

Chin v. ROP, 10 ROP 81 (2003)
SINGICH CHIN,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 01-08
Criminal Case Nos. 00-157 and 00-304

Supreme Court, Appellate Division
Republic of Palau

Submitted: March 10, 2003
Decided: March 25, 2003

Counsel for Appellant: Oldiais Ngirakelau

Counsel for Appellee: Scott Banker and David Matthews

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

MICHELSEN, Justice:

In this direct criminal appeal, Singich Chin challenges his convictions for trafficking and possession of methamphetamine. Specifically, Chin contends that the trial court erroneously admitted into evidence two exhibits proffered by the government. Because the admission of these exhibits was not an abuse of discretion, we affirm.

182 BACKGROUND

In early May 2000, the police arrested one of its own officers, Franky Borja, for trafficking in methamphetamine. After his arrest, Borja agreed to act as a confidential informant and lead police to his supplier, who he said was Chin. On the afternoon of May 17, 2000, Detective Felix Francisco met with Borja at the hospital parking lot in Meyuns to arrange a “buy-bust” operation, i.e., a monitored methamphetamine sale. Along with Chief Theodore Subris, Francisco searched Borja and his truck, gave him \$500 of pre-designated money to buy drugs from Chin, and prepared to follow and observe Borja until the buy had been completed. The officers then followed Borja’s vehicle as it traveled from the hospital to Malakal, turned around at Icebox Park, and began heading back towards Medalaii.

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Meanwhile Officer Flory Esebei, Officer Bradley Kumangai, and Officer Dolyn Tell were waiting in another vehicle near Chin's residence in Medalaii. They observed Chin leave his apartment, get into his truck, and drive off. They could not follow Chin immediately, but they headed towards Malakal, where they believed the buy would take place. While they were turning around in the parking lot at High Tide Restaurant, Francisco told them via radio to drop off Tell and then to follow Borja's vehicle. After dropping off Tell, Kumangai and Esebei spotted Borja's vehicle on its way back from Icebox Park. Francisco and Subris picked up Tell and proceeded to NECO Marine, temporarily losing sight of Borja's vehicle in the process.

As Kumangai and Esebei drove by NECO Marine, Kumangai observed Borja's truck parked next to Chin's truck, and Esebei saw Chin standing beside the driver's side of Borja's truck. Kumangai and Esebei turned around and drove back towards NECO Marine at the same time that Francisco, Subris, and Tell were approaching from the other direction. The police officers observed Borja's truck drive away, as Borja gave the signal that the buy had been completed. Francisco, Subris, and Tell then placed Chin under arrest, and transported both Chin and his truck back to the police station. During a search of Chin's vehicle at the police station, officers recovered the \$500 of pre-designated buy money.

Esebei and Kumangai followed Borja to the hospital parking lot after the buy had been completed. Kumangai testified that he "went over to the informant's truck . . . [a]nd [the] informant gave [him] two clear plastic tube[s] containing crystal like substance." Kumangai took the tubes (or straws), searched the car and Borja (finding nothing), and talked to Borja while holding the two straws in his hand. Kumangai then got back in the police car and put the two straws in a "small box that was beside the gear." At the police station, Kumangai took out the two straws and held them in his hand while other officers conducted the search of Chin's vehicle. Kumangai then gave the two straws to Francisco, at which point Francisco wrote his initials and the date on them.

Later that evening, police executed a search warrant at Chin's apartment. Officer Esebei testified that during the search, he found a clear glass pipe, and a clear plastic straw containing some sort of substance. Without marking the items, Esebei placed them in an evidence bag and handed it to Francisco. Francisco testified that he took the bag from Esebei, placed his initials and the date on it, and sealed it.

Francisco subsequently gave the three **L83** labeled straws (the two recovered from Borja, plus the one found in Chin's apartment) to Monica Ada at the Guam police crime lab. Ms. Ada testified that the straws tested positive for methamphetamine. The straws were later returned to Francisco and placed in the police evidence locker. At trial, the two straws with Francisco's initials were marked as Plaintiff's Exhibit 1A, and the bag with Francisco's initials, containing a third straw and a glass pipe, was labeled Plaintiff's Exhibit 1B. Francisco identified Plaintiff's Exhibit 1A as the two straws he had initialed and dated after receiving them from Kumangai, and Plaintiff's Exhibit 1B as the pipe and straw he had recovered from Esebei at Chin's apartment, and it was those Exhibits he took to Guam for testing. Over Chin's objection, the trial court admitted the exhibits into evidence and relied on them in finding Chin guilty of trafficking in

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methamphetamine (as to the two straws he sold to Borja), and possession of methamphetamine (as to the straw in the bag). Chin appeals, arguing that the trial court erred in admitting Plaintiff's Exhibits 1A and 1B because the government failed to establish a proper chain of custody.

DISCUSSION

A party seeking to admit an object into evidence must present "evidence sufficient to support a finding that the matter in question is what its proponent claims." ROP R. Evi. 901(a); *King v. ROP*, 6 ROP Intrm. 131, 139 (1997). To ensure that fungible evidence satisfies this requirement, a testimonial tracing of such evidence is necessary. *United States v. Abreu*, 952 F.2d 1458, 1467 (1st Cir. 1992). "The purpose of testimonial tracing is to render it improbable that the original item either has been exchanged with another or has been tampered with or contaminated." *Id.* (citing Edward C. Cleary et al., *McCormick on Evidence* § 212, at 668 (3d d. 1984)). With that in mind, we review for abuse of discretion the trial court's decision to admit the challenged Exhibits. *Ngiraked v. ROP*, 5 ROP Intrm. 159, 167 (1996).

With respect to Exhibit 1A, Chin asserts that there are several evidentiary gaps which prevent it from being sufficiently linked to the crime of conviction. First, Chin contends that the police created a gap in the "chain of custody"¹ by losing sight of Borja after Francisco and Subris stopped to pick up Tell, i.e., after Borja had been searched but before the monitored buy took place.² Nothing in the record suggests that Borja knew the officers would stop to pick up Tell, therefore providing Borja an opportunity to secrete two straws of methamphetamine on his person. To the contrary, other testimony—that Borja was soon observed standing next to Chin's truck, and that Chin was later found with the pre-designated buy money—was sufficient circumstantial evidence **184** for a fact-finder to conclude that Borja obtained the straws from Chin. *Cf. Ngirarorou v. ROP*, 8 ROP Intrm. 136, 139-41 (2000) (finding that prosecution may prove trafficking in controlled substance with only circumstantial evidence).

Chin also contends that there were gaps because Borja did not identify Exhibit 1A as being the same straws he received from Chin, and because Kumangai did not identify Exhibit 1A as the same straws he recovered from Borja. These were not gaps. The circumstances surrounding the buy provide evidence that Borja obtained the straws from Chin, Kumangai's testimony establishes that he handed Francisco the same two straws that Borja had given to him,³

¹As the parties acknowledge, gaps in the chain of custody of an item go to the weight it ought to be accorded once in evidence, not its admissibility, provided that the item to be introduced has not been altered in any material respect. *Kumangai v. ROP*, 9 ROP 79, 84 (2002) ; *King*, 6 ROP Intrm. at 140. Chin does not contend that Exhibits 1A and 1B were altered, but rather that the government failed to prove that they were the same objects involved with the crimes charged. Therefore, the issue at hand concerns whether the prosecution authenticated, through testimonial tracing, the evidence as that which was actually associated with the crimes.

²Strictly speaking, this is not a chain-of-custody issue since the chain of custody only begins after the evidence has come into the government's possession. *See Black's Law Dictionary* 229 (6th ed. 1990).

³Despite Chin's assertion at oral argument to the contrary, we believe Kumangai's testimony was clear that the straws he gave Francisco were the same straws he recovered from Borja. Kumangai testified as follows:

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and Francisco's testimony establishes that the straws in Exhibit 1A were the ones he received from Kumangai because he placed labels on them. The instant case is therefore distinguishable from one Chin relies upon, *People v. Rivera*, 592 N.Y.S.2d 697, 699 (N.Y. App. Div. 1993), where a police officer failed to testify as to whether the evidence sought to be admitted (drugs recovered from a multi-party drug bust) had been specifically recovered from the defendant. *Accord United States v. Casameto*, 887 F.2d 1141, 1188 (2d Cir. 1989) (holding that a plastic bag tested by chemist at DEA laboratory should not have been admitted, since bag could not be traced back to the crime scene by either written or testimonial evidence). Chin is also mistaken in relying upon *Novak v. District of Columbia*, 160 F.2d 588 (D.C. Cir. 1947), a case in which a critical lapse in the chain of custody was caused by a police officer's failure to testify as to the source of evidence that came into his possession. Here, the government introduced evidence showing that Exhibit 1A consisted of the very same straws that Chin sold to Borja.

Likewise, we apprehend no evidentiary gap with respect to Plaintiff's Exhibit 1B. Esebei testified that he found a plastic straw containing a crystal-like substance in a drawer in Chin's apartment, and that he gave the straw to Francisco. Francisco testified that he took the straw from Esebei, placed it in a bag and labeled it with **L85** his initials and the date, and could identify Plaintiff's Exhibit 1B as the very bag he had marked. We do not subscribe to Chin's theory that Esebei himself was required to identify Exhibit 1B as the same straw he found in Chin's apartment. There is no requirement that each government witness be able to individually authenticate an object sought to be admitted into evidence; instead, it is sufficient that some series of witnesses can, through their combined testimony, link the exhibit back to the crime. *Abreu*, 952 F.2d at 1467-68. The requirement of testimonial tracing was therefore satisfied with respect to Exhibit 1B: Francisco testified that he obtained the straw from Esebei, who in turn testified that the straw he gave to Francisco was the one he found it in Chin's apartment.

CONCLUSION

We conclude that the trial court did not abuse its discretion in admitting Plaintiff's Exhibits 1A and 1B, and we therefore affirm the judgment of the trial court.

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- Q: When you got the drugs from Mister Borja did you make any markings on them?
A: No, I did not.
Q: And do you recall when you gave them to Detective Francisco?
A: The same night we did the search on the car.
Q: Okay. Do you recall what time? Not the specific time but within the relative time frame?
A: I believe . . . maybe two hours after I recovered, I'm not exactly sure, but after I recovered the drugs from Franky.
Q: Do you recall whether or not it was prior to the search warrant?
A: The drugs that I got from Franky?
Q: Yes.
A: It was after the search, after we searched the suspect's car that I gave the drugs to Detective Francisco.