Matter of Logan C.
2020 NY Slip Op 32681(U)
August 19, 2020
Family Court, Kings County
Docket Number: D8092-20
Judge: Alan Beckoff

At a Term of the Family Court of the State of New York, held in and for the County of Kings, at 330 Jay Street, Brooklyn, New York on the 19th day of August 2020.

P R E S E N T:

Hon. Alan Beckoff

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In the Matter of :

LOGAN C.,

A Person Alleged to be A Juvenile Delinquent,

Respondent. :

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Docket Nos: **D8092-20**

DECISION ON MOTION

NOTICE: PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL MUST BE TAKEN WITHIN THIRTY DAYS OF RECEIPT OF THE ORDER BY THE APPELLANT IN COURT, THIRTY-FIVE DAYS FROM THE MAILING OF THE ORDER TO THE APPELLANT BY THE CLERK OF THE COURT, OR THIRTY DAYS AFTER SERVICE BY A PARTY OR LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIEST.

Alina Slabodkina, Assistant Corporation Counsel,
for the Presentment Agency
Adam Starritt, Legal Aid Society, for Respondent Logan C.
Christopher D. Williams, agency counsel, for interested non-party
New York City Police Department

Beckoff, J:

Respondent Logan C., age 15, was arrested on weapon possession charges after New York City police officers observed him in the passenger seat of a livery

cab and recovered a loaded firearm from inside the vehicle. While Respondent was detained at the 60th Precinct stationhouse in Brooklyn, a police officer offered him a bottle of water, from which he drank. The officer subsequently took the bottle and retrieved from it a sample of Respondent's DNA for testing to compare to DNA possibly left on the firearm.

Following a pre-petition hearing that resulted in Respondent's remand to juvenile detention pending the filing of a petition, the Presentment Agency charged Respondent with Criminal Possession of a Weapon in the Second Degree and related offenses. As part of a global settlement involving other petitions and arrests, Respondent admitted to a count of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03(1)(b), a class C felony), was adjudicated a juvenile delinquent, and was placed with the New York City Administration for Children's Services in a non-secure Close to Home facility for 12 months.

Before the dispositional order was entered, Respondent's counsel moved for an order directing the New York City Office of the Chief Medical Examiner ("OCME") to destroy and expunge any DNA sample or profile of Respondent that was obtained during his pre-arraignment detention. Alternatively, Respondent asked the Court to issue a protective order prohibiting OCME from uploading Respondent's DNA sample into the New York City Local DNA databank and barring any further comparisons apart from this case.

Although this case has already gone to disposition, the Court must still address the issue of what to do about Respondent's DNA sample.

Respondent's argument is that his DNA sample was obtained by the NYPD through subterfuge, that he did not abandon the water bottle, that he is a minor, and that state and federal law compel the destruction of the sample, or at least a protective

order barring its entry into a databank. The Presentment Agency argues that the Family Court, being a court of limited jurisdiction, does not have the authority to grant either kind of the requested relief. The New York City Police Department, which the Court directed be served with this motion because of its interest in the issue presented here, argues that the state's Executive Law, which governs the handling of material in DNA databanks that has been provided voluntarily or subject to a warrant or court order, does not apply because Respondent abandoned the water bottle and his DNA sample with it.[1]

The Court finds that regardless of how the police gathered the DNA sample from Respondent, the Family Court Act, the only pertinent statute here, does not afford him the remedies of either destruction of the sample or a protective order.

"The Family Court is a court of limited jurisdiction and may exercise only those powers specifically granted to it by the State Constitution or by statute." *Matter of Anthony S.*, 178 Misc2d 1 (Family Court, Kings County, 1998); *see also* Family Court Act §§ 115(a)(vi), 302.1(1) (the Family Court has exclusive original jurisdiction over juvenile delinquency proceedings); F.C.A. § 303.1(1) (the provisions of the Criminal Procedure Law "shall not apply" to juvenile delinquency proceedings unless "specifically prescribed" by the Family Court Act).

The Court may order a respondent in a juvenile delinquency proceeding to provide non-testimonial evidence such as "samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof[.]" F.C.A. § 331.3 (2)(v). However, there is no provision in the Family Court Act for the destruction of such material. The only section of the statute that speaks to the

[1] The Court had also directed Respondent's counsel to serve OCME with this motion, but that office has not submitted a separate answer.

destruction of anything obtained from a juvenile involves only fingerprints, palmprints, and photographs taken upon a juvenile's arrest pursuant to F.C.A. § 306.1(1) and (2). Any such fingerprints, palmprints, and photographs are to be forwarded to the division of criminal justice services if the person has been "adjudicated to be a juvenile delinquent for a felony" but "destroyed forthwith" if all of the person's petitions have been "disposed of by the family court in any manner other than adjudication of juvenile delinquency for a felony[.]" F.C.A. § 354.1(1) and (2).

So even if F.C.A. § 354.1 could be read to include DNA material, Respondent here has been adjudicated a juvenile delinquent based on his admission to a class C felony, still making this statute unavailable to him.

Respondent's alternative request for a protective order prohibiting OCME from uploading his DNA sample into a databank or doing any further comparative testing is also not covered by the pertinent sections of the Family Court Act. Regarding discovery obtained through a court order, F.C.A. § 331.5 says that the Family Court may issue a protective order "denying, limiting, conditioning, delaying or regulating discovery" for various reasons and providing how such discovery is to be maintained. But Respondent's DNA sample was not obtained by court order and, in any event, this section has no provision for a protective order to be made against an agency such as OCME.

Respondent cannot get relief from Family Court Act § 255 either. Although that section broadly provides that a judge of the Family Court "may order any state, county, municipal and school district officer and employee to render such assistance and cooperation as shall be within his legal authority," as shall be explained shortly,

there is currently no statutory authority for OCME to expunge a DNA sample or record of the subject of an Article 3 juvenile delinquency proceeding.

The caselaw on this subject is not extensive. In two unreported decisions of the Family Court, those judges correctly held, in this Court's view, that the Court does not have the statutory authority to direct OCME to destroy or expunge DNA material or to issue a protective order. *Matter of Darius O*., Kings County Family Court Docket # D27334-18 (Feb. 13, 2019); *Matter of Dewayne W.*, Bronx County Family Court Docket # D4191-19 (April 5, 2019).

This Court respectfully disagrees with *Matter of Jahsim R.*, 66 Misc3d 426 (Family Court, Bronx County, 2019), in which that Court held that Executive Law § 995-c(9)(b) gives the Family Court the discretion to order the expungement of DNA material. That Court relied on *Matter of Samy F. v. Fabrizio*, 176 AD3d 44 (1st Dept., 2019), in which the Appellate Division held that the Executive Law governed databanks maintained by OCME and that a person adjudicated a youthful offender in Supreme Court could have his DNA profile, based on DNA collected during a criminal investigation, expunged from the databank. The Court further relied on a *proposed* amendment to the Executive Law that would specifically provide that an individual who is the subject of a juvenile arrest that did not result in the filing of a petition or that resulted in a dismissal or a conviction on a non-criminal offense could apply to the Family Court for an order directing the expungement of any DNA sample or related material.

What distinguishes *Samy F*. from the present case is that it is a case involving a criminal proceeding in Supreme Court, so the situation there is obviously not governed by the very limited jurisdiction of the Family Court. Moreover, the Executive Law section relied upon by the Appellate Division in *Samy F*. and in turn

relied upon by the *Jahsim R.* Court has not yet actually been amended to provide for the expungement of DNA samples and records in Family Court juvenile delinquency proceedings.

Respondent here also cannot rely on *Matter of Abe A.*, 56 NY2d 288 (1982), which sets out a four-part standard for an order compelling someone to provide a DNA sample. Obviously there was no court order compelling Respondent to provide a DNA sample because he claims that his DNA was obtained by the pretextual act of being offered a drink. But the Court does not reach or decide the questions of whether there was some subterfuge by the NYPD in its method of obtaining a DNA sample from a minor or whether Respondent abandoned the water bottle after drinking from it. These are issues that might have been properly explored at a pre-trial suppression hearing, but there was none in this case prior to Respondent's admission.

For these reasons, Respondent's motion for an order directing expungement of his DNA sample or alternatively for a protective order is denied.

ENTER:

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ALAN BECKOFF, JFC

Dated: Brooklyn, NY
August 19, 2020