# STATE OF MICHIGAN

# COURT OF APPEALS

In the Matter of DONTAE LAVELLE NANCE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

DONTAE LAVELLE NANCE,

Respondent-Appellant.

UNPUBLISHED
June 28, 2011

No. 297578
Wayne Circuit Court
Family Division
LC No. 10-491620

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Respondent, a minor, appeals by leave granted an order of adjudication sustaining a petition's allegations regarding the charges of carrying a concealed weapon, MCL 750.227, and possession by a minor of a firearm in public, MCL 750.234f. We affirm.

This case arises out of a January 4, 2010, incident wherein respondent allegedly fled from police upon being approached about a possible curfew violation and, while fleeing, threw from his possession an object later identified as a loaded blue steel automatic handgun.

On appeal, respondent contends that the trial court erred when it denied his motion to compel the police to dust the gun he allegedly possessed for fingerprints or, in the alternative, appoint an expert to conduct the fingerprint analysis on the gun. We disagree. We review a trial court's decision regarding a motion for discovery for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). We also review a trial court's decision on whether to appoint an expert for an indigent defendant for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002). An abuse of discretion occurs when the trial court's decision is not within "the range of reasonable and principled outcomes." *People v Unger (On Remand)*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

The trial court did not abuse its discretion when it denied respondent's motion to compel the police to dust the gun for fingerprints. MCR 3.922 governs discovery in juvenile proceedings and sets forth, in pertinent part:

> **(A) Discovery.**
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> (1) The following materials are discoverable as of right in all proceedings provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:
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> (e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;
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> (f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, that are relevant to the subject matter of the petition;
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> * * *
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> (2) On motion of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable of right under subrule (A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery.

MCR 3.922 requires a party to request the results of expert tests, such as a fingerprint analysis on a handgun, no later than 21 days before trial. Under the court rule, the key to the production of the requested material is that the material or evidence be available in the first instance. That is, experts must first conduct tests and experiments, yielding results, before there can be any material or evidence to be sought through an order of discovery pursuant to MCR 3.922. Here, there was no material or evidence relating to fingerprint testing of the gun for respondent to request. Instead, respondent requested that the trial court compel petitioner to create or develop evidence by dusting the gun for fingerprints. MCR 3.922 does not require a party to create evidence; rather, the court rule requires a party to reveal already available and existing evidence or material to the requesting party. Contrary to respondent's assertion, there is nothing in MCR 3.922 that permits a court to compel the police or petitioner to perform a fingerprint analysis on the handgun where one had not yet been completed.

Our Supreme Court addressed a similar issue and court rule in *Phillips*, 468 Mich at 583. In *Phillips*, the Court considered whether MCR 6.201, governing discovery in criminal cases, permitted a trial court to compel a party to create an expert witness report where no such report existed. *Phillips*, 468 Mich at 584, 587-589. The prosecutor contended that, under the court rule, the trial court could compel the creation of a report. *Id*. at 589. At the time *Phillips* was decided, MCR 6.201(A)(3) stated "that a party must provide 'any report of any kind produced by

or for an expert witness whom the party intends to call at trial.'"[1] *Phillips*, 468 Mich at 590 (citation omitted). The Court rejected the prosecutor's contention because it was contrary to the plain language of MCR 6.201(A). *Phillips*, 468 Mich at 590. The Court held:

> According to the plain meaning of the words, a "report" is an account of something. A report that has been "produced" has already been brought forth or created. In other words, the report must already exist. There is nothing in the plain language of MCR 6.201(A) that permits a trial court to compel such a report to be created when it does not exist. [*Id.*][2]

Similarly, there is nothing in MCR 3.922 that allows a court to compel the creation of evidence that does not already exist, i.e., fingerprint testing on the gun. Accordingly, the trial court did not abuse its discretion in denying respondent's motion to compel the police or petitioner to dust the gun for fingerprints.

Next, the trial court's denial of respondent's alternative request to appoint an expert to perform a fingerprint analysis on the handgun was also not an abuse of discretion.

> This Court reviews a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion. MCL 775.15. "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).
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> *** * ***
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> As MCL 775.15 makes clear, a trial court is not compelled to provide funds for the appointment of an expert on demand. In *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), this Court held that, to obtain appointment of an expert, an indigent defendant must demonstrate a "'nexus between the facts of the case and the need for an expert.'" (Citation omitted.) It is not enough for the defendant to show a mere possibility of assistance from the requested expert. "Without an indication that expert testimony would likely benefit the defense," a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Id.* [*People v Tanner*, 469 Mich 437, 442-443; 671 NW2d 728 (2003).]

Further, respondent has the burden of showing that he could not safely proceed to trial without such expert assistance. See *id* at 440-441, 444, citing MCL 775.15.

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[1] MCR 6.201(A)(3) has since been revised.

[2] Although the Court acknowledged that there may be circumstances where "good cause" is shown to permit a trial court to compel a party to create expert witness reports under MCR 6.201(I), such as where "a trial court believes a party is intentionally suppressing reports by an expert witness," such circumstances were not present in *Phillips*. *Phillips*, 468 Mich at 591-593.

Respondent requested the appointment of a fingerprint expert to dust the gun for fingerprints. On appeal, he argues that the expert testimony would have been beneficial to his defense because the absence of his fingerprints on the handgun could have exonerated him. Although it would not have been unreasonable for the trial court to appoint a fingerprint expert for respondent, we find that it was not an abuse of discretion for the court to decline to do so under the circumstances. First, respondent apparently made no mention of another person being with him on the night of his arrest, raising a "wrong person" theory, until the day he testified at trial. Furthermore, respondent did not establish that a fingerprint expert would likely benefit his defense. A fingerprint analysis on the gun could have further inculpated respondent. It could also have shown no fingerprints, or even another person's fingerprints. Although the expert testimony could possibly have bolstered respondent's defense theory, it would not guarantee his exoneration because there was other evidence, specifically the testimony of Officer Barry Hayward, that respondent possessed the gun. While expert testimony regarding the absence of respondent's fingerprints on the gun might have bolstered his defense, the mere possibility of assistance from the requested expert is not enough to establish that the trial court abused its discretion. See *id*. at 443.

Further, the trial court did not abuse its discretion in denying respondent's motion to appoint an expert witness because respondent was able to safely proceed to trial without an expert. See *id*. at 444. Respondent's defense theory was that he was not the one who ran away from the police, and he did not possess a gun. In support of his theory, respondent presented evidence from Maurice Cuff, his mother, and himself. Respondent testified that he was walking with "occupant," who he later identified as a friend named Cornelius,[3] when two officers approached them in a squad car, and that it was Cornelius who ran away as one of the officers approached. The officer who had approached them chased Cornelius on foot, and the other officer drove away in the squad car. Respondent continued walking and came upon an officer looking for something on the side of the street with a flashlight. Soon thereafter, as respondent continued walking, he was approached by another squad car and one of the officers got out and arrested him. Respondent testified that he told the officer he was "not the one you two are looking for; I'm not that one." Respondent also testified that he did not have a gun. Respondent's mother testified that she knew of respondent's acquaintance named Cornelius, corroborating respondent's testimony that such an individual existed and boosting respondent's credibility. Cuff testified that respondent appeared to be minding his own business when the police approached and arrested him. According to Cuff, one of the officers appeared to be searching for something in the area where respondent was arrested, but Cuff did not see them recover anything. If believed, respondent's witnesses could have cast doubt on Officer Hayward's and Officer Randall Craig's testimony that it was respondent who took off running, with no mention of another person being with him, as well as Officer Hayward's testimony linking respondent to the gun. Moreover, respondent was able to cross-examine the officers about their intentions and observations on the night of the incident. Thus, we conclude that respondent was able to challenge petitioner's case and present his defense theory, i.e., that he did

[3] Respondent and his mother testified that they did not know Cornelius's last name.

not possess the gun, without the assistance of a fingerprint expert.[4] Accordingly, respondent has not shown that expert testimony was necessary in order to safely proceed to trial, and the trial court did not abuse its discretion in denying his motion to appoint an expert.

Respondent next briefly asserts that the failure of both the police and petitioner to dust the handgun for fingerprints violated his due process rights. It is well established in Michigan that the police are not required to seek and find exculpatory evidence. *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995), citing *People v Stephens*, 58 Mich App 701; 228 NW2d 527 (1975). In *Miller*, this Court found no violation of the defendant's right to due process where the police did not test his hands for gunpowder residue. *Id*. Similarly, in *Stephens*, this Court rejected the defendant's claim that the failure to dust a weapon for fingerprints was the same as suppressing or withholding evidence to the detriment of the defendant in violation of his due process rights. *Stephens*, 58 Mich App at 705-706. The *Stephens* Court reasoned:

> The crucial distinction is between failing to disclose evidence that has been developed and failing to develop evidence in the first instance. When the police fail to run any tests, the lack of evidence will tend to injure their case more than defendant's since the prosecution has the burden of proving guilt beyond a reasonable doubt. Whether or not to run fingerprint tests is a legitimate police investigative decision. Defendant's rights were not violated. [*Id*.]

Here, neither petitioner nor the police suppressed evidence or failed to disclose evidence that had already been developed. In fact, as discussed, there was no evidence regarding fingerprints on the gun to disclose in the first instance. Further, the decision whether to test the handgun for fingerprints was a legitimate police investigative determination. Accordingly, respondent's right to due process of law was not violated.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering

[4] Respondent was also free to argue at trial that petitioner's failure to produce evidence of his fingerprints on the gun further weakened the case against him, although it does not appear that he did so.