

## STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

NORMAN A. BARRON CHIEF MAGISTRATE TELEPHONE: (302) 571-2485

## LEGAL MEMORANDUM 83-108

TO:

ALL JUSTICES OF THE PEACE

STATE OF DELAWARE,

FROM:

NORMAN A. BARRO

CHIEF MAGISTAATE

DATE:

APRIL 26, 1983

RE:

THE BEST EVIDENCE RULE

## Hypothetical

John Doe is arrested for Shoplifting. He entered a plea of not guilty to the charge. Trial is held at a Justice of the Peace Court. The store security officer is the only witness against the defendant. He testifies to what he saw and there is no doubt that these observations were clearly enough to lead one to conclude that a shoplifting of a sweater had occurred. The security officer did not bring the sweater with him so as to offer same into evidence. At the close of the State's case, defense counsel moves to dismiss the charge because, he contends, the security officer failed to offer "the best evidence" against his client, to wit: The sweater. Thus, the argument goes, the defendant is denied due process of law in that he is prevented from viewing the sweater so as to develop a

defense which might have been viable had the sweater been available as evidence. Defense counsel concludes that the Best Evidence Rule requires that the sweater itself be available and that, in its absence, the security officer's observations and description of the sweater is not sufficient and cannot be substituted for the actual item itself.

How do you, as the presiding Justice of the Peace, rule on defense counsel's motion to dismiss?

I.

The Best Evidence Rule is as stated in DRE Rule 1002 which states as follows:

"Rule 1002. REQUIREMENT OF ORIGINAL.

To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in these Rules or by statute."1 (Emphasis added.)

The DRE provides exceptions as to when the original writing, recording or photograph is not required.

Rule 1003 states as follows:

<sup>&</sup>quot;Rule 1003. ADMISSIBILITY OF DUPLICATES.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

Rule 1004 states as follows:

<sup>&</sup>quot;Rule 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS. The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if:

<sup>(1)</sup> Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

<sup>(2)</sup> Original Not Obtainable. No original can be obtained by any available judicial process or procedures; or

<sup>(3)</sup> Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleading, or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

The case of <u>Day v. State</u>, Del.Supr., 297 A.2d 50 (1972) shows the proper application of the Best Evidence Rule. There, the defendant argued that the State's failure to introduce into evidence two marked bills of United States currency destroyed the State's case by reason of the Best Evidence Rule.

The police, through an informer, supplied two five dollar bills, the serial numbers of which were recorded, to an informer for the purchase of marijuana from the defendant. The police then searched the informer and found no drugs or money on his person. The informer and a police officer waited in a car until the defendant appeared in his car. The informer then got in the defendant's vehicle which left the area. The informer returned in five minutes with a quantity of marijuana. He told the officer he had obtained the marijuana from the defendant in exchange for the two five dollar bills. Shortly thereafter, the defendant was arrested. A search of his person yielded one of the two marked bills. The other bill was retrieved from a cash register in a store where the defendant had gone after leaving the informer.

The State's evidence with respect to the two marked bills was the oral testimony of the police officer who recorded the serial numbers and who testified that the bill found on the person of the defendant bore one of the recorded serial numbers, and the bill retrieved from the case register bore the serial number of the second one.

<sup>1 (</sup>continued)

<sup>(4)</sup> Collateral Matters. The writing, recording or photograph is not closely related to a controlling issue."

The Court rejected the defendant's contention that the conviction should be reversed by virtue of the Best Evidence Rule:

"The appellant has mistaken what the best evidence rule is. He argues that the rule requires the production of the best evidence available. But the best evidence rule is that 'in proving the terms of a writing, where such terms are material, the original document must be produced . . . McCormick on Evidence, §196; 4 Wigmore on Evidence, 3rd Ed., §1174. In the case at bar, the actual writing on the five dollar bills were immaterial. The only material point was the identification of the particular bills through the serial numbers recorded by the patrolman. It follows, therefore, that the State's case of circumstantial evidence was more than sufficient to support [the conviction]."

II.

From the foregoing, it is clear that there was no need for the store security officer to have actually offered the items allegedly shoplifted into evidence by virtue of the Best Evidence Rule or any other principle of law. So long as the witness can describe what was allegedly shoplifted and how it was done, a conviction may be had, assuming the trier of fact is satisfied that the case against the defendant was proven beyond a reasonable doubt. See Legal Memorandum 80-19, dated September 12, 1980, Shoplifting Cases; Legal Memorandum 81-47, dated March 27, 1981, Shoplifting Cases, Part II.

Under the facts of the hypothetical presented above, the defendant's motion to dismiss should be denied.

## NAB:pn

The Honorable Daniel L. Herrmann
The Honorable Grover C. Brown
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Charles M. Oberly, III
Lawrence M. Sullivan, Esquire
Eugene M. Hall, Esquire
E. Norman Veasey, Esquire, Pres., Delaware State Bar Assoc.
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