Filed 11/25/14 In re David F. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re DAVID F., a Person Coming Under the Juvenile Court Law.	B251543 (Los Angeles County Super. Ct. No. JJ20146)
THE PEOPLE, Plaintiff and Respondent, v. DAVID F., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Kevin Brown, Judge. Reversed and remanded.

Law Offices of Leslie G. McMurray and Leslie G. McMurray, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

The juvenile court found that appellant David F. is a person described in Welfare and Institutions Code section 602[1] as a result of committing felony vandalism, in violation of Penal Code section 594. David was initially placed home on probation, but as a result of a new case and a petition under section 777, David was ordered suitably placed.

David raises three issues in this timely appeal: (1) admission of David's confession to Officer Roberto Hernandez following the unlawful seizure of two notebooks from David by Roberto Correa, the dean of students at Huntington Park High School, violated the Fourth Amendment because there was insufficient evidence to dissipate the taint of the illegal searches; (2) the court erred by aggregating damages from separate acts of vandalism to support the finding of felony vandalism; and (3) the evidence is insufficient to support the charge of felony vandalism.

We conclude the juvenile court erred when it denied the motion to suppress David's statements to Officer Hernandez as the product of the unlawful seizure of David's notebooks. Admission of David's statements to Officer Hernandez at the adjudication of the vandalism petition was prejudicial error requiring reversal. David's second and third contentions are without merit. Because David is a ward of the court based on other orders, and the possibility of retrial exists, we remand the matter to the juvenile court for further proceedings.

BACKGROUND

David moved to suppress evidence pursuant to section 700.1, on the ground a warrantless seizure of two of David's notebooks by Roberto Correa, dean of students at Huntington Park high School, violated the Fourth Amendment. David also sought to

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[1] Statutory references are to the Welfare and Institutions Code, except where otherwise stated.

suppress the statements he made to Correa after the notebooks were seized. Finally, David argued that his statements to Officer Hernandez, who had been summoned by Correa, were "fruit of the poisonous tree" under *Wong Sun v. United States* (1963) 371 U.S. 471, 487-488 (*Wong Sun*).

For purposes of this appeal, the Attorney General "does not dispute the court's ruling excluding the notebooks and [David's] statement to Correa" under the Fourth Amendment. Given the posture of the case on appeal, the Fourth Amendment issue comes down to whether David's confession to Officer Hernandez was "fruit of the poisonous tree," as that phrase is defined in *Wong Sun*, *supra*, 371 U.S. 471. We therefore do not discuss in great detail the facts leading to the seizure of the notebooks, but instead focus on the issue of whether the exclusionary rule of the Fourth Amendment extends to David's statements to Officer Hernandez.

The juvenile court conducted the motion to suppress evidence over a number of sessions. The evidence revealed that Huntington Park High School had been the subject of multiple acts of vandalism in the form of graffiti, David became a suspect, and in the course of his investigation, Correa searched David's backpack and seized two of David's notebooks containing writings similar to the graffiti at the school. Correa questioned David regarding the graffiti on February 20, 2013, and after David admitted responsibility, Correa notified school police and Officer Hernandez responded. On that same day, Officer Hernandez met with Correa, who provided information regarding the graffiti, although the officer did not personally observe the damage to school property. Correa told Officer Hernandez that David admitted vandalizing the school with the same writings contained in his notebook. Correa provided the notebooks seized from David to Officer Hernandez. Officer Hernandez did not know the details of the search by Correa.

Officer Hernandez questioned David in Correa's office after advising David of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Correa was present during the interview and the notebook was on the desk in front of him when he spoke to David. David agreed to talk about the vandalism at the school and readily admitted his responsibility.

In all but one respect, the juvenile court granted the motion to suppress under section 700.1. The court described Correa an "honest" witness, but his testimony was so contradictory and confusing that the court concluded Correa simply does not know why he searched David's backpack and did not articulate sufficient reasons for the seizures of the two notebooks. The court suppressed David's notebooks and his statements to Correa, but denied the David's request to also suppress his statements to Officer Hernandez. As to Officer Hernandez's testimony, the court found the taint of the illegal seizure of the notebooks was attenuated because Officer Hernandez did not conduct the search and he had no knowledge of how it was conducted. The giving of the *Miranda* rights helped to dissipate the taint of the Fourth Amendment violation. Finally, the court indicated the notebook was not the subject of the interrogation.

SUMMARY OF FACTS FROM THE ADJUDICATION HEARING

Correa testified at the adjudication that he is the dean of students at Huntington Park High School. For several months prior to February 20, 2013, he saw graffiti at the school in 15-20 locations including "CSK," and "SHOX" or "SHOKZ," and the number "13." Correa documented the graffiti with photographs. He gave the photographs to Officer Hernandez on February 20, 2013, the day the officer investigated the vandalism to the school.

Officer Hernandez interviewed David in Correa's office. After David was read his *Miranda* rights, he admitting writing "CSK" (Crazy Stoners Crew) and "SHOKZ" (his moniker) throughout the school. David admitted being in CSK and the Florencia 13 gang. Using the photos provided by Correa, David initialed the photos depicting his graffiti. Correa was present for the entirety of Officer Hernandez's interview of David.

Gonzalo Barajas, the plant manager at Huntington Park High School for eight years, testified that he is familiar with the cost of repairs based on his experience. He estimated the cost to repair the vandalism at $3,000, including labor and materials. Repairs are made by an agency Barajas calls, and the school district pays the agency. He

knows what the paint costs and what the painters charge per hour. He estimated that the damage depicted in the photographs shown to him would cost $1,800 to repair. Walls and trash cans defaced with graffiti are repainted. Tiles and mirrors can be cleaned, depending on the graffiti, and graffiti on the ground can be power washed. He has not seen the bill to repair the damage, but it could be more than $3,000.

DISCUSSION

I

David argues the juvenile court erred when it failed to extend the protections of the Fourth Amendment to David's statements to Officer Hernandez. He reasons that his confession to Officer Hernandez was the fruit of the unlawful seizure of the notebooks and his statements to Correa. We agree.

Standard of Review

"'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' (*People v. Glaser* (1995) 11 Cal.4th 354, 362; see also *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1173.)" (*In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1130.)

Application of the Fourth Amendment to Searches by School Officials

The Fourth Amendment applies to searches by school authorities. (*New Jersey v. T.L.O.* (1985) 469 U.S. 325, 337.) Searches by school officials must be reasonable under

the circumstances, but are not subject to the warrant requirement of the Fourth Amendment and need not be based on the traditional standard of probable cause. (*Id.* at pp. 341-342.) As noted earlier, the Attorney General does not question the trial court's conclusion that the prosecution failed to establish the reasonableness of Correa's searches of David.

Fruit of the Poisonous Tree

The Fourth Amendment prohibits both unreasonable physical seizures and obtaining verbal evidence that derives from an unlawful intrusion. (*Wong Sun*, *supra*, 371 U.S. at pp. 485-486.) "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." (*Id.* at pp. 487-88.) The Supreme Court in *Wong Sun* held as to one defendant who had been illegally arrested before confessing "that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint'" because that defendant "had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement . . . ." (*Id.* at p. 491.)

In *Brown v. Illinois* (1975) 422 U.S. 590 (*Brown*), the court rejected the contention that *Miranda* warnings, alone, are sufficient to attenuate the taint of a violation of the Fourth Amendment. "The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without Miranda warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth.

Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation. [Fn. omitted.]" (*Id.* at p. 601.) "The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, [fn. omitted] the presence of intervening circumstances [(see *Johnson v. Louisiana* (1972) 406 U.S. 356, 365)], and, particularly, the purpose and flagrancy of the official misconduct [fn. omitted] are all relevant. [(See *Wong Sun, supra,* 371 U.S. at p. 491.)] The voluntariness of the statement is a threshold requirement. [(Cf. 18 U.S.C. § 3501.)] And the burden of showing admissibility rests, of course, on the prosecution. [Fn. omitted.]" (*Id.* at pp. 603-604; see also *Taylor v. Alabama* (1982) 457 U.S. 687, 691-693 (*Taylor*) [confession made six hours after illegal arrest, and following three advisements under *Miranda* and two meetings with visitors, not attenuated from the Fourth Amendment violation under *Wong Sun*].)

Our Supreme Court has observed, "The degree of attenuation that suffices to dissipate the taint 'requires at least an intervening independent act by the defendant or a third party' to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality. (*People v. Sesslin* (1968) 68 Cal.2d 418, 428; see *People v. Rich* (1988) 45 Cal.3d 1036, 1081.)" (*People v. Sims* (1993) 5 Cal.4th 405, 445.)

Analysis

We conclude that the prosecution has not established that David's confession to Officer Hernandez was sufficiently attenuated from the illegal seizure of the notebooks

and the questioning by Correa. There was no intervening act by David or a third party in this case to break the causal chain of exploitation of the illegality of the searches.

The Attorney General recognizes in this case that "the events occurred on the same day" and "a relatively short period of time passed between the relevant events." Although temporal proximity, the first factor under *Brown*, *supra*, 422 U.S. at p. 603, is not dispositive, in this case it is compelling. The events flowed smoothly and quickly between the unlawful search and the confession to Officer Hernandez. In *Taylor*, *supra*, 457 U.S. at pp. 691-693, a six-hour delay between an illegal arrest and the confession, three separate *Miranda* warnings, and two jailhouse visits was insufficient to dissipate the taint of the illegal arrest. The case before us presents a much weaker scenario than that found insufficient in *Taylor* to attenuate the taint of a Fourth Amendment violation.

The second factor under *Brown* is the presence of intervening factors, which simply do not exist in this case. David did nothing to separate the illegality of the search from his confession to Officer Hernandez, and there were no other identifiable intervening factors in the case. After the unlawful seizure of the notebooks and David's statements to Correa, David remained in Correa's office pending the arrival of Officer Hernandez. When the officer arrived, he was briefed by Correa as to Correa's seizure of the notebooks and David's statements to Correa, actions which the Attorney General accepts as violating the Fourth Amendment in this case. *While still in Correa's office, and with Correa present and the notebook on the desk*, David made his confession after receiving his *Miranda* rights from Officer Hernandez. We see nothing in this scenario which arguably caused a break in the chain of causation.

The third factor identified in *Brown* is the purpose and flagrancy of the law enforcement conduct. Given the record of Correa's testimony, we cannot discern exactly what happened in the seizures of the notebooks, for as the trial court noted, by the time of the adjudication Correa simply did not know the basis for his own searches. It is true, as the Attorney General argues, that Officer Hernandez was unaware of the illegality of the seizure of the notebooks. But standing alone, Officer Hernandez's lack of knowledge of the Fourth Amendment violation cannot break the straight line between the unlawful

search and David's confession to Officer Hernandez. The situation might have been different if Officer Hernandez had the opportunity to conduct some independent investigation into the vandalism, but the record is clear his interrogation of David was based only on the information he gained from Correa. The prosecution did not sustain its burden of showing that the confession to Officer Hernandez was not fruit of the earlier violations of the Fourth Amendment.

Introduction of David's confession to Officer Hernandez at the adjudication was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) David's involvement in the vandalism was established at the adjudication through his confession to Officer Hernandez. The order sustaining the section 602 petition must be reversed.

II

David raises two challenges to the sufficiency of the evidence. He first argues it was error to aggregate the various acts of vandalism in order to reach the $400 level of damage required to elevate a violation of Penal Code section 594 from a misdemeanor to a felony. Second, he contends that Barajas, the plant manager at Huntington Park High School, should not have been allowed to testify to his estimate of the amount of damages, and without his testimony, there is no substantial evidence that the amount of damage exceeded $400.

Although we are reversing the jurisdictional finding, it is necessary to address these issues because of the possibility of retrial on the section 602 petition. If the contentions had merit, which they do not, retrial of the petition as a felony would be prohibited by double jeopardy. We hold David is properly subject to retrial on the allegation of felony vandalism.

Standard of Review

"The same standard governs review of the sufficiency of evidence in adult criminal cases and juvenile cases: we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089.)" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.)

Aggregating Damages

"As with theft offenses, multiple instances of misdemeanor vandalism can be aggregated to form a single felony, unless 'the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan.' ([*People v.*] *Bailey* [(1961)] 55 Cal.2d [514,] 519 [(*Bailey*)].)" (*In re Arthur V.* (2008) 166 Cal.App.4th 61, 69; compare *In re David D.* (1997) 52 Cal.App.4th 304, 309 [refusing to apply the *Bailey* to vandalism of property belonging to different owners].) "[O]ur task is not to decide de novo whether aggregation is appropriate. As *Bailey* emphasizes, the question of '[w]hether a series of wrongful acts constitutes a single offense or multiple offenses' requires a fact-specific inquiry that depends on an evaluation of the defendant's intent. (*Bailey, supra,* 55 Cal.2d at p. 519.) Such an inquiry is appropriately left to the factfinder in the first instance." (*In re Arthur V., supra,* 166 Cal.App.4th at p. 69.)

A reasonable trier of fact could conclude that David's 20 acts of vandalism over a two month or less period, all directed at promoting either the tagging crew or gang he associated with, were committed pursuant to one intention, one general impulse, and one plan. *In re David D., supra,* 52 Cal.App.4th 304, upon which David relies, is distinguishable, because the case involved 34 separate acts of vandalism of property

belonging to different owners. Here Huntington Park High School was the location of all the charged acts of vandalism, and aggregation was permissible under *In re Arthur V., supra*, 166 Cal.App.4th 61.

Proof of the Amount of Damage Caused by David

David's final argument is that Barajas, the plant manager at Huntington Park High School, was not qualified to testify to the amount of damage caused by David. We disagree.

"'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert,' and 'may be shown by any otherwise admissible evidence, including his own testimony.' (Evid. Code, § 720, subds. (a), (b).)" (*People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1079.) "'The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse.' [Citations.]" (*Ibid.*)

The record does not support David's claim that the trial court abused its discretion in allowing Barajas to testify to the cost to repair David's vandalism. Barajas had been plant manager at the school for eight years. He was familiar with the procedure for obtaining repairs, and had knowledge of the cost of paint, the amount charged per hour by the painters, and how repairs would be made of walls, doors, tile, and mirrors. The trial court could reasonably conclude that knowledge and experience was sufficient to warrant admission of his estimate that repairs would cost $3,000, or perhaps even more. No abuse of discretion is shown.

DISPOSITION

The juvenile court's finding that David F. is a person described in Welfare and Institutions Code section 602 based upon his commission of vandalism in violation of Penal Code section 594 is reversed. Because David F. has other matters before the juvenile court, and retrial is possible, the cause is remanded for further proceedings.

KRIEGLER, J.

We concur:

TURNER, P. J.

GOODMAN, J. *

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.