




TRIAL BRIEFS

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Court erred in admitting text messages

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While the following discusses a criminal case, [People v. Watkins](#) , 2015 IL App (3d) 120882, it provides guidance on admitting text messages into evidence.

On January 26, 2012, several police officers executed a search warrant at a residence at 608 East Thrush in Peoria, Illinois. While searching the residence, officers found an open drawer in the kitchen with one bag containing 47.3 grams of powder cocaine, two bags containing a total of 13.4 grams of marijuana, two scales with suspected cocaine residue, three cell phones, a spoon with suspected cocaine residue, and an empty plastic baggie with suspected cocaine residue.

Charles Watkins and several other people were present when the police began their search. Watkins was the only person at the residence that evening with the first name of "Charles." Watkins was found lying on a bed and was the only person in that room. Watkins had \$577 in his pocket, mostly in \$20 bills. An additional \$4,566, which included 150 \$20 bills, was found under the mattress in the same bedroom. No drugs or drug paraphernalia were found on Watkins' person.

Watkins was arrested and charged with unlawful possession of a controlled substance with intent to deliver and with unlawful possession of a controlled substance. During the pretrial stage of the case, the State filed a notice of its intent to offer into evidence several of Watkins' prior drug convictions as proof of Watkins' intent to deliver.

On the date of the hearing on Watkins' motion *in limine*, defense counsel informed the trial court that he had just received some late discovery from the State. The discovery indicated that one of the police officers in the case had recovered several hundred text messages from one of the cell phones that was found in the same drawer as the drugs and that as an expert witness, the officer was going to opine that the text messages demonstrated an intent to distribute drugs.

Watkins asked that the text messages be excluded because they had not been turned over until just before the trial. The trial court denied that request and instead continued the trial for a few days to allow defense counsel to review the text messages and to further prepare for trial.

During the trial, Officer Dixon testified about the three phones that were recovered from the kitchen drawer. The phones were admitted into evidence.

Dixon had turned on the cell phones and was able to retrieve hundreds of text messages from one of the cell phones, which he believed were mostly drug-related, Dixon photographed the text messages that were on that cell phone. He did not alter, delete, or change the text messages, and testified that the photographs accurately depicted the text messages that were on the cell phone.

When the State sought to admit a sample of those text messages, Watkins objected on the grounds of relevancy, foundation, and hearsay. The trial court found that the text messages were relevant to show that the phone was part of a drug-dealing enterprise. The trial court commented that it was "very sensitive" to defense counsel's argument that the cell phone was not connected to Watkins. The trial court ruled that the State could introduce the text messages that contained the name "Charles" and that were related to tying the cell phone to Watkins and drug dealing.

Dixon was shown a group exhibit containing the photographs of the text messages. Dixon testified that exhibit contained accurate photographs of messages on the cell phone that named or identified a person.

During cross-examination, Dixon acknowledged that he did not know the phone number of the cell phone in question, that there was no indication on the phone itself or on the screen of the phone as to who was the owner of the cell phone, and that two other cell phones were recovered from the drawer or drawer area during the execution of the search warrant. Watson was convicted.

On appeal, Watkins challenged both the admissibility of the other-crimes evidence and the admissibility of the text messages.

Watkins asserted first that the admission of the text-message conversations was error because the State failed to lay a proper foundation to authenticate the text messages. The State presented no evidence that Watkins owned or used the phone from which the messages were recovered. There was no testimony from the sender or receiver of the messages as to who authored the messages and no records connected Watkins to the phone. Finally, there was no testimony from an expert witness, who had analyzed the phone and who could testify as to the integrity and genuineness of the messages.

Second, Watkins argued that admission of the text messages was erroneous because the content of the messages themselves was inadmissible hearsay and was used impermissibly by the State for the truth of the matters asserted--to show that Watkins was dealing drugs.

The court provided a detailed analysis of the admissibility of the text message photos.

To establish a foundation for admissibility, text messages are treated like any other documentary evidence. To authenticate a document, the proponent must present evidence to demonstrate that the document is what the proponent claims it to be. The proponent need only prove a rational basis upon which the fact finder may conclude that the document did in fact belong to or was authored by the party alleged. The trial court, serving a limited screening function, must then determine whether the evidence of authentication, viewed in the light most favorable to the proponent, is sufficient for a reasonable juror to conclude that authentication of the particular item of evidence is more probably true than not.

Documentary evidence, such as a text message, may be authenticated by either direct or circumstantial evidence.

Here, the text messages were admitted for a limited purpose, to show that Watkins had used the cell phone found in the drawer, and therefore, by implication, that there was a connection between Watkins and the drugs found in the drawer. The only evidence presented by the State to authenticate the text messages was (1) the cell phone was found in the same house as Watkins, and (2) some of the messages referred to, or were directed at, a person named

“Charles.” In the appeals court’s opinion that evidence was not sufficient to properly authenticate the text messages as being sent to Watkins.

As mentioned, there were no cell phone records to indicate that the cell phone belonged to or had been used by Watkins or anyone else at the residence. There was no eyewitness testimony to indicate that the cell phone belonged to or had been used by Watkins or that the messages were sent to Watkins. Additionally, there were no identifying marks on the cell phone itself or on the cell phone’s display screen to indicate that the cell phone belonged to or had been used by Watkins.

Dixon’s testimony was not sufficient to authenticate the text messages because Dixon had no personal knowledge of the text messages and had no idea who was the owner or user of the cell phone.

Thus, the appellate court held that trial court abused its discretion by admitting the text messages over Watkins’s objection. Watkins’s conviction was reversed and the case was remanded for a new trial.

Texting is ubiquitous, and even we old-timers text. Lawyers who want to introduce text messages into evidence must be careful to lay the necessary foundation. ■

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