CRIMINAL LAW—THE DYER ACT—ADMISSIBILITY OF POLICE DEPARTMENT RECORDS UNDER THE FEDERAL BUSINESS RECORDS ACT

Defendant, in the United States District Court for the Middle District of Georgia, was convicted by a jury for violation of the Dyer Act[1] for receiving a motor vehicle which was moving in interstate commerce with knowledge that it was stolen. On appeal, the United States Court of Appeals for the Fifth Circuit held first, that "the police reports and insurance company records were improperly admitted under the Federal Business Records Act or any other recognized exception to the 'hearsay' rule for the purpose of establishing" one of the elements necessary for a conviction under the Dyer Act that the car was stolen, and second, that ". . . the remaining circumstantial evidence is insufficient to prove this element. Thus, the conviction cannot be sustained."[2]

For purposes of analysis and decision the court, in determining whether the government had substantiated its case under the requirements of the Dyer Act,[3] divided the evidence submitted by the government into two areas. The first area was direct evidence offered for the purpose of proving that the vehicle in question was actually stolen, and the second was circumstantial evidence which the government offered to satisfy the "beyond a reasonable doubt" requirement necessary to sustain the conviction under the Dyer Act.[4] The court devoted the majority of its opinion to the first body of proof and summarily dealt with the issue of circumstantial evidence.

At trial, certain documents were introduced to establish that the automobile in question was stolen. These documents consisted of police reports of the Miami Police Department,[5] and Aetna Insurance

1. 18 U.S.C. § 2313 (1964).

2. U.S. v. Shiver, 414 F.2d 461, 464 (5th Cir. 1969).

3. In a prosecution for violation of the Dyer Act, 18 U.S.C. § 2313, the government has the burden of proving "(1) that appellant received the described vehicle; (2) that such vehicle was moving in interstate commerce at the time it was received; (3) that it had been stolen; and (4) that appellant had the requisite knowledge." Odom v. United States, 377 F.2d 853, 855 (5th Cir. 1967). The *Shiver* court decided the appeal solely on the third element mentioned above.

4. 414 F.2d at 462.

5. A distinction can be drawn between the terms "was in fact stolen" and "was reported stolen." The Court states the reports were offered to show the car was in fact stolen, whereas the government's brief reveals the intention to be that it was introduced to show the car was reported stolen rather than the fact of the theft. The entire body of proof collectively was introduced to show that the vehicle "was in fact stolen." The first part of this proof was offered by the government to show the vehicle "was reported stolen." Had this record been coupled with

Company "Proof of Loss" forms, including a Proof of Loss Statement and Bill of Sale, signed by Harry Snell as owner of the car.[6] Also, since neither Harry Snell nor his wife, Becky, appeared at the trial, the court admitted a certified copy of the Florida title registration of the automobile which had the same number as that of the vehicle reported stolen, to prove their ownership.

The admissibility of these records is governed by the provisions of the Federal Business Records Act[7] (hereinafter referred to as the FBRA). One of the purposes of the FBRA was to open the way for federal courts to admit into evidence records which were essential or useful to efficient business operations without requiring the appearance in court of the particular person who made the record or entry.[8] In order for these business records to be admissible, the standard of the "probability of trustworthiness" must be met.[9] This standard is generally satisfied by a showing that the report was made in the normal

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the testimony of either Harry or Becky Snell, the third essential element, namely the proof that the car had in fact been stolen, would have been conclusively proved as in U.S. v. Graham, 391 F.2d 439 (6th Cir. 1968). (See especially the discussion relating to the automobile which was the subject of count one of the indictment at p. 447-448). However, this court apparently feels that once the police report, originally introduced to show that the automobile had been reported stolen, is accompanied by records indicating that the insurer has paid the owner for loss of the same numbered vehicle the nature of such evidence changes from introduced for the purpose of showing that the car "was reported stolen" to introduced for the purpose of showing that the car was "in fact stolen," the latter held inadmissable in Graham at 448.

6. U.S. v. Shiver 414 F.2d 461, 462 (5th Cir. 1969). Neither the detective who identified the police record nor the insurance adjustor who identified the insurance company record showing payment of a theft loss to Snell had personal knowledge of the theft.

7. Formerly 28 U.S.C. § 695 (1940 ed.), now 28 U.S.C. § 1732 (1964 ed.) which states in part:

> (a) In any court of the United States and in any court established by an Act of Congress, any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

8. Palmer v. Hoffman, 318 U.S. 109, 112 (1942); Hartzog v. United States, 217 F.2d 706, 710 (4th Cir. 1954). For the legislative history of the Act see Sen. Rep. No. 1965, 74th Cong. 2d Sess. (1936).

9. Palmer v. Hoffman, 318 U.S. 109, 113, 114 (1942).

course of business, and is offered by one who can attest to its authenticity.[10]

Varying positions have been taken by the federal courts in deciding whether or not documentary evidence, similar to that offered in the present case, is admissible to prove facts stated therein. Some of the cases set forth a requirement that not only must the entrant be making the entry in the record in the regular course of business, but also, if another person supplies the information to the entrant, then that other person must have been acting in the regular course of business in supplying such information.[11] This is often referred to as the "duty of declarant" requirement.[12] Aside from this requirement, it should be noted that police accident records,[13] charts,[14] motor vehicle title certificates,[15] and machine records cards,[16] have been admitted under the FBRA to prove facts which were stated in those records.

In holding the records in the present case inadmissible, the court relied greatly on *United States v. Graham*,[17] a case similar to, but factually distinguishable from, *Shiver*.[18] In *Graham*, the court held that the police report, offered to prove the allegation that a car had been stolen, was inadmissible for the purpose of proving the fact of the theft, but could be admissible to show that such car had been reported stolen.

10. Bridger v. Union Ry. Co., 355 F.2d 382, 391 (6th Cir. 1966).

11. Yates v. Blair Transport, Inc., 249 F. Supp. 681 (S.D. N.Y. 1965), which based its decision on a state court decision which stated: "When, however, the informant to the entrant of the record is under no duty to anyone to make a truthful account of the facts thus recorded, the record will not be admissible as proof of such facts." Fagan v. Newark, 78 N.J., Super. 294, ——, 188 A.2d 427, 440 (1963), citing Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).

12. The language of Standard Oil Co. of California v. Moore, 251 F.2d 188 (9th Cir. 1957), cited by *Yates*, illustrates the "duty of declarant" and "statements made entirely in the course of business" ideas.

> But where the entrant or maker records information supplied by others, it must appear that 'it was part of their regular course of business to report to him what the declarants themselves knew, as it was part of his business to record what they said.' Where the information comes to the entrant or maker from unauthorized persons, the memorandum or record is therefore inadmissible, not because it contains hearsay, but because it was not made in the regular course of business.

13. Bridger v. Union Ry. Co., 355 F.2d 382 (6th Cir. 1966).

14. U.S. v. Mortimer, 118 F.2d 266 (2nd Cir. 1941).

15. Thompson v. U.S., 334 F.2d 207 (5th Cir. 1964).

16. Grandsinger v. U.S., 332 F.2d 80 (10th Cir. 1964).

17. 391 F.2d 439, 448 (6th Cir. 1968).

18. In *Graham* the Chicago Police Department record constituted the entire evidence tendered to establish the proof that the car noted in count two (there were two cars involved in the alleged theft) was in fact stolen, whereas the Miami Police Department report in *Shiver* was coupled with an authenticated copy of the Florida registration of the car having the same number of the vehicle stolen and Aetna Insurance Proof of Loss Forms.

This holding based primarily on the business duty of declarant requirement[19] seems to place unreasonable restrictions on the use of police reports offered under the FBRA. The Act itself provides, in part: "All other circumstances of the making of such writing or record, *including lack of personal knowledge by the entrant or maker*, may be shown to affect its weight, but such circumstances shall not affect its admissibility,"[20] (emphasis added). Thus the very language of the FBRA would seem to abandon any "duty of declarant" requirement. However, even assuming that such requirement still exists, it is a citizen's duty to report violations of the law to proper officials. Therefore, both parties, the informant and the entrant, are acting in the regular course of business by reporting such violations.

In ruling on the admissibility of the reports introduced, the *Shiver* court should have considered the line of reasoning suggested in *McDaniel v. United States*.[21] This reasoning is that if the document in question has "(a)ll the hallmarks of authenticity,"[22] then it should be admissible. Section 1732 of the FBRA "should (not) be interpreted in a dryly technical way, contrary to ordinary habits and customs, to reduce sharply its obvious usefulness."[23] The reception of the records in *Shiver* was cumulative, being based on the reliabiliy of records routinely kept in the ordinary course of business, the trustworthiness given to the police officer entrant, and direct testimony in the case. The documents introduced, including the police report, would appear to be properly within the scope of the FBRA.

The exclusion of the documentary evidence from the record created the second problem area in this case, that being the sufficiency of other evidence, circumstantial in nature, to fulfill the requirements for conviction under the Dyer Act. The *Shiver* court, without even discussing the factual similarity of *Odum v. United States*[24] which they repeatedly cited, ruled that the circumstantial evidence precluded convicting the defendant.[25]

The record shows that the defendant was in possession of the vehicle two days after it was reported stolen, although the vehicle identification number on the bill of sale was not the same as the one imprinted on

19. 391 F.2d at 448.

20. 28 U.S.C. § 1732(a) (1964). *See also* Woodring v. U.S., 376 F.2d 619 (6th Cir. 1967).

21. 343 F.2d 785 (5th Cir. 1965).

22. *Id.* at 789.

23. Harris v. Smith, 372 F.2d 806 (8th Cir. 1967).

24. 377 F.2d 853 (5th Cir. 1967).

25. "Suffice it to say that the circumstances relied upon by the government, together with all reasonable inferences arising therefrom, preclude such a finding." 414 F.2d at 462.

the vehicle. Defendant did not receive a certificate of title but only a bill of sale from the seller and had persuaded his brother to obtain unlawfully an Alabama tag for the car. Shiver claimed to have won the car in a gin rummy game but failed to list the vehicle on a bankruptcy schedule filed subsequent to its acquisition.[26]

The criterion to be followed in determining whether the evidence in a case is sufficient to uphold the verdict of the jury is, as stated by the Fifth Circuit Court of Appeals in *Odom*:

> The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. Glasser v. United States, 1941, 315 U.S. 60, 80; 62 S.Ct. 457, 469; 86 L. Ed. 680, 704. Our obligation, therefore, is to examine the record to determine whether there is any theory of the evidence from which the jury might have excluded every hypothesis except guilt beyond a reasonable doubt.[27]
> (Citations omitted)

The *Shiver* court set forth the criterion in essentially the same language as that used in *Odom*.[28] The *Odom* court further said:

> The standard utilized by this Court is not whether in our opinion the evidence and all reasonable inferences therefrom failed to exclude every hypothesis other than guilt, but rather whether there was evidence from which the jury might reasonably so conclude.[29]

The facts in *Odom* indicating that the car was stolen need to be presented in order to show the similarity between this and the principal case. The evidence was that the defendant was in possession of the car after it was reported stolen, that the defendant produced no witnesses relating to the manner of obtaining the car, that the price he was to alledgedly pay for the car was low compared to its apparent worth, that the defendant could not explain when and how he came to be in possession of the car, and finally, that the owner testified that the car was taken without his permission.[30] Upon this evidence the jury concluded that the automobile had been stolen and that Odom was guilty of a violation of the Dyer Act as charged by the Government.[31]

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26. *Id.*
27. 377 F.2d at 855.
28. 414 F.2d at 462.
29. 377 F.2d at 855.
30. 377 F.2d 853 (5th Cir. 1967).
31. The court on appeal rejected Odom's contention that the evidence is insufficient to sustain his conviction, but reversed and remanded on a testimonial error.

The testimony of the owner of the car in *Odom* relating that the car had been stolen seems to be the only difference from that in *Shiver*, other than the records offered in *Shiver*. The record reveals that the Assistant U.S. Attorney explained to the court in detail that the reasons for the absence of Harry Snell, co-owner of the automobile in question, were his advanced age and medical condition.[32] The United States District Court for the Middle District of Georgia considered such reasons for Snell's absence substantial and sufficient.

Upon a review of the cases in this area it becomes evident that the evidence was sufficient to uphold Shiver's conviction. This writer feels the standards set out in *Odom* have been met. It is apparent that the evidence presented indicating that the car was in fact stolen is more than "substantial" in view of the above standard.

J. STEPHEN GUPTON, JR.

32. The court comments both as to the vehicle being owned by Harry and Becky Snell and as to their failure to appear at the trial to offer direct testimony that the vehicle was in fact stolen, but evidently does not consider the reasons for their non-appearance relevant, for regarding this point, the court is silent.