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Michael B. Anderson

CHAIN OF CUSTODY REQUIREMENTS IN ADMISSIBILITY OF EVIDENCE

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In the investigation and preparation of a case, an attorney will sometimes find that crucial evidence has passed through several parties' possession. The transfer may have occurred prior to the event in issue (products liability cases); or the transfer itself may be the precise event in issue (sale of dangerous drugs); or the transfer may have occurred after the event in issue (chemical analysis of blood or drug samples). Each transfer affords, however, the possibility of accidental or willful alteration of the item. There may be a potential loss of ability to positively prove that the item offered in evidence was the item involved in the transaction in question. The party opposing the offer of evidence may seek to exploit the lack of positive identification or raise the possibility of alteration. The court is then faced with the question of whether the evidence should be admitted. Such a situation occurred in the recent Montana case of *State v. Thomas*.[1]

I. The Decision of State v. Thomas

The defendant was convicted of sale of dangerous drugs. The state's case included testimony from a witness who was found in possession of a blue box, containing a plastic bag the contents of which proved to be marijuana. The witness testified that she saw the defendant transfer a plastic bag to her friend at eight o'clock that morning. The friend retained possession until noon, when she transferred the blue box to the witness. The witness retained possession until two o'clock that afternoon, when the school superintendent discovered the box in her possession.

The defendant, Thomas, contended that the state's evidence had been improperly admitted because the state had not established a continuous chain of possession from him to the school superintendent. The defendant sought to exploit two breaks in the chain of possession: first, when the evidence was in possession of the witness' friend, and second, when the evidence was in possession of the witness. The defendant cited in support an Iowa case, *Joyner v. Utterback*,[2] for the proposition that, if one link in the chain of possession is missing, the exhibit cannot be introduced.

The court distinguished *Joyner* as involving chain of custody

1. State v. Thomas, 32 St. Rep. 229, 532 P.2d 405 (1975).
2. Joyner v. Utterback, 196 Iowa 1040, 195 N.W. 594 (1923).

after confiscation by law enforcement officials[3] and affirmed the conviction. The Montana supreme court found that, where the evidence was inexorably linked to the defendant, mere conjecture of the possibility of tampering was insufficient to preclude the introduction of the evidence. It further stated that the defendant's burden was to show affirmatively that tampering had taken place.[4] As a guideline, the court stated:

> In each case the trial judge before he admits it in evidence must be satisfied that in reasonable probability the article has not been changed in important respects . . . In reaching his conclusion he must be guided by the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.[5]

II. The Effect of State v. Thomas

The *Thomas* decision appears to be an attempt to balance burdens between the offeror of evidence and the opposing counsel. Evidence must still be linked to the defendant and must be reasonably free from change in important respects.[6] However, the opponent of its introduction must go beyond mere conjecture and affirmatively show tampering.

Some questions remain, however. While distinguishing *Joyner* as a post-confiscation case, and holding the *Thomas* case to involve a pre-confiscation issue, the court cited as support for its conclusion *State v. Olsen*,[7] a post-confiscation case. In *Olsen*, burglary tools and fruits of the crime were locked in the defendant's car by law enforcement officials. They then drove the car from Baker to Sidney, with a half-hour stop in Glendive, during which interval the car was left unattended. The quotation regarding reasonable absence of material change appearing in *State v. Thomas* was the court's response rejecting the defendant's position that it was:

> . . . incumbent upon the prosecution to prove there was absolutely no possibility that the exhibits had been tampered with during the time the car was left unattended.[8]

The court's use of the *Olsen* case to distinguish the *Joyner* post-confiscation setting raises doubts whether pre- or post-confiscation is a distinction without a difference, or whether there remains an implied requirement of a complete chain of possession in the post-

3. State v. Thomas, *supra* note 1 at 406.
4. *Id.*
5. *Id.* at 407, *citing* State v. Olsen, 152 Mont. 1, 10; 445 P.2d 926, 931 (1968).
6. *Id.*
7. State v. Olsen, *supra* note 5.
8. *Id.* at 931.

confiscation setting.

It is as yet unclear when the defendant's affirmative burden to show tampering will arise. In *Thomas* the evidence said to be "inexorably linked" to the defendant.[9] Will the burden be less when the connection becomes more tenuous? Will the burden rest with the prosecution to negate tampering when the link is less "inexorable"? How does placing an affirmative burden of showing tampering affect the traditional resolution of doubts in favor of a criminal defendant? It is this writer's contention that the uncertainties arising from the court's analysis unreasonably detract from what may have been a proper result, and that the appropriate guidelines are available to minimize the confusion.

III. An Attempt at Clarification

The Montana Code of Criminal Procedure offers clear guidelines regarding control and disposition of articles seized by law enforcement officials.[10] Basically, the procedure calls for prompt delivery to the judge of instruments, articles and things seized, taking of an inventory, and providing a copy to the person from whom the property was taken. The judge enters an order for the custody or appropriate disposition of the items seized pending further proceedings.[11] If no arrest is made, items seized without warrant may be retained in custody of the seizing officer for sufficient time for investigation of the crime, then delivered to the proper judge for disposition orders.[12] A person claiming right of possession of the seized items may apply to the judge for return, where, upon notice and hearing, the judge may order the property returned if it is not needed for evidence or if satisfactory arrangements can be made for its return for subsequent use as evidence.[13]

If followed, this procedure may well eliminate many problems arising in chain of custody cases. The items will be subject to court supervision from early in the case until their use as evidence or return to their possessor. Adequate records will show what was taken and its manner of custody. Appropriate orders may apply to objects which may change or deteriorate with time. Sufficient investigation may proceed with court approval. An experienced judge may be able to issue tailored instructions for the custody and disposition of property according to its nature. At this time, however, the

9. State v. Thomas, *supra* note 1 at 406.

10. *See generally*, Revised Codes of Montana (1947), [hereinafter cited as R.C.M. 1947], §§ 95-712-95-715.

11. R.C.M. 1947, § 95-713.

12. R.C.M. 1947, § 95-714.

13. R.C.M. 1947, § 95-715.

procedures are virtually untouched by judicial decision.[14]

The statute presently involved in chain of custody cases is Section 93-1201-1, R.C.M. 1947, which states:

> Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation or character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

The thrust of the statute is to require the object to be relevant to the fact in dispute. Toward this end, it is generally held that an adequate foundation consists of testimony that the object offered is the object which was involved in the incident, and that its condition is substantially unchanged.[15]

A. *Identification*

The threshold determination is identification. When the object sought to be introduced is readily identifiable, its admissibility should provide few difficulties, regardless of who has had custody of it. This category of ready identifiability may explain the result reached in *State v. Fitzpatrick*.[16] There, the state offered blood-stained clothing which the defense challenged for lack of identifying marks placed on the items. The challenge was held to be without merit, for the offered items were easily identified.[17] This threshold requirement could have been satisfied in *Thomas*, if it were shown that a distinctive blue box changed hands and that the marijuana was found in that box.[18] It may not be significant that the items are fungible, provided they are somehow identifiable.[19] Attempts to identify items by seals, tags, packaging or marking may well satisfy

14. Only one case is known by this writer to have reached the Montana supreme court. *State v. Nanoff*, ___ Mont. ___, 509 P.2d 837 (1973), involved the return of a gun to the defendant, convicted of a felony 20 years earlier, where the gun was seized under a faulty search warrant and without authority.

15. CLEARY, MCCORMICK ON EVIDENCE, p. 527, (2d. Ed. 1972); State v. Byrne, 60 Mont. 317, 325; 199 P. 262, 264 (1921); State v. Wong Fong, 75 Mont. 81, 87; 241 P. 1072 (1925); *See also*, Note, *Preconditions for Admission of Demonstrative Evidence*, 61 N.W.U.L. REV. 472, 481 (1966).

16. State v. Fitzpatrick, 163 Mont. 220, 516 P.2d 605 (1973).

17. Offered items included: a gray sweatshirt with the name "Fitzpatrick" thereon and including a distinctive design on the back; a pair of denim trousers from which the pockets had been torn; a pocket matching the trousers with the name "Fitzpatrick" on it. *Id.* at 608.

18. *See also*, State v. Olsen, *supra* note 5 (burglary tools and jewelry); State v. Byrne, *supra* note 15 (skull fragments).

19. An extreme example, notable in overlooking possibilities of tampering is *State v. Wong Fong*, *supra* note 15. There, a package alleged to contain cocaine was admitted. While the package was retained by the sheriff, the sample used in identifying the substance is only accounted for by the statement it was taken by a chemist for analysis.

the requisite uniqueness for identifying otherwise indistinguishable items.[20]

An item may be so indistinguishable as to be unidentifiable. This category finds support in the decision of *Richardson v. Farmers Union Oil Company*,[21] a civil case dealing with the admissibility of evidence concerning petroleum fuel obtained subsequent to a fire which was offered to prove its condition at a time prior to the fire. The court found the evidence inadmissible, stating:

> Plaintiff contends that with respect to his offers of proof, the length of time elapsing before the examinations were made would not affect the competency of admissibility of such evidence, but merely its weight . . . We find no fault with this principle applied as it was in that case to something obvious, but in this case we are not dealing with something which is obvious . . .[22]

The extent to which identifiability controls admission of evidence is strongly emphasized in the case of *Lestico v. Kuehner*,[23] a case cited by the Montana Supreme Court in *State v. Olsen*.[24] *Lestico* involved a personal injury action wherein the plaintiff claimed the car accident was caused by defendant's excessive speed. In defense, the defendant sought to introduce a punctured tire casing, indicating another cause for his accident. Objection was made by the plaintiff as to chain of custody of the tire. The court treated the contention summarily:

> It is utterly immaterial in how many or whose hands the tire had been so long as it could be identified.[25]

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20. *See*, Note, 110 U.PA.L.REV. 895, 896 (1962), stating, ". . . in states where the Uniform Business Records as Evidence Act has been adopted, some courts have accepted, in lieu of continuous possession, records indicating that the specimen remained unchanged while it was in the custody of the testing laboratory." *See also*, State v. Burtchett, 31 St. Rep. 739, 530 P.2d 471 (1974), where the examining chemist testified to receipt and personal delivery of the samples of arson evidence to Montana. *See also*, State v. Frates, 160 Mont. 431, 434; 503 P.2d 47, 49 (1972), where "[t]he evidence establishes a chain of possession of the LSD tablets from defendant to the arresting officers; from there to tagging, marking and storing in the evidence vault at the Billings police department; the packaging and addressing of four of the tablets to the Bureau of Narcotics and Dangerous Drugs in San Francisco; the receipt of the four pills by that agency; their examination, testing, and identification by chemist Chan of that agency; and, the return of the plastic container, the mailing box, and the mailing wrapper, bearing the handwriting of one of the Billings officers, to the Billings police department. Under such circumstances, the absence of the direct testimony of the person who actually mailed them to San Francisco is immaterial. . . ."

21. Richardson v. Farmers Union Oil Company, 131 Mont. 535, 312 P.2d 134 (1957).

22. *Id.* at 139.

23. Lestico v. Kuehner, 204 Minn. 125, 283 N.W. 122 (1938).

24. State v. Olsen, *supra* note 5.

25. Lestico v. Kuehner, *supra* note 23 at 125.

B. *Absence of Material Change*

Having first determined the evidence can be identified, a court should then consider whether the offered items have suffered so material a change as to lose their evidentiary value. Change should not affect admissibility, but should go to the weight of the evidence. A jury could then assess the weight of the offered evidence in light of the burdens of proof prevailing in a civil or criminal case. Preference should be for admission, provided the evidence is properly identified. In such case, chain of custody may have more impact on identification than absence of change. A court still retains the right to preclude introduction of evidence which, because of inadequate proof of its custody, may be unduly prejudicial, cause surprise or confusion, or waste the court's time. But an appellate court should refrain from creating new, affirmative burdens on a party, as was done in *State v. Thomas*, when existing burdens will suffice.

Several cases indicate a refusal to place a burden on an offering party to affirmatively exclude all possibility of change.[26] In fact, change may be significant without destroying the evidentiary value of the offered evidence.

> Even though the object is not in exactly the same condition at trial as at the time in issue—or even in substantially the same condition—the exhibit may still be admitted if the changes can be explained and they do not destroy the evidentiary value of the object.[27]

The most effective control over the evidentiary value of offered evidence is the relative burdens of proof between parties based on whether the case is a civil or criminal action. The same item may be admitted with different result depending on whether the standard is preponderance of evidence or proof beyond reasonable doubt. The standards governing admissibility remain the same for both civil and criminal litigation, as they should.[28] Yet, by letting identity control admissibility and change go to weight, inconsis-

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26. State v. Wong Fong, *supra* note 15 at 1074: "It was not necessary that all possibility of its having been tampered with should be excluded by affirmative testimony." State v. Olsen, *supra* note 5 at 931: "But there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with. . . ." State v. Thomas, *supra* note 1 at 406-407: "Defendant, however, simply alleges that the possibility of tampering existed while the plastic bag was in the possession of Miss Shelly. This mere conjecture by defendant is not sufficient to preclude the introduction of this evidence. Defendant's burden was to show affirmatively that tampering had taken place." However, State v. Burtchett, *supra* note 20: "The State must identify the particular exhibit as relevant to the criminal charge and must show prima facie that no alteration or tampering with the exhibit occurred. Once that has been done, the burden of proving alteration shifts to appellant."

27. Note, *Preconditions for Admission of Demonstrative Evidence, supra* note 15 at 484.

28. 1 WIGMORE ON EVIDENCE P. 16, § 4 (3d ed. 1940).

tency may be avoided and confusion lessened. A judge, assured of an offered item's identity, need not dwell on change of condition as a matter of law, but leave that task to opposing attorneys arguing their clients' interests, with a jury weighing the impact of the offered evidence.

An applied example may be helpful. In *State v. Thomas*, the question of whose burden it was to show tampering, or absence of tampering, could have been resolved on a full disclosure by both prosecution and defense counsel. The prosecutor would have initially been required to offer witness testimony identifying the blue box and its contents. Defense counsel could have objected by challenging the identity of this evidence. If the evidence were admitted, defense counsel could then have attempted to create a reasonable doubt that would have reduced the weight of the evidence by offering possibilities of tampering. This approach might have been directed at those who possessed the box prior to its confiscation, or directed at those who performed chemical analyses on its contents. In the latter instance, the prosecutor may then have been able to rely, in part, on a rebuttable presumption of official regularity in handling the item.[29] Defense counsel could then have argued its opportunity to discover evidence of tampering was so limited, the item being kept in law enforcement channels, that the prosecution should have made a stronger showing than mere reliance on a rebuttable presumption. Defendant could have offered evidence to rebut the presumption, attempting to create a reasonable doubt by showing the item was not handled with official regularity. In response, the prosecutor could have offered official records of custody. In reaching a decision as to the weight of the offered evidence, the jury would thus have been determining whether there existed reasonable doubt. Such a decision would have been based on the fullest possible disclosure of circumstances surrounding the evidence, not on a legal determination of an affirmative burden to be placed on a defendant. By this method, the pre-confiscation/post-confiscation dilemma is also resolved. Where both parties have relatively equal access to proof of tampering, as would likely happen in pre-confiscation settings, the burdens would remain evenly distributed between both parties. But where items remained in official custody, or in the hands of an opponent, the burden rests more heavily on the holder of the evidence to show he handled the evidence properly. Doubts may still be resolved in favor of a criminal defendant.

29. R.C.M. 1947, § 93-1301-7 provides: "All other presumptions may be controverted. . . . (15) That official duty has been regularly performed."

IV. Conclusion

The chain of custody requirement is most important when it is a vital link in proving identity of the offered evidence; without a showing of custody it is as likely as not the evidence analyzed was not the evidence originally involved in the incident. But where the question is not whether the offered item was the original, but whether its condition has changed, the court should properly admit the evidence and let what doubt exists be resolved by a jury measuring its weight against the burden of proof required to prevail in a civil or criminal case.