



State v. Devine

July 1997, Test 2



Preface

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of one of the first two MPTs, which were administered in July 1997 in eight states: Colorado, District of Columbia, Georgia, Hawaii, Iowa, Missouri, Nevada, and New Mexico.

The instructions for the test appear on the back cover. For further information regarding the test, see the **MPT Information Booklet**.

State v. Devine

FILE

Memorandum from Peter Paulson	1
Memorandum regarding trial briefs	3
Transcript of testimony of Detective Johnny Ripka	4
Arrest Report	10

LIBRARY

Franklin General Statutes	11
Franklin Rules of Evidence	11
Milford v. State (1994)	14

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).

Office of the District Attorney

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

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 the
8 normal detective training, both of which have components dealing with the recognition of
9 narcotics and controlled substances, I have attended a two-month course at the State Police
10 Academy entitled, "Detecting and Apprehending Drug Dealers." I also attended a four-week
11 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 that
16 work, 34 people were indicted and convicted of the sale and possession of hard drugs in this
17 community. I became familiar with how drugs are brought into this area, prepared for sale,
18 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 Hollow
23 neighborhood of Beckley with my partner, Eric Hellman. I observed a red 1990 Oldsmobile
24 Cutlass traveling at a high rate of speed down Maple Avenue in Beckley. I followed the
25 Cutlass for three blocks, from 4th Street to 7th Street, and clocked the vehicle at 53 miles per
26 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.
16 I asked him again for his driver's license and he replied that he had left it at home. I asked
17 him again for the registration and he said it was in the glove compartment. I told him to
18 retrieve it. He got back into the vehicle and reached over to open the glove compartment.
19 When he opened it, a sandwich-size zip-lock bag fell out of it onto the floor and came into
20 plain view. I saw that it contained a white substance. I reached in and retrieved the bag.
21 Detective Hellman removed \$275 in cash from the glove compartment. I ordered Mr.
22 Devine to exit the vehicle and put his hands on the roof of the vehicle. He did so and I patted
23 him down for weapons. I visually 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 processed
28 his arrest. We relieved him of his belt, wallet, keys, and watch prior to putting him in the
29 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:** Isn't 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 most
19 often carry guns?

20 **A:** Well, I wouldn't go that far but we usually see guns or knives when we arrest drug dealers.

21 **Q:** Now you searched Mr. Devine from head to toe, didn't you?

22 **A:** Yes.

23 **Q:** And you searched his car as well?

24 **A:** Yes.

25 **Q:** So if he had a weapon, you would have found it?

26 **A:** I suppose, yes.

27 **Q:** And there was no gun, no knife, no weapon of any kind, was there?

28 **A:** No.

29 **Q:** Neither in the car nor on Mr. Devine?

30 **A:** That's right.

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

1 **A:** Of course.

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

3 **A:** Yes.

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

5 **A:** Yes.

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

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

8 **Q:** From the perspective of a crack user, the purer the cocaine you start with, the better the
9 crack, the better the high. Isn't that correct?

10 **A:** Uh huh.

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

12 **A:** Yes.

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

14 **A:** All forms of cocaine are addictive, but I understand that crack users become heavily addicted
15 quite quickly.

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

17 **A:** Yes.

18 **Q:** So it wouldn't surprise you to learn that someone smoked up as much as 13 grams of crack
19 over a period of several days, would it?

20 **A:** I guess not.

21 **Q:** In fact, it would be typical for a crack user to consume this much crack in two to three days,
22 isn't that true?

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

24 **Q:** So it wouldn't surprise you that an affluent crack user could consume as much as \$1,000
25 worth of cocaine in two or three days?

26 **A:** No.

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

28 **The Court:** All right. We'll adjourn for the day. Ladies and gentlemen of the jury, please
29 remember my admonition that you should not discuss the case with anyone and so forth.
30 You're excused for the day. Will counsel please stay for a minute?
31 [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, so
2 we'll reconvene at the usual time the day after tomorrow. Mr. Paulson, when do you plan
3 to rest?

4 **Atty. Paulson:** Well, your honor, I have some redirect for Mr. Ripka. I intend to elicit some further
5 testimony based on what he saw two days before the defendant's arrest. While on stakeout
6 in the Frog Hollow neighborhood, Mr. Ripka saw Mr. Devine pass a small plastic bag, about
7 1" x 1" in size, containing what appeared to be cocaine through an open car window to
8 another individual. He saw that individual give Mr. Devine some money. I also want to call
9 Officer Fusco, the arresting officer in a prior conviction of Mr. Devine, to testify about the
10 circumstances that led to his prior conviction for sale of narcotics. Your honor, Mr. Devine
11 had been out of jail for only six months at the time of his arrest by Mr. Ripka. I have already
12 given Ms. Delbert Rule 404 notice of Officer Fusco's testimony and a copy of the report he
13 filed at the time of the prior arrest. I am now giving my notice under 404 of Ripka's
14 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 the
20 end of the day. Why don't you both file briefs that address the admissibility of the proffered
21 testimony of officers Ripka and Fusco and Ms. Delbert's objections to their admissibility
22 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 Devine David			DOB/AGE 6-15-68	RESIDENCE PHONE (DAY/NIGHT)	BUSINESS PHONE (DAY/NIGHT)
STREET ADDRESS 555 Franklin St.		CITY Beckley	STATE Franklin	ZIP CODE 33331	
STATEMENT TAKEN BY (NAME/BADGE) Det. G. Fusco, Narcotics / #7105		IN PRESENCE OF			

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

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Franklin General Statutes
Article XVI. Crimes and Punishments

Section 286. Unlawful manufacture, distribution, and possession, etc., of controlled substances.

(a) Except as authorized by this subheading, it is unlawful for any person to manufacture, distribute, or dispense or to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all the circumstances an intent to manufacture, distribute, or dispense a controlled dangerous substance;

(b) Any person who violates any of the provisions of subsection (a) of this section with respect to a substance classified in Schedules I or II which is a narcotic drug is guilty of a felony and is subject to imprisonment for not more than 20 years, or a fine of not more than \$25,000, or both.

Franklin Rules of Evidence

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

* * * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

* * * *

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

* * * *

Milford v. State

Franklin Supreme Court (1994)

The appellant, Edward Milford, was convicted of the unlawful possession of cocaine in sufficient quantity to reasonably indicate an intent to distribute. In this appeal he claims that the trial court erred in permitting the introduction of evidence revealing other criminal activity on his part.

On December 12, 1992, three officers of the Franklin State Police executed a search and seizure warrant at the residence of Edward and Lena Milford. At the time of the search, Edward Milford was not at home, although Lena was. The police recovered from a bedroom a large plastic baggie containing five smaller baggies, each of which contained cocaine.

The fact that the appellant was not caught with the contraband in his hands is not legally fatal to proof of possession. Possession and control need not be immediate and direct but may be constructive.

In terms of legal sufficiency, Edward Milford argued that he was not only not in the bedroom from which the cocaine was seized at the time of the search, he was not even in the house. Nothing suggested that the bedroom was his. Nothing made him a more likely possessor of the narcotics than any of the other five residents of the home.

Milford's connection with the house would probably have been enough to permit the State

to clear the low hurdle of legal sufficiency, but the margin of clearance would have been narrow. In this case, however, we are not called upon to make these closer decisions, for, despite Mr. Milford's insistence, we are not going to look at the events of December 12 in a vacuum.

If the evidence of December 12, standing alone, might have given rise to arguable ambiguities, the observations of December 10 dissolved those ambiguities. On December 10, Herman J. Grunion, a neighbor of the Milfords for two years and a frequent visitor in their home, went to their home in the company of Mike Wiehl, an undercover State Trooper. In the presence of Wiehl, Grunion purchased directly from Lena Milford a one-eighth-ounce package of cocaine for \$280. Edward Milford was present when the sale was consummated.

This narcotics sale on December 10 was a crime other than the charged possession on December 12. The question for decision is whether it was relevant and important in establishing guilt with respect to the December 12 charge of possession.

The relevance and vital importance of the "other crimes" evidence here in issue looms large. Close proximity between appellant and the cocaine was shown on December 10 even if the connection was less proximate on December 12. The presence of the cocaine

was, moreover, shown to be within his knowledge on December 10.

It has long been recognized that evidence of other bad acts, although relevant and having some probative force, presents the problem that it is difficult to prevent a jury from improperly using evidence of other bad acts or giving it more weight than it deserves. The policy that other bad acts should be excluded is driven by two fears. One fear is that jurors will conclude from evidence of other bad acts that the defendant is a "bad person" and should therefore be convicted of the current charge, and the other fear is that jurors will conclude that the defendant deserves punishment for the other bad conduct.

Evidence of other bad acts may, however, be admissible if it is relevant to the offense charged on some basis other than mere propensity to commit crime, and if it passes muster under the ever-present test of balancing relevance against unfair prejudice. The threshold inquiry a court must make before admitting similar acts evidence under Franklin Rule of Evidence §404(b) is whether that evidence is probative of a material issue other than character. Evidence of other crimes may be admitted if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal.

When evidence of other bad acts is relevant for reasons other than general criminal propensity, the trial judge must determine whether the accused's involvement in the other

crimes is established by a preponderance of the evidence. If this requirement is met, the trial judge must then carefully weigh the necessity for and probative value of the evidence of other bad acts against any unfair prejudice likely to result from its admission. This approach recognizes that evidence of other bad acts usually has some relevance and that relevant evidence is usually admitted unless some good reason is shown to exclude it.

When a disputed issue involves the accused's state of mind, and especially when the only means of ascertaining that mental state is by drawing inferences from conduct, then prior instances of the conduct of the accused are relevant. Hence, evidence of other offenses is admissible on the trial of the current charge to prove state of mind. To be admissible as relevant, such offenses need not be exactly concurrent. If they are committed within such time, or show such relation to the current charge, as to make connection obvious, such offenses are admissible. Where the other crime is so linked in point of time or circumstances as to show state of mind, the evidence is admissible.

This case is distinguishable from *Mellish v. State* (Franklin Supreme Court, 1992), involving the charge of possession of heroin with the intent to distribute. At issue was the admissibility of evidence that at some unspecified time in the past, the defendant and the witness had "worked together selling narcotics." This Court held the evidence inadmissible, finding no special relevance, and, indeed, questionable probative value

even for criminal disposition. Proof that the accused had previously sold narcotics perhaps as long as five years before the crime charged in the indictment hardly tends to establish a disposition or propensity to commit the offense alleged, let alone an intent to do so. The remoteness in time of prior conduct has always been a consideration in determining relevancy, particularly when prior misconduct is alleged. Passage of time may actually indicate rehabilitation of the person.

In this case, the evidence, although involving other uncharged crimes, was admissible because of the strong inference that could be drawn from such evidence that Milford knowingly possessed the cocaine found on the day of the search and that he possessed it with the intent to distribute it. Evidence of the other offense possessed special relevance transcending mere criminal character. The necessity for the evidence was obvious. Proof of the other acts was clear, convincing, and uncomplicated, and the probative value of the evidence clearly outweighed its potential for unfair prejudice. Accordingly, we affirm.

NOTES

INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
3. You will have two kinds of materials with which to work: a File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the task you are to complete.
4. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 45 minutes to organizing and writing after you have studied and digested the materials. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet.
7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete given to you in the first memorandum in the File and on the content, thoroughness, and organization of your response.