LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, MARCH 3, 2020

PERSPECTIVE

State Supreme Court 'clarifies' expert witnesses and hearsay

By Don Willenburg

Last week, the California Supreme Court decided two cases about the effect of its watershed decision *People v. Sanchez*, 63 Cal. 4th 665 (2016), governing expert witnesses and their use of hearsay. *Sanchez* built a wall blocking expert witnesses' use of "case-specific" hearsay evidence. On first read, *People v. Veamatahau*, 20220 DJDAR 1660 (Feb. 27, 2020), arguably opens a hole in that wall as wide as the internet. In reality, while the decision is an important clarification, it will likely not affect most of the problems or extra work practitioners have encountered since *Sanchez*.

Veamatahau is a drug possession case. As in many cases, the police did not run a chemical analysis, but relied on the testimony of a trained criminalist, who in turn relied on a website containing identifying information for various drugs. Hence the question on which the Supreme Court granted review:

Did the prosecution's expert witness relate inadmissible case-specific hearsay to the jury by using a drug database to identify the chemical composition of the drug defendant possessed?

"Case-specific" is crucial because *Sanchez* distinguished between "case-specific" hearsay and "background" hearsay. The expert can rely on both, but can only relate to the jury background hearsay. After *Sanchez*, an expert can no longer "relate as true case-specific facts asserted in hearsay statements, unless they are *independently proven by competent evidence or are covered by a hearsay exception.*" 63 Cal. 4th at 686 (emphasis added). The expert can rely on such statements, but cannot relate them to the jury (i.e., "I read in the police report that Jimmy was 15 feet away, so I concluded that...")

The rule is different for "background information." "[E]xperts may relate information acquired *through their training and experience*, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." 63 Cal. 4th at 675 (emphasis added). This rule is born of practical necessity, not any statutory or doctrinal hearsay exception. (No one knows that Lee surrendered at Appomattox, that Babe Ruth hit 60 home runs one year, or that Napoleon lost at Waterloo, except via hearsay.)

In *Veamatahau*, the criminalist testified on direct examination "that, in his field, it is standard practice to identify pharmaceutical pills by visual inspection, whereby one compares markings found on the pills against a database of imprints that the Food and Drug Administration requires to be placed on tablets containing controlled substances. He then testified that he performed this visual inspection on the pills seized from defendant and formed the opinion that they contained alprazolam."

On cross-examination, the criminalist testified "that the database he used 'tell[s] you' that pills displaying a certain imprint 'contain[] alprazolam, 2 milligrams.'"

The defense argued that identifying the pills via this independent database was using case-specific hearsay. One reported decision, *People v. Stamps*, 3 Cal. App. 5th 988 (2016), rejected such criminalist testimony as case-specific hearsay under *Sanchez*, and also as generally unreliable because the internet "is inherently untrustworthy." *Id*. at 996-97, citation omitted.

Veamatahau disapproved *Stamps* and drew an important distinction. "Any information about the specific pills seized from defendant came from [the criminalist's] personal observation (that they contained the logos "GG32 — or 249") and his ultimate opinion (that they contained alprazolam), not from the database. In short, information from the database is not case specific but is the kind of background information experts have traditionally been able to rely on and relate to the jury." As the *Veamatahau* Court of Appeal opinion stated: "His testimony about the appearance of the pills, though case specific, was not hearsay because it was based on his personal observation. His testimony about the database, while hearsay, was not case specific, but the type of general background information which has always been admissible when related by an expert." 4 Cal. App. 5th 68, 73 (2018).

The court noted that this conclusion was consistent with examples given in the *Sanchez* decision, such as a diamond tattoo as a sign of gang membership, an equation used to estimate speed based on skid marks, or the potential long-term effects of a head injury. The defendant argued that the examples were dicta. "Defendant is mistaken. We meant what we said in *Sanchez*, including what we said in this particular example: the fact that a 'diamond is a symbol adopted by a given street gang [is] background information.'" Lesson to advocates: Careful what you call dicta, especially to the court that said it.

The court found the criminalist to be doing just what expert witnesses are supposed to do (no, not consult the internet). "[W]e do not see how expert witnesses are doing something other than making use of their expertise when they rely on their "special knowledge, skill, experience, training, and education" to (1) select a source to consult, (2) digest the information from that source, (3) form an opinion about the reliability of the source based on their experience in the field, and (4) apply the information garnered from the source to the (independently established) facts of a particular case." The focus is on the information contained in the testimony. "[Whether an expert testified to certain facts based on composite knowledge 'acquired from sources too numerous to distinguish and quantify' or if the expert simply looked up the facts in a specific reference as part of his or her duties in a particular case, the facts remain the same."

So no, *Veamatahau* does not blow an internet-sized hole in *Sanchez*. It nibbles at one edge, resolving a conflict between *Stamps* and other "Ident-a-Drug" criminalist cases. It does not directly affect the most vexing issues practitioners encounter, like medical records on which multiple other experts rely. *Veamatahau* may help one group of experts who customarily rely on hearsay: real estate valuation experts. They regularly rely on pure hearsay "comparables," but under *Veamatahau* they may well be able to "form an opinion about the reliability of the source based on their experience in the field."

The beginning of this article said there were two *Sanchez*-related decisions. The other is *People v. Perez*, which ruled that "a defendant's failure to object at trial, before *Sanchez* was decided," did not "forfeit[] a claim that a gang expert's testimony related case-specific hearsay in violation of the confrontation clause." *Perez* deserves its own article, or several. ■

Don Willenburg *is a partner at Gordon Rees Scully Mansukhani, LLP.*