Filed 3/29/12 In re Donald W. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re DONALD W., a Person Coming Under the Juvenile Court Law.	B231080 (Los Angeles County Super. Ct. No. VJ38904)
THE PEOPLE, Plaintiff and Respondent, v. DONALD W., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Heidi W. Shirley, Juvenile Court Referee. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Joseph P. Lee and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Donald W. appeals from an order of wardship pursuant to Welfare and Institutions Code section 602 following the juvenile court's finding that he committed the offense of residential burglary, in violation of Penal Code section 459, a felony. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 19, 2010, Cheri Thomas left her residence on Market Street in Long Beach around 6:30 a.m. to go to work. When she arrived home around 5:00 p.m., she saw that her television and laptop computer were missing, her kitchen cabinets were open, and things were thrown on the floor.

She went to the leasing office to call the police, and the police told her not to touch anything before they arrived. When the police arrived, they checked for fingerprints. The forensic specialist asked Thomas if there was anything she had not touched since moving into the apartment in September 2009. Thomas pointed out a purple box containing perfume vials, so the specialist took fingerprints from the box. The box had been in the closet, but it was now in the middle of the bedroom floor, and Thomas had not placed it there. The perfume had been given to her by her husband's grandmother in December 2009, but she had not touched it since then, and her husband never touched it.

On August 6, 2010, a petition was filed under Welfare and Institutions Code section 602, charging appellant with one count of residential burglary, in violation of Penal Code section 459.

At the adjudication hearing, defense counsel objected to fingerprint evidence, which the prosecution described as the "major crux" of the case. Defense counsel objected to a fingerprint roll of appellant being done in court because the technique was different from the live scan previously performed on

appellant. The court overruled the objection, and the fingerprint roll was taken. Defense counsel asked for an Evidence Code section 402 hearing on the fingerprint evidence. He objected to the testimony of the fingerprint analyst, Nancy Preston, questioning the accuracy and relevance of her testimony, but the court overruled his objections.

Preston testified[1] that she was the forensic specialist who responded to the burglary at Thomas' home. She testified that the perfume box was on a chest in the closet in the bedroom, not on the floor. She lifted a fingerprint from the perfume box and took Thomas' fingerprints to eliminate the fingerprint as hers, but she did not take Thomas' husband's. The fingerprint was about one inch by one-half inch in size. The following day, Preston searched the criminal database of the Automated Fingerprint Identification System and received 50 possible matches.

Preston then began comparing each possible match to the latent fingerprint she obtained from the crime scene. The People introduced Exhibit 1, which was a printout of the first possible match from the database search, showing both the latent fingerprint and the possible match. Preston testified that, once she decides that a match is sufficiently close to warrant further review, she obtains a fingerprint card, which is a copy of the actual card the suspect's fingerprints were rolled on, and she compares that to the latent fingerprint. Exhibit 2 was the copy of the fingerprint card Preston compared with the latent fingerprint.

The first possible match from Preston's database search belonged to appellant. When Preston compared the latent fingerprint with appellant's fingerprint card, she found that the latent fingerprint recovered from the crime scene matched appellant's left ring finger.

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[1] Preston's testimony was given in what was described as an Evidence Code section 402 hearing, but it was also considered part of the adjudication hearing.

After Preston determined that the fingerprint belonged to appellant, she submitted it for verification, which was standard practice. She testified that, if a fingerprint was not verified, the information would not be submitted to the detective. She was not aware of any misidentifications in her 15 years conducting fingerprint analyses in her lab.

Preston testified that, because the identification of appellant had already been established, she took appellant's fingerprints in court only to verify "that he is the person in court today." Defense counsel objected on the basis that the person who verified the identification was not there to testify, in violation of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527 (*Melendez-Diaz*). The court overruled the objection, reasoning that Preston had testified that, once an identification was verified, the documents are submitted to the detectives. Defense counsel further contended that Preston's testimony that the identification had been verified was inadmissible hearsay, again citing *Melendez-Diaz*, but the court overruled the objection. People's Exhibit 3 was the fingerprint card that Preston took of appellant in court that day.

Under cross-examination, Preston testified that there were no fingerprints in the entire residence other than the one she found on the perfume box. After comparing appellant's fingerprint with the latent fingerprint, she did not check any of the other 50 results she received from the fingerprint database.

The People moved into evidence the three exhibits of fingerprint evidence. Defense counsel did not object to Exhibit 1, the comparison of the latent fingerprint with the possible match, but he objected to the other two – Exhibit 2, the fingerprint card with appellant's name on it, and Exhibit 3, the fingerprint examination card performed in court that day. He again raised the argument that

there was no foundation laid to establish that the latent print belonged to appellant, but the court overruled the objections and admitted all three exhibits into evidence.

The juvenile court found the allegations of the petition true, sustained the petition, and declared the offense a felony. The court declared appellant a ward of the court under Welfare and Institutions Code section 602 and removed him from the care and custody of his parents. The court committed appellant to a mid-term camp community placement program. Appellant was already on probation for a sustained petition for violation of Penal Code section 422. The court set the maximum confinement time at six years, eight months; six years for the residential burglary in the instant case, plus eight months (one-third the middle term) for a violation of Penal Code section 422. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant contends that the admission of the fingerprint analysis identifying the fingerprint found on the box as appellant's without calling the witness who made the identification violated his Sixth Amendment right to confrontation as discussed by the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and *Melendez-Diaz*. This case is distinguishable from *Crawford* and *Melendez-Diaz*.

In *Crawford*, the Supreme Court held that the admission of out-of-court testimonial statements by a witness violated the Sixth Amendment unless the witness was unavailable to testify and the defendant had had a prior opportunity for cross-examination. (*Crawford*, *supra*, 541 U.S. at pp. 53-59.) The Court stated that there were various types of such testimonial statements, including "'material such as affidavits, custodial examinations [and] prior testimony that the defendant was unable to cross-examine.'" (*Id.* at p. 51.) However, the Court "le[ft] for

another day any effort to spell out a comprehensive definition of 'testimonial.'" (*Id.* at p. 68.)

The Court again addressed the constitutionality of admitting out-of-court testimonial statements in *Melendez-Diaz.* In *Melendez-Diaz,* the state court admitted into evidence "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented [was] whether those affidavits are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2530.)

The Court held that the affidavits were testimonial statements for purposes of the Confrontation Clause, describing them as "incontrovertibly a '"solemn declaration or affirmation made for the purpose of establishing or proving some fact."' [Citation.]" (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) "[M]oreover, not only were the affidavits '"made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,"' [citation], but under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance, [citation]." (*Ibid.*) The court therefore held that the analysts who wrote the affidavits "were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to '"be confronted with"' the analysts at trial. [Citation.]" (*Ibid.*)

Appellant relies on *Crawford* and *Melendez-Diaz* to argue that the admission of the fingerprint evidence that identified him as the perpetrator violated his Sixth Amendment right to confront the witnesses against him. With respect to Preston's testimony concerning her identification of appellant's fingerprint, appellant's Sixth

Amendment right as articulated by *Crawford* and *Melendez-Diaz* was not violated because Preston was the analyst who determined that the latent print at the crime scene matched appellant's fingerprint. This situation accordingly is distinguishable from *Crawford* and *Melendez-Diaz*, both of which involved the admission of testimonial statements by affiants who were not available to testify at trial.

To the extent Preston testified concerning the validation of her identification of appellant's fingerprint by someone who did not testify, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Given Preston's detailed testimony as to her procedure, the brief testimony concerning the validation of the identification could not have affected the court's finding sustaining the petition.

DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J. SUZUKAWA, J.