

FILE

Office of the District Attorney

Victoria County
145 East Harold Street
Beckley, Franklin 33331
(901) 555-1111

TO: Applicant
FROM: Peter Paulson, Assistant District Attorney
RE: State v. Devine
DATE: July 29, 1997

I am prosecuting David Devine in a criminal case in which he is charged with possession of cocaine with intent to distribute. He was arrested in possession of nearly half an ounce of high-grade cocaine. Defendant's motion to suppress the cocaine, based upon his claim that the search and seizure were unlawful, was denied at the pretrial hearing and again yesterday when his lawyer, Celia Delbert, renewed it at trial.

The defense is not contesting the possession charge, but rather is focused on that part of the charge dealing with intent to distribute. In her opening statement, Delbert hammered at the lack of evidence regarding Devine's intent.

Two witnesses have testified so far for us. The first witness to testify was Scott Crisman, a chemist with the State Toxicology Lab (because he was unavailable later, we called him first). He testified that he received a zip-lock bag from Detective Ripka that contained 13.1 grams of a white powdery substance that he determined was 70% pure cocaine. All of defendant's objections to his testimony were overruled.

The second witness was Detective Ripka, the arresting officer in the case. I have completed my direct examination, and the defense has completed cross-examining Ripka. I have attached the transcript of his testimony. The direct examination went well for us, but we were hurt on cross-examination when Ripka basically conceded that the facts were also consistent with the defense theory of possession for personal use. I now intend to conduct redirect examination of Detective Ripka to elicit his testimony that, two days before the arrest of Devine, he saw Devine selling what appeared to be cocaine in small packages from his car. The defense has objected to the introduction of this evidence.

I will call one more witness. Officer Fusco arrested Devine 18 months ago for possession of heroin with intent to distribute. Devine was convicted and served a year in prison. I want Officer Fusco to testify to the circumstances of that arrest. I've given defense counsel notice under Rule 404 of the Rules of Evidence, and the court has ruled that the notice is sufficient. Delbert has objected to the testimony of both witnesses on other grounds.

This additional testimony from Ripka and Fusco would bolster our claim that Devine intended in the present case to distribute the cocaine. It is essential, therefore, that we persuade the court to admit the testimony of the witnesses concerning the two instances of prior criminal conduct.

The judge has declared a one-day recess. This gives us time to prepare our arguments supporting the admission of this evidence. I have attached some of the Franklin Rules of Evidence (which are identical to the Federal Rules of Evidence) and a case from our Supreme Court.

I want you to write the persuasive brief requested by the court arguing for the admission of the testimony of Ripka and Fusco concerning the two instances of prior criminal conduct. The brief should also anticipate and refute the arguments the defense is likely to make in support of the objections it made yesterday just before the judge recessed the trial. Please prepare the brief in accordance with our office procedure (which I have attached).

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MEMORANDUM

September 8, 1995

To: Attorneys
From: Andrea Preston, District Attorney
Re: Trial Briefs on Evidentiary Proffers

This memo is for the purpose of clarifying the expectations of the District Attorney's Office and to provide guidance to Assistant District Attorneys. All trial briefs on evidentiary offers shall conform to the following guidelines.

We follow the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: THE WITNESS IS COMPETENT TO TESTIFY. Proper: A FIVE-YEAR- OLD WHO ADMITTED HER MOTHER WOULD NOT PUNISH HER FOR LYING, BUT STILL TESTIFIED SHE KNEW THAT LYING WAS WRONG, IS COMPETENT TO TESTIFY.

The body of each argument should incorporate the relevant facts, analyze applicable legal authority, and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Unless specifically assigned, Assistant District Attorneys should not prepare separate statements of facts. Tables of contents, tables of cases, summaries of arguments, and indices for a trial brief on evidentiary proffers will be prepared, where required, after the draft is approved.

State v. Devine, Crim. No. 23-994

Transcript of the Testimony of Detective Johnny Ripka

July 28, 1997

Direct Examination by Assistant District Attorney Peter Paulson:

1 **Q:** State your name and occupation for the record

2 **A:** I am Detective Johnny Ripka. I am employed by the Beckley Police Department at the rank
3 of detective and am currently assigned to the narcotics squad

4 **Q:** How long have you been so employed?

5 **A:** I have been with the police department for 15 years, the last five in narcotics.

6 **Q:** Can you describe any special training you have had in regard to narcotics?

7 **A:** Yes. In addition to the training that all police officers receive in the Police Academy and
8 the normal detective training, both of which have components dealing with the recognition
9 of narcotics and controlled substances, I have attended a two-month course at the State
10 Police Academy entitled, "Detecting and Apprehending Drug Dealers." I also attended a
11 four-week course offered by the FBI in Washington on working undercover

12 **Q:** Have you had any experience regarding the enforcement of the laws dealing with dangerous
13 drugs?

14 **A:** Yes. Four years ago, I worked undercover for a period of nine months. I lived among people
15 active in the drug culture in order to investigate the drug trade in Beckley. As a result of
16 that work, 34 people were indicted and convicted of the sale and possession of hard drugs
17 in this community. I became familiar with how drugs are brought into this area, prepared
18 for sale, sold, and used.

19 **Q:** Detective Ripka, have you seen the defendant before today?

20 **A:** Yes.

21 **Q:** Can you describe the circumstances?

22 **A:** At approximately 11:15 in the evening on March 25, 1997, I was patrolling the Frog
23 Hollow neighborhood of Beckley with my partner, Eric Hellman. I observed a red 1990
24 Oldsmobile Cutlass traveling at a high rate of speed down Maple Avenue in Beckley. I
25 followed the Cutlass for three blocks, from 4th Street to 7th Street, and clocked the
26 vehicle at 53 miles per hour.

27 **Q:** What is the speed limit in those three blocks?

1 **A:** The area is posted as a 30 mile-per-hour zone.

2 **Q:** What did you do next?

3 **A:** I turned on my flashing lights and pulled the driver over. I approached the vehicle on the
4 driver's side and Detective Hellman approached it on the passenger side. There was one
5 individual in the car, the defendant.

6 **Q:** And do you see that individual in the courtroom?

7 **A:** Yes, he is that man over there (indicating).

8 **Q:** Your honor, may the record reflect that the witness is pointing to the defendant, David
9 Devine.

10 **The Court:** It may so reflect.

11 **Q:** What happened next?

12 **A:** I shined my flashlight into the car and I asked him to produce his license and registration.

13 **Q:** And how did he respond?

14 **A:** He stammered, looked jumpy, looked kind of wired. He did not immediately produce the
15 license so I requested that he exit the vehicle. I opened his door and he proceeded to exit. I
16 asked him again for his driver's license and he replied that he had left it at home. I asked him
17 again for the registration and he said it was in the glove compartment. I told him to retrieve it.
18 He got back into the vehicle and reached over to open the glove compartment. When he opened
19 it, a sandwich-size zip-lock bag fell out of it onto the floor and came into plain view. I saw that
20 it contained a white substance. I reached in and retrieved the bag. Detective Hellman removed
21 \$275 in cash from the glove compartment. I ordered Mr. Devine to exit the vehicle and put his
22 hands on the roof of the vehicle. He did so and I patted him down for weapons. I visually
23 checked the bag and believed that it contained cocaine.

24 **Q:** What did you do at that time?

25 **A:** I placed Mr. Devine under arrest and placed him in the back of our unit and advised him of
26 his rights. I called the precinct and arranged to have Mr. Devine's car towed to the impound
27 yard. Detective Hellman and I then transported Mr. Devine to central booking and
28 processed his arrest. We relieved him of his belt, wallet, keys, and watch prior to putting
29 him in the lockup. We discovered another \$230 in cash in his wallet at that time.

30 **Q:** Regarding the sandwich-size zip-lock bag you referred to, what did you do with that?

31 **A:** I placed an evidence tag on it and marked it with the date and my initials.

1 **Q:** Showing you what has been marked as State's Exhibit Number 9 for identification, can you
2 identify it?

3 **A:** Yes, that is the zip-lock bag I took from Mr. Devine's car on March 25.

4 **Q:** Detective, what if anything distinguishes cocaine held for personal use from that held for
5 future sale and distribution?

6 **A:** Number one is quantity. Anything more than a few grams is indicative of sale. Number two
7 is purity. For example, 70% pure cocaine is hard to buy on the street. Street dealers buy
8 cocaine like that from major dealers and then cut it to sell in much smaller quantities.
9 Number three is the neighborhood. Drug activity tends to be concentrated in certain
10 neighborhoods. Number four, sellers carry large amounts of cash in small denominations
11 to facilitate multiple sales.

12 **Q:** Now Mr. Crisman previously testified in this case that State's Exhibit 9 contained 13.1
13 grams of a substance that was 70% pure cocaine. Can you tell us what it would cost to buy
14 that much cocaine?

15 **A:** Cocaine of that level of purity would cost anywhere from \$1,000 to \$1,700.

16 **Q:** And, in your opinion, what does it mean when cocaine is 70% pure?

17 **A:** It means that it will be cut and resold. The typical cocaine bought on the street has a purity
18 of no more than 20%. It is a fairly simple procedure to mix cocaine with other inexpensive
19 substances such as lactose. That reduces its purity but makes selling it a very profitable
20 enterprise.

21 **Q:** So if 13.1 grams of 70% pure cocaine were cut to 20% pure cocaine and resold, how much
22 would the seller make?

23 **A:** I calculate that cutting it would yield around 46 grams of cocaine. If it were sold by the
24 gram, each gram would sell for \$90 to \$120 and so a seller would gross \$4,000 to nearly
25 \$5,000 for his effort.

26 **Q:** Can you describe the neighborhood where you arrested Mr. Devine?

27 **A:** The Frog Hollow neighborhood is the center of most of the street-level drug dealing in
28 Beckley.

29 **Q:** In what denominations was the \$505 you seized from Mr. Devine?

30 **A:** It was in fives, tens, and twenties.

31 **Atty. Paulson:** Thank you, no further questions.

1 **Cross-Examination by Attorney Delbert:**
2 **Q:** So you have had a lot of experience hanging out with drug dealers?
3 **A:** Yes, I have met more of them than I ever could have imagined.
4 **Q:** And drug dealing is a dangerous occupation, is it not?
5 **A:** Quite.
6 **Q:** And you said that drug purchases are made in cash?
7 **A:** Yes.
8 **Q:** And sometimes lots of cash?
9 **A:** Yes.
10 **Q:** And it is illegal?
11 **A:** Yes.
12 **Q:** And so the buyers and sellers of drugs can't expect police protection of their business?
13 **A:** Right.
14 **Q:** So a drug dealer carries lots of cash and gets no police protection?
15 **A:** Right.
16 **Q:** Is it true, therefore, that drug dealers need to protect themselves?
17 **A:** I guess so.
18 **Q:** And isn't it also true, Detective Ripka, that in order to protect themselves drug dealers
19 most often carry guns?
20 **A:** Well, I wouldn't go that far but we usually see guns or knives when we arrest drug
21 dealers.
22 **Q:** Now you searched Mr. Devine from head to toe, didn't you?
23 **A:** Yes.
24 **Q:** And you searched his car as well?
25 **A:** Yes.
26 **Q:** So if he had a weapon, you would have found it?
27 **A:** I suppose, yes.
28 **Q:** And there was no gun, no knife, no weapon of any kind, was there?
29 **A:** No.
30 **Q:** Neither in the car nor on Mr. Devine?
31 **A:** That's right.

1 **Q:** You have heard of free basing cocaine, haven't you?

2 **A:** Of course.

3 **Q:** Free basing is a method of smoking cocaine, right?

4 **A:** Yes.

5 **Q:** And before it is smoked it has to be chemically treated, right?

6 **A:** Yes.

7 **Q:** It would be possible to use this cocaine (indicating) for free basing?

8 **A:** Yes, it could be converted to crack and smoked.

9 **Q:** From the perspective of a crack user, the purer the cocaine you start with, the better the

10 crack, the better the high. Isn't that correct?

11 **A:** Uh huh.

12 **Q:** Crack users try to get high levels of purity in their cocaine, don't they?

13 **A:** Yes.

14 **Q:** And crack is quite addictive, isn't that true?

15 **A:** All forms of cocaine are addictive, but I understand that crack users become heavily

16 addicted quite quickly.

17 **Q:** And in your experience, addicts use a lot of the drug they are addicted to?

18 **A:** Yes.

19 **Q:** So it wouldn't surprise you to learn that someone smoked up as much as 13 grams of

20 crack over a period of several days, would it?

21 **A:** I guess not.

22 **Q:** In fact, it would be typical for a crack user to consume this much crack in two to three

23 days, isn't that true?

24 **A:** If they can get their hands on it, they will smoke it.

25 **Q:** So it wouldn't surprise you that an affluent crack user could consume as much as \$1,000

26 worth of cocaine in two or three days?

27 **A:** No.

28 **Atty. Delbert:** No further questions.

29 **The Court:** All right. We'll adjourn for the day. Ladies and gentlemen of the jury, please

30 remember my admonition that you should not discuss the case with anyone and so forth.

31 You're excused for the day. Will counsel please stay for a minute?

1 [Jury leaves the courtroom. Court and counsel confer in the absence of the jury.]

1 **The Court:** Counsel, I have an engagement that's going to keep me away from court tomorrow,
2 so we'll reconvene at the usual time the day after tomorrow. Mr. Paulson, when do you
3 plan to rest?

4 **Atty. Paulson:** Well, your honor, I have some redirect for Mr. Ripka. I intend to elicit some
5 further testimony based on what he saw two days before the defendant's arrest. While on
6 stakeout in the Frog Hollow neighborhood, Mr. Ripka saw Mr. Devine pass a small
7 plastic bag, about 1" x 1" in size, containing what appeared to be cocaine through an open
8 car window to another individual. He saw that individual give Mr. Devine some money. I
9 also want to call Officer Fusco, the arresting officer in a prior conviction of Mr. Devine,
10 to testify about the circumstances that led to his prior conviction for sale of narcotics.
11 Your honor, Mr. Devine had been out of jail for only six months at the time of his arrest
12 by Mr. Ripka. I have already given Ms. Delbert Rule 404 notice of Officer Fusco's
13 testimony and a copy of the report he filed at the time of the prior arrest. I am now giving
14 my notice under 404 of Ripka's testimony.

15 **Atty. Delbert:** I object to the testimony of both officers. First of all, it's too late to give notice
16 under 404. Second, the testimony about each prior incident is out under 404. And, in any
17 event, each incident is out under 403.

18 **The Court:** Well, look. In light of what happened on cross-examination of Ripka, I'm going to
19 excuse the late 404 notice. Ms. Delbert, the recess will give you the time you need. It's
20 the end of the day. Why don't you both file briefs that address the admissibility of the
21 proffered testimony of officers Ripka and Fusco and Ms. Delbert's objections to their
22 admissibility under 404 and 403. I'll rule when we reconvene.

Beckley Police Department Arrest Report

INCIDENT NO.				DATE OF STATEMENT	
				January 30, 1996	
NAME (LAST, FIRST, MIDDLE) OF PERSON GIVING STATEMENT				DOB/AGE	BUSINESS PHONE (DAY/NIGHT)
Devine David				6-15-68	
STREET ADDRESS		CITY	STATE	ZIP CODE	BUSINESS PHONE (DAY/NIGHT)
555 Franklin St.		Beckley	Franklin	33331	
STATEMENT TAKEN BY (NAME/BADGE)		IN PRESENCE OF			
Det. G. Fusco, Narcotics / #7105					

STATEMENT

Information supplied by reliable informant (#107) that a WM named "Dave" was selling heroin from his vehicle, blue 1992 Buick LeSabre (license plate #PEX 711), at the corner of Westin Hills Blvd. and Meadowood Dr. On January 30, 1996, at 2230 hours proceeded to Westin- Meadowood intersection in the Frog Hollow area of city with Officer T. Seyfat in an unmarked vehicle. Positioned vehicle about 50 ft. south of intersection on west side of Meadowood with a clear unobstructed view of intersection. At 2247 hours the suspect vehicle, blue '92 Buick with license plate #PEX 711, arrived and parked on south side of Westin Hills Blvd., about 15 ft. from corner. Only one person observed in vehicle, WM with dark hair and white shirt, who moved from driver's position to passenger seat. Observed two vehicles pull in front of suspect vehicle (at 2252 and 2258 hours). An individual exited each vehicle and proceeded to passenger side window. Observed WM in suspect vehicle turn on interior light, take something from glove compartment, and exchange unknown item for some amount of currency. At 2259 Officer Seyfat and undersigned officer exited police vehicle and proceeded to suspect vehicle. Seyfat approached driver side as I approached passenger side, identifying selves, ordering occupant out of vehicle. Patdown search of person revealed no weapons but a large bulk in rear pants pocket that proved to be \$792 in cash, no bill larger than \$20. Search of glove compartment produced 43 small glassine baggies (about 1" x 1" in size) of a white substance. Visual and texture check suggested heroin. Suspect advised of rights and taken into custody. Identification revealed name David Devine, above address.

Signature

