1976

State of Utah In The Interest of Kenneth Eugene Marquez A Person Under Eighteen Years of Age : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH in the interest of

KENNETH EUGENE MARQUEZ

A person under eighteen years of age.

Case No. 14571

REPLY BRIEF OF APPELLANT

Appeal from an Order of the Second District Juvenile Court for Salt Lake County, State of Utah, The Honorable Regnal W. Garff, Jr., Presiding.

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There are basic misunderstandings in Respondent's analysis of this case as reflected in its brief. Therefore Appellant shall analyze the brief submitted by Respondent, giving reference to the page numbers of its brief wherein a point is asserted.

POINT I

THE JUVENILE COURT ERRED IN ADMITTING INTO EVIDENCE FINGERPRINT RECORDS OF THE ACCUSED WITHOUT PROPER FOUNDATION THAT SUCH FINGERPRINTS WERE TAKEN IN COMPLIANCE WITH UTAH STATUTORY PROVISIONS AND JUVENILE COURT RULES.

The State concedes that Utah Code Annotated §55-10-116 (1953), is the sole authority for the taking of a child's fingerprints (p.2). That statute requires the consent of a juvenile court judge, and is embodied in Rule 39, Utah Juvenile Court Rules of Practice and Procedure (U.J.C.R.P.P.). Therefore, to be properly admissible, there must be adequate foundation laid by the state to show compliance with the statutory mandate.

However, the State asks the court to ignore on unreasoned public policy grounds Rule 2 of the Utah Rules of Evidence which require that the Utah Rules shall apply in every proceeding, whether criminal or civil. In so advocating, the State also implies that the Court should disregard the constitutional guarantees set forth in In re Gault, 387 U.S. 1 (1967), Kent v. U.S., 383 U.S. 541 (1966), and In re Winship, 397 U.S. 358 (1970), (p.3). An adult confronted with the introduction of fingerprint evidence is entitled to the benefit of assessing at trial the adequacy of the foundation laid for admission. The legislature recognized the necessity of adding an additional protection for juveniles by enacting §55-10-116, Utah Code Ann. (1953). To deny the effect of these cases and the Utah statute is not only reversible error but would make a mockery of the Court's and the Legislature's attempts to confer additional protection on juveniles.

The State further contends (p.4) that absent an illegal detention or where prints are given voluntarily, there is no basis for objection to the admission of fingerprint evidence. People v. Hannaman, 507 P.2d 466 (Colo. 1973), Redd v. Decker, 447 F.2d 1346 (5th Cir. 1971). Mr. Marquez does not challenge the sufficiency of these legal arguments, but contests their application here, since without the benefit of sufficient foundation as to compliance with §55-10-116 and Rule 39, U.J.C.R.P.P., it is impossible to know under what circumstances the prints were obtained or whether or not they were given voluntarily. Without foundation, the State's arguments are premature, and Mr. Marquez is without sufficient knowledge upon which to base an objection at trial.

State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970) is cited (p.4) for the proposition that fingerprints may be taken absent a warrant of arrest. However, where a statute such as 55-10-116 and Rule 39 U.J.C.R.P.P. set forth the circumstances under which prints of a juvenile may be taken, use of this case as authority is improper. A close reading of State v. Dillon, supra, also reveals that the Idaho court ruled that fingerprints are protected from unreasonable searches and seizures.

The State argues (p.5) that it is a "hazardous guess at best that the legislature would have afforded juveniles the

protection found in the statute at the cost of allowing juvenile offenders to escape punishment." It is Mr. Marquez's contention that the legislature recognized the need to protect the juvenile who is often ignorant, naive and too immature to identify and articulate his or her individual rights, and that a juvenile offender must have the benefit of not having fingerprints taken without judicial consent. The State argues that to deny admittance of such evidence would be paramount to allowing juveniles to escape punishment. Such an assumption is beyond the parameters of the issue, since a determination of guilt or innocence and sentencing is a function of the judiciary apart from a finding that a piece of evidence is competent.

That the State in good faith advocates Mr. Marquez could have or should have compelled destruction of the record (p.5) would be, if accepted, a travesty. A juvenile should not have to remedy what might have been improper actions of the state and under no circumstances is under any affirmative duty to do so. Stone v. Powell, 44 U.S.L.W. 5313 (U.S. July 6, 1976), U.S. v. Jains, 44 U.S.L.W. 5303 (U.S. July 6, 1976), People v. Coleman, 120 Cal. Rptr. 384, 533 P.2d 1024 (1975).

The State enters into a lengthy discussion of the Supreme Court's resistence to the expansion of the scope of the exclusionary rule and cites substantial authority for

its proposition. (p.7) State v. Powell, 144 U.S.L.W. 5313 (U.S. July 6, 1976), U.S. v. Jains, 44 U.S.L.W. 5303 (U.S. July 6, 1976).

However, it is the State's argument that a criminal defendant cannot require a prosecutor to lay a foundation to show that all evidence admitted was legally obtained. However, Mr. Marquez urges recognition that the question before the court is not whether the evidence should have been suppressed but whether or not the state failed to meet its burden in supplying the court with evidence as to sufficient foundation and whether the trial court erred in admitting evidence proffered without proof of compliance with the statute.

Finally, the State argues (p. 10) that peace officers must not be unduly hampered in investigative attempts, State v. Perry, 27 Utah 2d 48, 492 P.2d 1349 (1972), without a corresponding benefit being provided. This standard when applied to the facts herein is ludicrous. The benefit to be gained is clearly the protection of the rights of juveniles as provided by 55-10-116 and the U.S. Constitution.

POINT II

THE JUVENILE COURT ERRED AS A MATTER OF LAW IN DECLARING FINGERPRINT RECORDS ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The rule of People v. Zerbes, 6 Cal. 2d 425, 57 P.2d 1319 (1936) is still sound judicial precedent which should be adopted by the court. Zerbes, supra, holds that where the state's fingerprint expert had not known the person fingerprinted personally and had not personally recorded the prints, the experts testimony was hearsay and the card properly rendered incompetent. This is the situation in the instant case.

The State cites People v. Crosslin, 251 Cal. App. 968, 60 Cal. Rptr. 309 (1967) as the better California rule (p.11). In California, fingerprint evidence is admissible under the Uniform Business Records as Evidence Act codefeed as §1953f of the California Code of Civil Procedure where the foundation for admitting the record is properly laid, i.e. "if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. (p. 314 Cal. Rptr.). In the Crosslin case, foundation was deemed sufficient where a police captain testified that he had taken fingerprints for numerous years, related in detail how prints were prepared, explained what various numbers appearing on the card signified, identified who prepared cards, and testified that he checked the date and numbers on defendant's card and found the card to be in the correct location, and that the card was prepared in the normal course of business on the date the defendant was arrested.

Testimony at trial in the instant case in no manner meets the standard set forth in Crosslin, and therefore the Zerbes rule continues to be applicable.

POINT III

EVEN ASSUMING FINGERPRINT EVIDENCE IS ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, THE JUVENILE COURT ERRED IN ADMITTING FINGERPRINT RECORDS BECAUSE OF INSUFFICIENT FOUNDATION UNDER THAT EXCEPTION.

As both Mr. Marquez and the State agree, the cases of State v. Davie, 121 Utah 189, 240 P.2d 245 (1952) and Clayton v. Metropolitan Life Ins. Co., 96 Utah 331, 85 P.2d 819 (1938) demonstrate the foundational requirements for admission of evidence as a business records exception to the hearsay rule (p. 13). However, the State indicates that Mr. Marquez must isolate the area of foundational insufficiency.

Mr. Marquez contends that under the standard required by Clayton, supra, there was absolutely no offer of testimony to show the necessity of admitting records without requiring the person making the entry to testify, and that all other testimony was insufficient to satisfy the remaining requirements.

Mr. Marquez also challenges the use of State v. Polson, 93 Idaho 912, 478 P.2d 292 Cert. denied 402 U.S. 930 (1971)

as applicable authority for the proposition that when a fingerprint record has been produced from official custody a sufficient foundation has been laid for its admission. The Polson, supra, case is distinguishable on its facts. There, the records introduced from official custody were "certified" records held by the Records Administrator of the Idaho State Penitentiary who was also the person whose testimony was taken.

POINT IV

THERE WAS INSUFFICIENT FOUNDATION LAID TO INSURE THE AUTHENTICITY OF THE FINGERPRINT CARD ADMITTED INTO EVIDENCE.

The State alleges (p. 18) that fingerprints are not subject to change over a period of time, or that it is impossible to create a spurious fingerprint. On the contrary, Mr. Marquez asks the court to recognize the possibility that in a system where personnel change often and where prints are kept in unsealed envelopes, the possibility exists that prints can be mutilated or destroyed, interchanged or misplaced. Further, Mr. Marquez is not required to demonstrate any credible motive for an individual to interfere with the integrity of fingerprints, since intentional interferance by an individual is not the sole means by which evidence could be rendered incompetent.

In this instance, the State attempts to analogize chain of custody standards for latent prints (p. 19). Again, the State misunderstands. To establish the chain of custody

for a latent print, particularly where the print was taken in connection with the offense for which a defendant is being tried is not analagous for it is a much less complicated situation in which the time span between the finding of the print and its introduction is relatively short.

POINT V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DISMISSAL BECAUSE THE EVIDENCE FAILED TO ESTABLISH, AS A MATTER OF LAW, THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

Three cases are cited by the State as illustrations of instances in which fingerprints found in the area of a crime were sufficient indications of guilt so as to uphold a conviction. Yet, each case is distinguishable. In State v. Washington, 17 Utah 2d 149, 405 P.2d 793 (1965), the print of defendant Washington was found inside a burglarized house. In Harvey v. People, 495 P.2d 204 (Co.o. 1972), the identifying print was on a bottle lying directly next to the victim of a murder. In State v. Tew, 234 N.C. 612, 688 S.E. 2d 291 (1951), the fingerprint evidence was on a piece of glass found inside a burglarized building.

In fact, the Colorado Supreme Court in Harvey v. People, Supra, set aside the conviction of the defendant and remanded

based upon insufficient circumstantial evidence, which specifically, in the Harvey case, supra, the court said:

> To satisfy the requirements of proof in a circumstantial case, the fingerprints which correspond to those of the accused must be found in the place where the crime was committed under such circumstances as to rule out the possibility that they could have been impressed at a time other than when the crime was committed. P.207.

This, of course, is not the situation in the instant case where the one latent print admitted at trial had been lifted two days after a burglary from a basement window through which no access to the burglarized portion of the home could be had.

DATED this _____ day of December, 1976.

JAMES T. MASSEY
Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Reply Brief of Appellant to Vernon B. Romney, Attorney General for the State of Utah, 236 State Capitol Building, Salt Lake City, Utah 84114, and to Mr. Earl F. Dorius, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 9 day of December, 1976.