IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 1401018815
v.	:	
	:	
WILLIS C. HAND, JR.,	:	
	:	
Defendant.	:	

Submitted: December 2, 2014
Decided: January 27, 2015

ORDER

Upon the State's Motion *in Limine* to Exclude the
Testimony of Susan Schmidhauser.
Granted.

Lindsay A. Taylor, Esquire, Department of Justice, Dover, Delaware; attorney for the State of Delaware.

James E. Liguori, Esquire of Liguori & Morris, Dover, Delaware; attorney for the Defendant.

WITHAM, R.J.

Before the Court is the State's Motion *In Limine* to exclude two letters sent by the Delaware Attorney General's office to defense counsel regarding the case at bar as well as to prevent the testimony of Deputy Attorney General Susan Schmidhauser concerning her knowledge regarding the drugs seized in this case in order to aid in establishing the chain of custody. The motion is granted.

FACTS AND PROCEDURE

Willis C. Hand, Jr. (hereinafter "Defendant") was stopped for the traffic violation of not wearing his seatbelt and was found in possession of a glass pipe that is frequently used for marijuana use. During the stop the Defendant stuffed a baggie containing what was thought to be marijuana in his mouth, and ran towards a field. The Defendant was detained and an inventory search of his truck revealed two semiautomatic shotguns.

The Defendant was arrested on January 31, 2014 for the following crimes: Possession of a Firearm by a Person Prohibited, Tampering with Physical Evidence, Resisting Arrest, Possession of Marijuana, and Possession of Drug Paraphernalia. The Defendant was indicted on all charges except for the Tampering with Physical Evidence, which was *nolle prossed* by the State of Delaware.

The day prior to Defendant's trial, Defendant's counsel notified the State that he would be calling Susan Schmidhauser, Deputy Attorney General for the State of Delaware (hereinafter "DAG Schmidhauser"), as one of its witnesses. On September 30, 2014, instead of proceeding to trial, the parties had an office conference and the State made an oral Motion *in Limine* to prevent DAG Schmidhauser's testimony. On

September 30th, this Court held an evidentiary hearing to aid in the motion ruling . During the hearing the State called DAG Susan Schmidhauser, Trooper First Class Ryan Wright, and Forensic Chemist Alia Harris.

During the evidentiary hearing, DAG Schmidhauser testified that initially she was assigned the case, and subsequently the case was transferred to Deputy Attorney General Lindsay Taylor in early 2014 so she could gain more trial experience, as she is a newer attorney. While the case was pending, the State became aware of the issues involving the Office of the Chief Medical Examiner (hereinafter "OCME").[1] She testified as to her knowledge of the drugs pertinent to the OCME scandal, as well as the drugs relevant to the Defendant's case. Ms. Schmidhauser testified that she never physically touched any of the evidence relevant to the Defendant's case.

DAG Schmidhauser was questioned and testified to letters sent by the State regarding possible *Brady* violations as a result of the OCME case. She stated that these letters were sent to defendants in "any pending drug matter" regarding a potential *Brady* violation pursuant to the OCME investigation and their respective

[1] On January 14, 2014, Tyrone Walker was on trial for drug dealing charges in the Superior Court of the State of Delaware, in and for Kent County before the undersigned. During the trial, an evidence envelope was presented to an officer to confirm that the substance in the envelope was the substance found on the Defendant at the time of arrest. When the officer opened the envelope, the relevant drugs were missing. This sparked an investigation into the practices of the OCME resulting in a finding of multiple cases of pilfering drugs by employees for their own personal use. "The State has brought charges against persons in the chain of custody in many of the pending cases. The Court ruled that there was evidence of pilfering or stealing of drugs by a person or persons for their own use. There was no evidence of "planting" drugs to get a false conviction. There was no evidence that any actual chemical analysis by the chemist was false." *State v. West* (cited as State v. W.), 2014 WL 7466714, at *1 (Del. Super. Dec. 16, 2014).

cases.[2] Further, DAG Schmidhauser testified that letters were sent to defense counsel in cases where "there was a possibility that the drug evidence went to the Office of the Medical Examiner."[3] The first letter was sent April 3, 2014 (regarding possible *Brady* violations) to defense counsel.

DAG Schmidhauser testified that her knowledge of the actual drugs in the present case was slim, because she had never spoken with the intake officer prior to the date of the evidentiary hearing. DAG Schmidhauser testified that the drugs were never sent to the OCME, and that she learned this from reading the Defendant's file. She learned of this after the April 3, 2014 letter was sent.

A second letter was sent on April 24, 2014 to defense counsel by the State saying that the drugs in the present case were submitted and tested at the OCME. DAG Schmidhauser testified that the drugs were not sent to the OCME, contrary to the letter, and that she was made aware of this fact through the information about the case included in her file.

The Court reserved decision on the motion and requested the parties file memoranda in support of their respective positions by November 11, 2014. On November 21, 2014, the parties each filed a brief in support of their motion.

STANDARD OF REVIEW

In general, Delaware's chain of custody law requires that the State authenticate

[2] Transcript at 17.

[3] Transcript at 18.

the evidence proffered and eliminate the possibilities of misidentification and adulteration, not to an absolute certainty, but simply as a matter of reasonable probability."[4] The chain of custody is defined as

> "[i] the seizing officer; [ii] the packaging officer, if the packaging officer is not also the seizing officer; and [iii] the forensic toxicologist or forensic chemist or other person who actually touched the substance and not merely the outer sealed package in which the substance was placed by the law enforcement agency before or during the analysis of the substance."[5]

However, individuals who merely handle evidence en route to a destination are not required to testify as to the chain of custody.[6] When presented with an evidentiary hearing on whether to allow evidence to be admitted at trial, Delaware courts have held that the admissibility of evidence is within the discretion of the trial judge.[7] "The exercise of judicial discretion in making evidentiary rulings often centers around authentication or identification."[8] Under Delaware Rule of Evidence 901(a), the party offering an item for evidence at trial is required to present other "evidence

---

[4] 11 Del. C. § 4331.

[5] 11 Del. C. § 4331(1).

[6] *Demby v. State*, 945 A.2d 593 at * 1131 (Del. 2008).

[7] *Tricoche v. State*, 525 A.2d 151, 152 (Del. 1987) *citing Ciccaglione v. State*, Del Supr. 474 A.2d 126, 130 (1984); *Lampkins v. State*, Del Supr., 465 A. 2d 785, 790 (1983); *Thompson v. State*, Del. Supr., 399 A.2d 194, 198-99 (1979).

[8] *Tricoche v. State*, 525 A.2d 151, 152 (Del. 1987).

sufficient to support a finding that the matter in question is what its proponent claims."

DISCUSSION

Testimony of Deputy Attorney General Susan Schmidhauser

The Defendant seeks to admit at trial the testimony of DAG Schmidhauser as well as two letters sent by the Attorney General's office regarding evidence allegedly analyzed at the OCME. The Defense relies on *State v. Demby* in order to explore the chain of custody.[9] *Demby* mandated that a defendant is not precluded from exploring chain of custody evidence in an effort to prevent the substance in question into evidence. However, the circumstances of *Demby* revolve around the defendant's assertion that Delaware's chain of custody statue, 10 *Del. C.* § 4331 (1) and (2) violated his right to due process. He argued that § 4331 repealed a defendant's rights because the State should have to prove that substances that have been seized be proven as a condition precedent to admissibility, prior to a defendant's trial. Specifically, that individuals who "merely handle contraband evidence in sealed packages during its transportation between a law enforcement agency and the State Medical Examiner's office" should be required to testify as to the chain of custody. The Supreme Court of Delaware affirmed the trial court's decision, stating that the State need only "eliminate the possibilities of misidentification and adulteration, 'not

[9] *Demby v. State*, 695 A.2d 1127 (Del. 1997).

absolutely, but as a matter of reasonable probability.'"[10]

The Defense's motion to admit DAG Schmidhauser's testimony was made specifically in light of the OCME investigation, and as such, the ruling in *State v. Irwin* is relevant in that it specifically regarded evidence awaiting trial during the time of the OCME scandal.[11] *Irwin* discussed cases that were awaiting trial that had substances stored at the OCME drug lab. *Irwin* explicitly states that the State is not required to prove the chain of custody "beyond all possibility of doubt" but that in some cases with a specific set of facts will allow for the defendant to call "all available witnesses in the chain of custody from the time the evidence was submitted to the OCME drug lab until it was taken from Troop 2 and sent to the independent lab for testing."[12]

The State rebuts the Defendant's assertion that DAG Schmidhauser is a part of the chain of custody based on her testimony that she had never actually handled the drugs nor had she spoken with the Trooper who seized them until the day of the evidentiary hearing. The State argues that DAG Schmidhauser has no personal knowledge of the chain of custody and is therefore not a *part* of the chain of custody in this case. Further, requiring DAG Schmidhauser to submit to questioning regarding the chain of custody would be contrary to the holding in *Demby*, as DAG

---

[10] *Demby v. State*, 695 1127 (Del. 1997)(*citing Tatman,* 314 A. 2d at 418).

[11] *State v. Irwin*, 2014 WL 6734821 (Del. Super. Nov. 17, 2014).

[12] *Id.*

Schmidhauser had even less interaction with the substances than a person who transports them.

Presumably, the Defense is asserting that because DAG Schmidhauser's signature is on each of the letters sent by the Attorney General's office to defense counsel, that she was a part of the chain of custody and had knowledge of the whereabouts of the drugs.

The Court must wholly reject this assertion. Based on the testimony at the evidentiary hearing, it is apparent that the State authorized boilerplate letters to be sent to all defendants who had any pending criminal matters who may have had evidence sent to the OCME. This was a decision made by the administration of the Attorney General's office for good measure without consulting each individual Deputy Attorney General. DAG Schmidhauser testified that she did not elect to send such a letter, that such a letter was not sent solely to defense counsel in the present case, and such letters were not sent solely to this one Defendant.

Further, DAG Schmidhauser testified that the drugs seized from the Defendant were never sent to the OCME. She testified that there was a note in the file that states "ME's Office never had this case," and the Defense has not put forth any information to the contrary, apart from the boilerplate letters sent from the Attorney General's office. Further, the Defendant failed to assert any evidence of tampering or impropriety involving the drugs seized in his case. For this reason, the Defendant is not entitled to a more extensive chain of custody line of questioning that would have been afforded by *Irwin*, since there is no substantive evidence that the drugs were

held or tested at the OCME.

Ultimately, the Defendant is not entitled to any more burdensome chain of custody procedure because it has failed to establish that the drugs were in fact housed at the OCME. Trooper Wright, the arresting officer, testified that the drugs were transported to Troop 3 (as opposed to Troop 2) after being seized from the Defendant. Further, the forensic chemist Alia Harris, also testified that she did not know whether the drugs had been previously tested at the OCME before being delivered to the private testing facility where she worked. In sum, no testimony was elicited during the evidentiary hearing that gives rise to the drugs being sent to the OCME, aside from the boilerplate letters sent from the Attorney General.

Admissibility of Letters Sent to Defense Counsel from the State

The purpose of the Defense submitting the letters sent by the Attorney General's office into evidence would be to have a jury infer some evidentiary wrongdoing on the part of the State. The Court in *Irwin* plainly opposed the mention of the OCME investigation unless "there is either evidence of tampering of the packaging submitted by the police or a discrepancy in weight, volume or contents from that described by the seizing officer. If evidence of tampering is not present and there is no discrepancy, the OCME investigation is not relevant under Delaware Rule of Evidence 402 or at least would be misleading and unfair under [Delaware Rule of Evidence] 403." Admitting the letters from the Attorney General into evidence solely to inform a jury of the ongoing OCME investigation is impermissible.

CONCLUSION

The State's Motion *in Limine* to exclude the testimony of DAG Susan Schmidhauser as well as to exclude the letters from the Attorney General's Office dated April 3, 2014 and April 24, 2014 is hereby *granted*.

IT IS SO ORDERED.

Hon. William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Lindsay A. Taylor, Esquire
James E. Liguori, Esquire