2010 PA Super 222

IN THE INTEREST OF D.Y.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF D.Y.	:	No. 1300 EDA 2009

Appeal from the Order entered April 1, 2009,
In the Court of Common Pleas of Philadelphia County,
Family Court, Juvenile Division, at No. 0719-08-12

BEFORE: ALLEN, LAZARUS, and FREEDBERG,* JJ

OPINION BY LAZARUS, J.: Filed: December 3, 2010

D.Y. appeals from the dispositional order adjudicating him delinquent for burglary, criminal trespass, theft by unlawful taking, receiving stolen property and criminal mischief. On appeal, D.Y. claims that "the lower court erred in admitting hearsay information at [his] adjudicatory hearing, to wit, that the fingerprints on a "10 print card"[1] were his fingerprints.

Here, where fingerprint testimony was the sole evidence linking D.Y. with the crime, and where the "ten print card" was neither admitted at D.Y.'s hearing as evidence, nor did any witness testify that the prints on that card were in fact D.Y.'s fingerprints, his adjudication cannot stand. Thus, we reverse and remand for further proceedings.

[1] A "ten print card" contains the imprint of an individual's ten fingerprints after they have been rolled in ink and stamped on a card.

*Retired Senior Judge assigned to the Superior Court.

FACTS

During the evening hours of October 10, 2008, the victim returned to her home on North 6th Street in Philadelphia to discover that her front door and back kitchen window were wide open and the back door was damaged. The house had been ransacked, with clothes and other personal belongings strewn all around the residence. Missing from the home were four gold rings, two bracelets, a gold chain, two portable DVD players, and a small hand-held safe that contained family passports, social security cards and $1,500. The value of the stolen items totaled approximately $14,000.

After receiving a phone call from one of the victim's neighbors reporting the break-in, police officers went to the scene to investigate. During her examination of the home, Detective Roseanna Filippello noticed that the exterior screen to one of the rear windows had been pushed up and that there appeared to be smudges on the window. The detective was ultimately able to lift a fingerprint from the outside of the window. The fingerprint was submitted to the police department's "Latent Print" section where it was examined by a fingerprint technician. The technician, who testified at D.Y.'s adjudicatory hearing, put the prints into an "automated fingerprint identification system" (AFIS). The AFIS would match the latent prints with prints that were already in the police department's computer system based upon ten print cards that had been taken of individuals at the District in the past. In this case, the AFIS came back with a positive "candidate list." Then, by comparing the unique

characteristics from the latent print to the prints on an individual's corresponding ten print card, the technician narrowed it down to a single possible suspect, D.Y.

Both Detective Filippello and the fingerprint technician testified at D.Y.'s juvenile hearing. The court also considered the stipulated testimony of the victim. Ultimately, the trial judge convicted D.Y. of the above mentioned offenses; he was ordered to remain committed to the Abraxas juvenile facility where he had been serving a commitment for an unrelated delinquency adjudication.

DISCUSSION

We find the present case is controlled by our Court's holding in ***Commonwealth v. Pedano***, 405 A.2d 525 (Pa. Super. 1979). In ***Pedano***, a fingerprint roll card that allegedly had the imprint of the defendant's fingerprints was admitted at his burglary trial to establish his identity as the perpetrator. In addition, the detective that actually conducted the fingerprint roll card on defendant also testified at trial regarding the fingerprinting process with the defendant. On appeal, our Court reversed the defendant's conviction because the Commonwealth failed to "establish a chain, even a tenuous one, stretching from [a detective's] fingerprinting of appellant to the rolled impression card employed by [another detective]." ***Id.*** at 528.

Similarly, in the instant case a "ten print card"[2] was the critical link identifying D.Y. as the perpetrator of a burglary. Defense counsel specifically objected at D.Y.'s adjudicatory hearing to questioning the technician regarding the ten print card because the card itself had not been admitted as evidence (nor was it even in the Commonwealth's possession at the hearing) and because the source of the card was unknown. N.T. Adjudicatory Hearing, 4/1/2009, at 22; 34. In fact, the fingerprint technician testified at the hearing that the only reason the card was linked to D.Y. was because his name was on the card and the photo number on the card matched the number that came out on the AFIS report. Because there was nothing establishing who fingerprinted D.Y. for purposes of the ten print card and the person that actually conducted the fingerprinting was never brought in to testify that it was in fact D.Y.'s fingerprints on the card, we must reverse D.Y.'s adjudication and remand.[3]

D.Y. does not deny that there are in fact fingerprints on the ten print card; his claim is that they may not be his. Although the card did have D.Y.'s name written on it, the fingerprints were taken at some point prior to the instant crime – yet we do not know when they were taken and who in fact took

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[2] A "ten print card" is the equivalent to a fingerprint roll card in ***Pedano***.

[3] In ***Pedano***, unlike the present case, the court even had the detective that actually conducted the fingerprint roll card on defendant come in and testify to that process. However, because no link was ever established that the "roll card detective" gave the card to a second detective who then gave it to a third detective that matched the latent fingerprints taken from the crime scene to the fingerprints on the "roll card," the evidence was deemed inadmissible. 405 A.2d at 528.

the prints. Notably, the AFIS technician testified that it is possible that the police computer system could inaccurately record prints to the photo number on the AFIS system. N.T. Adjudicatory Hearing, 4/1/2009, at 35.

Due to the lack of evidence regarding the methodology linking the prints on a specific ten print card to D.Y. and the possibility of inaccuracy in the cards themselves, we find that the evidence was inadmissible and that the trial court abused its discretion in ruling to the contrary.[4] Thus, because D.Y.'s adjudication was based on this inadmissible evidence, we must reverse and remand for a new adjudicatory hearing. ***In re Gillen***, 344 A.2d 706 (Pa.

[4] We remind the trial court that after D.Y. was adjudicated delinquent, our United States Supreme Court issued a seminal Confrontation Clause case, ***Melendez-Diaz v. Massachusetts***, 129 S. Ct. 2527 (2009), which held that criminal defendants have a Sixth Amendment right to cross-examine experts who conduct forensic tests in their cases. Specifically, in ***Melendez-Diaz*** the Supreme Court determined that the defendant, who had been convicted of various drug trafficking and distribution offenses, had the right to confront the forensic analysts who generated certificates stating that the substance seized from the defendant was cocaine. Notably, in ***Commonwealth v. Barton-Martin***, 5 A.3d 363 (Pa. Super. 2010), our Court applied the rationale of ***Melendez-Diaz*** and held that the appellant's rights under the Confrontation Clause were violated where Commonwealth did not present at trial the analyst who prepared lab report indicating appellant's blood alcohol level was above 0.16% to convict her of driving under the influence, 75 Pa.C.S.A. § 3802(c). Arguably, the same rationale in those cases can be applied here where the Commonwealth failed to present at trial the individual that prepared the 10 print card that allegedly contained D.Y.'s fingerprints – which was the sole evidence to prove the element of unauthorized entrance into the victim's home for purposes of burglary and related crimes.

Super. 1975) (law is clear that inadmissible hearsay may not serve as basis for adjudication of delinquency).[5]

Order of adjudication reversed. Case remanded for new adjudicatory hearing in the juvenile court. Jurisdiction relinquished.

ALLEN, J., files a Dissenting Opinion.

[5] Due to the fact that the fingerprint evidence was the *only* thing linking D.Y. to the instant crime, we cannot find that its admission was harmless error.

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DISSENTING OPINION BY ALLEN, J.:

I respectfully dissent. Here, the Commonwealth qualified Clifford Parson, a fingerprint technician, as an expert in analyzing crime scene fingerprints. Parson testified that he compared latent fingerprints from the scene of a crime with a previous "ten print card," and determined that the fingerprints at the scene of the crime belonged to D.Y. ("Appellant."). The only issue in this appeal is whether the trial court abused its discretion in permitting Parson to testify to an alleged hearsay statement – *i.e.* that Appellant's name and fingerprints were on the ten print card. Because Parson was an expert and relied upon the hearsay statement to form his opinion, he was allowed to testify to the hearsay statement under Pa.R.E. 703 and 705.

The Majority cites a chain-of-custody case, ***Commonwealth v. Pedano***, 405 A.2d 525 (Pa. Super. 1979), as "controlling" authority for its position. Slip. Op. at 3-4. ***Pedano***, however, is readily distinguishable because it is a chain-of-custody case which addresses the admissibility of demonstrative

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evidence, namely a fingerprint roll card. Here, the Commonwealth never sought to introduce the ten print card into evidence, and thus, ***Pedano*** is inapplicable. Indeed, ***Pedano*** does not discuss, let alone address, the sole issue in this case - whether an expert can disclose hearsay testimony when that testimony formed a basis for the expert's opinion.

Although chain-of-custody and hearsay are both evidentiary tenets, they are entirely distinct. Chain-of-custody refers to the manner in which evidence was maintained from the time it was collected to its submission at trial, ***see Commonwealth v. Alarie***, 547 A.2d 1252 (Pa. Super. 1988), while hearsay is an out-of-court statement offered at trial to prove the truth of the matter asserted, ***see Commonwealth v. Bujanowski***, 613 A.2d 1227 (Pa. Super. 1992). The Majority fails to appreciate this distinction. Contrary to the Majority's view, the governing authority in this case is Pa.R.E. 703 and Pa.R.E. 705.

In its entirety, Pa.R.E. 703 states:

> **Rule 703. Bases of opinion testimony by experts**
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> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id.

"In Pennsylvania . . . Pa.R.E. 705 requires an expert witness to testify as to the facts or data upon which the witness's opinion is based, whether or not the facts or data would otherwise be admissible in evidence." ***Id.***, *Comment*; ***see*** Pa.R.E. 705 ("[T]he expert must testify as to the facts or data on which the opinion or inference is based."). "When an expert testifies about the underlying facts and data that support the expert's opinion and the evidence [is] inadmissible, the trial judge, upon request, shall . . . instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence." Pa.R.E. 705, *Comment*.

With regard to Pa.R.E. 703, this Court has stated:

> It is well-established that an expert may express an opinion which is based on material not in evidence, including other expert opinion, where such material is of a type customarily relied on by experts in his or her profession. ***Collins v. Cooper***, 746 A.2d 615, 618 (Pa. Super. 2000); ***Primavera v. Celotex Corp.***, 608 A.2d 515 (Pa. Super. 1992). Such material may be disclosed at trial even though it might otherwise be hearsay . . . Such hearsay is admissible because the expert's reliance on the material provides its own indication of the material's trustworthiness: "The fact that experts reasonably and regularly rely on this type of information merely to practice their profession lends strong indicia of reliability to source material, when it is presented through a qualified expert's eyes." ***Primavera***, 608 A.2d at 520.

Boucher v. Pa. Hosp., 831 A.2d 623, 628 (Pa. Super. 2003). ***See Maravich v. Aetna Life & Casualty Co.***, 504 A.2d 896, 900-01 (Pa. Super. 1986) (permitting expert to testify to hearsay statements when those statements were reasonably relied upon by the expert in forming his opinion); ***Id.*** at 900 (quoting McCormick on Evidence § 324.2 (3d ed. 1984) ("An expert witness

may . . . base an opinion on facts or data that are not 'admissible in evidence' if of a type reasonably relied upon by experts in the field. . . . [T]he basis facts may be testified to by the expert, and accordingly they are in evidence. The effect of [this rule] has been to create a hearsay exception, or perhaps dispense with the requirement of first-hand knowledge, as the case may be.")).

Here, Parson compared the ten point card to the latent fingerprints, and thus, the ten point card was perceived by Parson first-hand. ***See*** Pa.R.E. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by . . . the expert at or before the hearing."). There can be no dispute that fingerprint experts, such as Parson, reasonably rely on ten point cards to establish the identity of the person whose fingerprints were left at the scene of a crime. Accordingly, under Pa.R.E. 703 and 705, Parson was permitted to testify that Appellant's name and fingerprints were on the card, even though this testimony may have been hearsay. ***See Boucher***, 831 A.2d at 628 ("Such material may be disclosed at trial even though it might otherwise be hearsay. . . . [H]earsay is admissible because the expert's reliance on the material provides its own indication of the material's trustworthiness[.]"); ***Maravich***, 504 A.2d at 900-01.

The Majority, nonetheless, expresses its concern that the fingerprints on the ten print card "were taken at some point prior to the instant crime," and the record does not establish "when they were taken and who in fact took

[them]." Slip. Op. at 4. These reservations, however, do not affect the admissibility of Parson's expert testimony; rather, they relate solely to the weight of his opinion. ***See Primavera***, 608 A.2d at 523 ("While the fact that the testifying expert may have based his opinion, in part, on the diagnoses and opinions of other experts may impact on the weight the jury assigns to his ultimate opinion, this fact alone does not require exclusion."). Indeed, "[a]n expert witness does not warrant the accuracy of facts on which he or she bases his or her opinion, but only assumes responsibility for the conclusion he or she draws from the assumed facts." 24 P.L.E., EVIDENCE § 415.

"Once expert testimony has been admitted, the rules of evidence then place the full burden of exploration of facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination." ***Ratliff v. Schiber Truck Co.***, 150 F.3d 949, 955 (8th Cir. 1998) (citation omitted). "It is thus the burden of opposing counsel to explore and expose any weaknesses in the underpinnings of the expert's opinion." ***Id.*** (citations omitted). Here, Appellant had ample opportunity to impeach Parson on cross-examination regarding the above discrepancies. In addition, Appellant could have offered evidence on his own behalf to disprove the facts upon which Parson relied for purposes of his expert opinion, *i.e.*, that the fingerprints on the ten print card belonged to Appellant. As such, I do not believe that the Majority's concerns render Parson's expert testimony

inadmissible because these concerns merely assess the weight of Parson's testimony.

For the above-stated reasons, I conclude that the juvenile court did not abuse its discretion in admitting Parson's expert testimony over Appellant's hearsay objections. Unlike the Majority, I would affirm the juvenile court's dispositional order. Hence, I dissent.