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In re: State of Columbia v. John Davis, et al.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant, by and through counsel, submits this motions in limine seeking to exclude hand written transcripts of alleged text messages between defendants Jones and Cameron on the basis of the Original Documents Rule.

II. APPLICABLE LAW

Under State of Columbia, Rules of Evidence, Rule 1001(d), an "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout-or other output readable by sight-if it accurately reflects the information. Rule 1001 (e), a "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002, an original writing, recording, or photograph is required in order to prove its content, unless these rules provide otherwise.

Rule 1004, an original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith; (b) an original cannot be obtained by any available judicial process; or (d) the writing, recording, or photograph is not closely related to a controlling issue.

III. LEGAL ARGUMENT

In *State v. Jones,* the defendant was charged with conspiracy to traffic counterfeit watches. The prosecution sought to introduce evidence of a police detective's hand written notes and testimony relating to email communications between Jones and her co-conspirator. The notes and testimony were used solely to prove that Jones and her co-conspirator were in communication with one another during the relevant period of time. The notes of the detective were not offered to prove the content of the emails and the emails themselves were never produced. Thus, the court found the notes and testimony admissible because the were not being offered to prove anything other than communication.

Unlike in *Jones*, where the notes and testimony were not be offered to prove the crime, here, the hand written notes and testimony being offered by Officer Powers and the State is being offered to prove the intent and overt acts of Davis as well as a plan to conspire to distribute. Thus, the *Jones* case is unlike the instant matter, and the original document rule should be applied here.

In *State v. Grimes*, the defendant was charged with robbery and wire fraud and he brought an appeal regarding the denial of his motion in limine to exclude photographs taken by police subsequent to his arrest. Grimes sought to exclude five photographs of traveler's checks being offered by the prosecution because the checks themselves were no longer available. The court

found that the best evidence to prove the existence of communications and plans to arrange sales of drugs is the text messages themselves. However, the text messages are unavailable. As a result, the prosecutions reliance on Columbia Rule of Evidence 1004(a) which provides that the original is not requires, and other evidence of the contents of a writing is admissible, if " [a]ll the original are lost or destroyed, and not by the proponent acting in bad faith."

Similarly to *Grimes*, the evidence the State is seeking to be admitted is not a true duplicate as defined in Rule 1001(e). Under Rule 1002, the State is required to produce as evidence the original text messages to prove its content. The issue is that the State is seeking to introduce evidence of a conspiracy by way of text messages but the original text messages are unavailable. Under the rules of evidence, a duplicate is only admissible if it accurately reproduces the original. Davis objects to the use of Officer Power's hand written transcription because the text messages themselves are lost or destroyed due to bad faith. Officer Power's has testified that he transcribed the original text messages. However, he should have used other means to collect and store potential "evidence" by taking a photograph or otherwise making an electronic record that would not be tampered with. Thus, his hand written account, which he admittedly did over the course of two days and with interruptions, is not a reliable source or a true representation of the text messages and does not suffice as a "duplicate." Additionally, without an electronic account of the text messages, there is no way to verify that Jones was in fact the sender/receiver of the text messages that Officer Powers purports. As such, the evidence should be excluded.

The court in *Grimes* further used a balancing test of burdens: governments burden regarding conduct, and the defendant's burden to demonstrate prejudice, to determine whether or not evidence that is not an original should be admitted.

A. GOVERNMENT'S BURDEN JUSTIFYING CONDUCT

i. The court should consider whether the evidence was lost or destroyed while in its custody;

Here, the State seeks to prove the existence of text messages and content of communications between Davis and Cameron signifying an alleged conspiracy to distribute cocaine by way of handwritten notes/transcript allegedly copied by Officer Powers because the original text messages are not available. Officer Powers testified in a motion to suppress that the text messages allegedly were "deleted" because Cameron had her phone set to delete messages. However, Officer Powers did nothing to prevent the deletion of the text messages and offered no proof that Cameron actually had the messages deleted.

ii. Whether the government acted in disregard for the interests of the accused;

Here, the State acted in disregard for Davis' interest because they did not take reasonable steps to secure alleged evidence of a conspiracy and even when attempt was made to secure the evidence, Officer Powers transcribed the alleged messages over a series of a couple of day with interruptions. Thus, the government acted without regard for Davis interest.

iii. Whether it was negligent in failing to adhere to reasonable standards of care for police and prosecutorial functions, and;

Here, the police did not take reasonable measures to secure the evidence such as powering off the cell phone or putting in a farday bag to prevent interference. Officer Powers could have

utilized other electronic means to protect the evidence but he took no substantial steps to preserve the evidence beside hand transcribing the messages.

iv. If the acts were deliberate, whether they were taken in good faith or with reasonable justification.

Here, the acts by Officer Powers may have been taking in good faith as that is SOP of the police department; however, the prosecution should have been more diligent in preserving the evidence it need to prove a conspiracy and there is no reasonable justification to allow such significant evidence to become unavailable and then need to rely on hand writing transcription.

B. DEFENDANT'S BURDEN DEMONSTRATING PREJUDICE

i. The court must consider the centrality of the evidence to the case and its importance in establishing the elements of the crime, including motive or intent;

Here, the text messages, and specifically the content of the messages, are being proffered by the State to demonstrate Davis' intent to distribute cocaine and that he took substantial, overt steps in the furtherance of a conspiracy to distribute. The text messages are the only showing of an alleged intent which is central to the case.

ii. The reliability of secondary or substitute evidence;

Here, the reliability of the secondary or substitute evidence is unreasonable. Officer Powers testified that he hand wrote the alleged transcript of the text messages between Davis and Cameron; however, it did so over the course of two days and while he was regularly interrupted by other officers, calls for service, etc. Therefore, the contents of Officer Powers' handwriting is unreliable information and reasonably could be inaccurate.

Additionally, during prior testimony. Officer Powers reported that the got a search warrant for Cameron's phone and that he found a series of text messages between Davis and Cameron. However, the State offers no evidence that the phone number or the contact in Cameron's phone actually was identified as belonging to Davis. In fact, without the phone itself, which has not been proffered as evidence because the messages are allegedly gone, there is not sure way of knowing the messages were between Davis and Cameron, further diminishing the reliability of Officer Powers testimony and hand written transcription.

iii. The probable effect on the jury from absence of the evidence.

Here, there is a highly probably effect of prejudice on Davis by the jury in the absence of the original evidence. The jury is likely to be swayed by the testimony and the writings of Officer Powers because he is a police officer in a position of power and is deemed to be trustworthy. Therefore, the absence of the actual text messages will make it more probable that the jury accepts as accurate the notes of Officer Powers, despite their unreliability .

IV. CONCLUSION

Based on the above, Defendant Davis respectfully requests that the court grant this motion in limine to exclude the handwritten transcript and testimony of Officer Powers as it relates to the unavailable text messages and Davis will be substantially prejudiced if the substitute evidence is admitted.

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