Evidence § W Professor Len Sosnov

1993 Evidence Exam Excerpt

What follows is the essay question, which was approximately one-third of the grade, and a very good answer to part (1) of that essay.

Essay Ouestion

As with the last part of the exam, the Federal Rules and United States Constitution provide the governing rule of law.

Read this carefully before answering the questions — the questions are based on this factual scenario.

Herbie Clack ("C") has been charged with possession with intent to deliver (sell or give away) a prohibited drug, methamphetamine ("meth"). On November 1, 1992, police executed a search warrant for the one-story two-bedroom house at 1400 Elm Street. When they arrived at the house at 9:00 p.m. and knocked on the door, a female named Mary Jane Coker ("Mary Jane") answered. Seated in the living room, the room which the front door enters into, was "C". Police searched the residence and found a bag containing 30 small glassine packets of meth hidden in a closet in one of the bedrooms. The packets contained a total of 15 grams of meth. They also seized other evidence, including empty glassine packets in the kitchen and a letter to Mastercard. The search was concluded at 10:00 p.m. Only "C" was charged although both he and Mary Jane had been taken to the police station initially. Mary Jane was released a few minutes before midnight that night after giving a statement to police which consisted of her tearfully saying that she did not know anything about the drugs they found.

"C" is now being tried five months after his arrest and all pre-trial motions have been denied, including motions to suppress evidence. Possession is defined as the ability to exercise control over the object. Possession can be joint, meaning that more than one person can be found guilty of possessing the same items at the same time. The other elements of the offense are an intent to deliver and proof that the substance found was meth.



The Criminal Trial Begins

EACH ITEM OF EVIDENCE AT TRIAL IS PRESENTED IN THE EXACT ORDER BELOW.

You are the Judge and must rule on the admissibility of the challenged evidence.

When deciding admissibility, remember to carefully consider at what point in the proceedings the evidence is being offered and for what purpose. If the evidence should not be admitted at all, explain. If the evidence should only be admitted in part, make such a ruling and explain. Also, explain if the evidence should only be admitted for a limited purpose. In other words, act as if you are the judge and make a ruling and give the reasons explaining your ruling. Remember, these are not short answer questions. A good answer correctly identifies the evidentiary issues involved, explains the governing legal principles, and then applies the facts to the rule of law to reach a conclusion.

The prosecution presents its case, seeking to introduce the following <u>objected to evidence</u>:

- (1) The custodian of records for the police department. She will testify that the records she brought are official police records, kept in the regular course of business, and that it is the regular practice of the police department to keep such records. The records sought to be admitted state that it is an inventory report prepared by Officer Scheinfeld on November 1, 1993 at 10:15 p.m. The report states that Officer Scheinfeld searched the kitchen at 1400 Elm Street that night, and at approximately 9:15 p.m. he "found hidden inside a gallon jar of pasta sauce in the refrigerator 100 empty small glassine packets, type used to package drugs."
- (2) The testimony of Officer Herrin, one of the officers who executed the search warrant. He will testify that in the living room he found a letter addressed to Mastercard. He said he remembered it stated, "To Whom It May Concern: I am not paying your latest bill for fifty dollars because I never received the item." Officer Herrin testified that it had a return address of 1400 Elm Street and a signature that said Herbie Clack. He testified that



he did not have the letter because it fell out of the police case file at some time and could not be found although they searched for it.

(3) The next witness is Ollie Roach who will testify that on October 24th, 1993 (a week before the search) he purchased a gram of meth from C at a pool hall (a mile from where D was arrested). C was never arrested for this alleged offense.

After the unobjected to testimony of a chemist that the packets were tested and found to contain methamphetamine. The Prosecution Rests.

The defense presents its case

The defense proposes to introduce the following objected to evidence:

(4) C proposes to present the following evidence concerning Ollie Roach, the last government witness who you should assume was (rightly or wrongly) permitted to testify. Assume that C can present the evidence in proper form after laying a proper foundation, etc.

Evidence of a Roach conviction for possession of heroin 2 years ago. The offense of heroin possession carries a maximum penalty of 2 years in prison and Roach was sentenced to 9 months in prison.

- (5) C also wants to introduce evidence that Roach was caught attempting to steal heroin out of the police evidence locker six months before this trial and evidence that he was arrested for this offense a week later and that he has a trial scheduled on these charges next month. Assume that C can present this evidence through appropriate witnesses if permitted to do so.
- (6) Testimony by Laura Hasty, the best friend of Mary Jane, concerning what Mary Jane said to her. Mary Jane came over her house an hour after being released by police, rushed in the door and said, "You won't believe this! Wow, what a trip, a terrifying heavy duty cop scene. I can't believe the police bought the crap I told them and C got left holding the bag for my stuff. That poor innocent schnook. He doesn't even live there; he was just visiting."



Part (1) answer

This is an out-of-court statement being offered for the truth of the matter against the defendant. Therefore, it is inadmissible hearsay unless it comes within an exception. While the prosecution, through a custodian of records has tried to establish its admissibility as a business record (record kept in "regular course of business" and "regular practice" to keep such records) it is inadmissible because this police report is also a public record, and the public record exception specifically prohibits observations by law enforcement personnel, like the instant case, from being admitted in a criminal case. The courts have held that this prohibition in the public records exception would be meaningless if courts permitted the same record to be admitted under the business records exception.

The prohibition against admission of police observations in reports in criminal cases has been ignored only when the police observation is very routine. That is not the case here where it took place during a police raid and search, and the office's report even contains a damaging expert opinion that the packets that were found are used in the drug trade. Inadmissible hearsay.