter within his expertise and as to which he would be competent to express an opinion if he were testifying in person. The court indicated that the standards used in qualifying an expert for purposes of the business records exception are no different from those used in qualifying an expert to testify at trial.[4] The court concluded by stating that the determination of whether such standards have been met is within the sound discretion of the trial court.[5]

Following this analysis, the *Rhone* court noted that the evidence showed that Hill had been employed by the police laboratory for approximately one year; that the nature of his job was to examine clothing and debris; and that he must have had a degree in his particular field.[6] The court then held that the trial court had not abused its discretion in ruling that Hill had been properly qualified as an expert. The dissent quarrelled with this holding on the ground that the only witness to testify concerning Hill knew nothing specific about his qualifications.

The main point of departure in the dissent, however, was not the qualification issue. Judge Bardgett, with whom Judge Seiler concurred, emphatically argued that the admission of this opinion evidence under the Uniform Business Records as Evidence Act[7] in a criminal trial vio-

3. 365 Mo. 677, 285 S.W.2d 663 (1956). *Allen* was a civil case in which no confrontation problems would arise.

4. 555 S.W.2d at 841, *citing* Hyman v. Great Atl. & Pac. Tea Co., 359 Mo. 1097, 225 S.W.2d 734 (1949); Herman v. American Car & Foundry Co., 245 S.W. 387 (St. L. Mo. App. 1922).

5. *See* State v. Rose, 249 S.W.2d 324 (Mo. En Banc 1952).

6. 555 S.W.2d at 842.

7. *See* note 2 *supra*.

lated the defendant's right to confront the witnesses against him protected by the Missouri and United States Constitutions.[8]

Although the language of the Missouri Constitution would suggest a strong confrontation argument,[9] Missouri courts have been unwilling to strike down application of hearsay exceptions on that basis. In *State v. McO'Blenis*[10] the Missouri Supreme Court was called upon to decide whether the introduction of prior recorded testimony against a defendant in a criminal trial violated his right to be confronted by the witnesses against him as guaranteed by the Missouri Constitution. In a lengthy opinion, the court held that the constitution was not intended to upset exceptions to the hearsay rule which were well established when the constitution was adopted.[11] This reasoning was later approved in *State v. Durham*,[12] in which the court held that because a hospital record qualified as a hearsay exception under the Uniform Business Records as Evidence Act, its introduction into evidence did not violate Missouri's confrontation clause.

Under the federal constitution, the United States Supreme Court has been more receptive to confrontation arguments attacking the application of hearsay exceptions in criminal cases. It was held at an early date, however, that the confrontation clause is not a bar to all hearsay evidence. In *Mattox v. United States*[13] two witnesses who had testified against the defendant had died since the first trial, and the prosecutor was allowed to read their former testimony into evidence at the second trial. In emphasizing the *necessity* of allowing the prior testimony into evidence, the Court analogized the situation to that of using dying declarations.

It was not until 1967 in *Pointer v. Texas*[14] that the Supreme Court applied the confrontation clause to the states by means of the due process clause of the fourteenth amendment. The Court held it error to admit testimony at trial which had been given at a preliminary hearing at which the defendant was not represented by counsel. *Pointer,* however, was decided on both confrontation and right to counsel grounds.

Three years later the Court had occasion to examine exceptions to the hearsay rule solely in terms of the confrontation clause. In *Barber v. Page*[15] the transcript of a witness' preliminary hearing testimony was

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8. U.S. CONST. amend. VI; MO. CONST. art. 1, § 18a.

9. "That in criminal prosecutions the accused shall have the right ... to meet the witnesses against him *face to face*; ..." MO. CONST. art. 1, § 18a (emphasis added).

10. 24 Mo. 402 (1857).

11. *Id.* at 417.

12. 418 S.W.2d 23 (Mo. 1967).

13. 156 U.S. 237 (1895).

14. 380 U.S. 400 (1965).

15. 390 U.S. 718 (1968).

admitted into evidence at the defendant's criminal trial under the prior recorded testimony exception to the hearsay rule. This exception requires unavailability of the witness as a condition precedent to admissibility. The Court held that technical unavailability, in the sense of a mere showing that the witness is absent from the jurisdiction, is not sufficient to fulfill confrontation demands. Actual unavailability must be established by a good faith effort to secure the presence of the witness at trial.[16]

The next significant development in the confrontation-hearsay area was in *California v. Green*.[17] In *Green* the state's witness remembered nothing of his prior statements or of his testimony at the preliminary hearing. The defendant's attorney had cross-examined the witness at the preliminary hearing. This preliminary hearing testimony was admitted into evidence in order to refresh the witness' memory under a California statute allowing admission for the purpose of proving the truth of the matter asserted. The United States Supreme Court held that neither the admission of this evidence nor the California statute violated the confrontation clause. The Court went on to state that the admission of a declarant's out-of-court statement does not violate the confrontation clause as long as the declarant is testifying at trial and is subject to full and effective cross-examination.

Although *Green* strongly emphasized the opportunity to cross-examine the out-of-court declarant, any implication that this was a constitutional requirement was dispelled in *Dutton v. Evans*.[18] A cellmate of one of the defendant's co-conspirators was called to testify at trial. He testified that his cellmate had said: "[I]f it hadn't been for [the defendant], we wouldn't be in this right now." The Court held that admission of this testimony under the co-conspirator exception to the hearsay rule did not violate the confrontation clause.

Three factors were central to the holding in *Dutton*. First, the Court emphasized the "indicia of reliability" of the evidence and indicated that its concern was that the trier of fact have a satisfactory basis for determining the truth of the prior statement. The Court concluded that the statement was trustworthy because it was spontaneous and against the penal interest of the declarant. The Court also said that the evidence was not "crucial or devastating" because it was of peripheral significance in comparison to the testimony of the eyewitness and the other nineteen witnesses for the state. Finally, the Court noted that there would have been no utility in cross-examination of the declarant. The Court found it inconceivable that cross-examination would have shown that the co-conspirator was not in a position to know whether Evans was involved in the crime.

16. *Id.*
17. 399 U.S. 149 (1970).
18. 400 U.S. 74 (1970).

An analysis of *Rhone* under these three factors lends little support to the result reached by the Missouri court. First, had Hill been in court to testify, it would have been possible for the defense to probe his qualifications as an expert. Of even greater significance to the defense and consequently to the trier of fact would have been an examination of the methods used by Hill in arriving at his conclusion that the particles found on the defendant's clothing matched those retrieved from the scene of the break-in. For example, Hill could have been cross-examined concerning the margin for error in the tests used, the degree of judgment used in arriving at the test results, and the degree to which other experts would agree with Hill's interpretation of the tests. Whether the answers to questions in these and other areas would have weakened the evidentiary value of Hill's findings is not known; this is precisely the problem.

Another factor discussed in *Dutton* was the peripheral significance of the contested evidence. In *Rhone* the only evidence other than the laboratory report that placed the defendant at the scene of the break-in was the testimony of the arresting officers. One officer testified that he was unable to see clearly the facial features of either man. However, he did testify that one of the men was wearing a dark blue shirt and plain trousers. This description matched the clothing worn by the defendant. The other officer stated that he apprehended the defendant descending from the roof of the market, and that the defendant was found to be in possession of a pistol which had been taken in the burglary. The defendant testified that he had come upon the scene of the burglary only after the police arrived, and that he had found the gun lying on the ground near the market. The believability of the defendant's testimony was significantly colored by the laboratory report which placed him at the scene of the break-in. As the dissent in *Rhone* pointed out, the laboratory report was powerful evidence that the defendant had been in the building especially if consideration is given to the weight accorded to modern scientific evidence.[19] The admission of this laboratory report was "crucial and devastating" to the defendant's case within the meaning of *Dutton.*

The main thrust of the Court's reasoning in *Dutton* turned on the finding that the hearsay statement had "indicia of reliability." In a business record, the recording of easily observable facts such as employment records,[20] hours worked,[21] goods sold, or services performed,[22] may have sufficient indicia of reliability; it is safe to assume that the percep-

19. 555 S.W.2d at 844 (Bardgett, J., dissenting).
20. Happy v. Blanton, 303 S.W.2d 633 (Mo. 1957).
21. Gallizzi v. Scave, 406 Pa. 629, 179 A.2d 638 (1962).
22. George F. Robertson Plastering Co. v. Magidson, 271 S.W.2d 538 (Mo. 1954).

tion of the person who observed these simple acts was accurate. The recording of a mere conclusion should not carry with it such an assumption of accuracy. As the dissent in *Rhone* pointed out, there was no evidence from which the trial court could assume that the conclusions were of such a routine character as to be inherently reliable. Therefore, the test results in *Rhone* did not carry sufficient indicia of reliability under the *Dutton* analysis.

Another problem raised by the use of business records as evidence is that such records are often prepared in anticipation of litigation.[23] The objection to records prepared for use at trial is that they do not have the inherent reliability characteristic of day-to-day records made in the ordinary course of business.[24] This lack of trustworthiness is the touchstone of the routine exclusion of records made in preparation for litigation.[25] Although it can be argued that the laboratory reports in *Rhone* were prepared solely for investigative purposes, such an argument ignores the fact that the reports were also compiled for possible use in a criminal prosecution. This may further weaken the reliability of the evidence.

In its discussion of indicia of reliability in *Dutton,* the Court said that the confrontation clause reflects a practical concern for the accuracy of the truth-determining process in criminal trials. This goal, according to the Court, is achieved by assuring that the trier of fact has a satisfactory basis for evaluating the truth of a hearsay statement. The Uniform Business Records as Evidence Act reflects a similar concern for accuracy. Before hearsay evidence in a business record will be admitted, evidence must be presented as to the identity of the business record and its mode of preparation.[26] The record is then admissible only if the trial court determines in the exercise of its sound discretion[27] that a sufficient foundation has been laid.[28]

The extent to which *Dutton* may limit a court's discretion in admitting business records in criminal trials is unclear. The confrontation clause may require more foundation testimony than is necessary in civil cases. Courts could require the person identifying the record and testifying as to its mode of preparation to be technically familiar with the procedures used in the analysis being reported. This could be accomplished by calling the original entrant to the stand. Where this is not feasible because that person is no longer working in the police laboratory or is unavail-

23. It was the contention of the dissent that these records were memoranda made by the prosecuting team for use at trial. 555 S.W.2d at 847 (Bardgett, J., dissenting).

24. W.E. Rubright Co. v. International Harvester Co., 358 F. Supp. 1388, 1403 (W.D. Pa. 1973).

25. Kitchen v. Wilson, 335 S.W.2d 38 (Mo. 1960).

26. *See* note 2 *supra.*

27. State v. Boyington, 544 S.W.2d 300 (Mo. App., D.K.C. 1976); Thomas v. Fred Weber Contractor, Inc., 498 S.W.2d 811 (Mo. App., D. St. L. 1973).

28. *See* cases cited note 27 *supra.*

able for other reasons, someone familiar with the process could be called to testify.

This method would give the defendant an opportunity to engage in a meaningful cross-examination as to the factors involved in arriving at the conclusion in the business record. The jury would also be given a sufficient basis to evaluate the truth of the report, thus fulfilling the concerns of the Supreme Court in *Dutton.* Such a constitutional gloss on a hearsay exception requirement is not unprecedented. Since *Barber v. Page*[29] the Supreme Court has required *actual* unavailability of a witness as a condition precedent to the use of his prior recorded testimony at a criminal trial.

Actual unavailability of the entrant should be required in business record cases. The Missouri common law business records exception to the hearsay rule required unavailability.[30] This procedure emphasized the *necessity* of using a business record because the entrant's testimony was not available.[31] In Missouri's statutory business records exception,[32] the unavailability requirement has been eliminated[33] as a matter of convenience. In criminal cases in which life or liberty may be lost, convenience should be secondary to the right of a defendant to confront the witnesses against him. The objection is not that the hearsay statement of an unavailable witness is more reliable than the hearsay statement of an available witness. Rather, a prosecutor should not be allowed to use relatively unreliable evidence (the business record) when more reliable testimony is available. Such constitutional requirement of unavailability may nonetheless be impractical. Police departments would be unduly burdened by a rule requiring them to keep track of laboratory technicians who had left their employ. Prosecutors could be seriously inconvenienced if they were required to arrange for the appearance at trial of laboratory technicians who are not actually unavailable. Finally, even if the laboratory technician were actually unavailable, the analysis contained in the record would be no more trustworthy.

A variant of this approach has been suggested by one writer[34] and adopted by statute in Iowa. By giving ten days notice to the prosecutor,

29. 390 U.S. 718 (1968).

30. Missouri Forged Tool Co. v. St. Louis Car Co., 205 S.W.2d 298 (St. L. Mo. App. 1947); Bedwell v. Capitol Motor Ass'n, 66 S.W.2d 962 (K.C. Mo. App. 1933); Einstein v. Holladay-Klotz Land & Lumber Co., 118 Mo. App. 184, 94 S.W. 296 (St. L. Ct. App. 1906).

31. The Supreme Court also emphasized a necessity requirement by requiring actual unavailability in *Barber v. Page,* 390 U.S. at 718.

32. *See* note 2 *supra.*

33. Rossomanno v. Laclede Cab Co., 328 S.W.2d 677 (Mo. En Banc 1959); Ellis v. State Dept. of Pub. Health & Welfare, 285 S.W.2d 634 (Mo. En Banc 1955).

34. Comment, *Evaluative Reports By Public Officials–Admissible As Official Statement?,* 30 TEX. L. REV. 112 (1951).