2019 IL App (4th) 180328-U

NO. 4-18-0328

FILED
January 31, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| Plaintiff-Appellant, | ) | Circuit Court of |
| v. | ) | Vermilion County |
| RONALD PETTIS, | ) | No. 18CF14 |
| Defendant-Appellee. | ) | |
| | ) | Honorable |
| | ) | Nancy S. Fahey, |
| | ) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Cavanagh concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court dismissed the appeal, concluding it was without jurisdiction where the State had other avenues to pursue to present its evidence.

¶ 2 In May 2018, the trial court commenced the jury trial of defendant, Ronald Pettis, on the charge of residential burglary (720 ILCS 5/19-3 (West 2016)). The State sought to prove its case by introducing evidence of defendant's fingerprints, taken after he was arrested, and expert testimony indicating a fingerprint of defendant matched a latent fingerprint taken from a window of the burgled home. The court denied the State's motion to admit evidence of defendant's fingerprints on the ground the evidence lacked a sufficient foundation. The State filed a certificate of impairment and a notice of appeal. Because the State had other avenues to pursue to present its evidence, we dismiss the appeal for lack of jurisdiction.

¶ 3 I. BACKGROUND

¶ 4 On May 2, 2018, the trial court commenced the jury trial of defendant. Police Officer Cliff Hegg testified, on November 7, 2016, he responded to a reported residential burglary. While at the residence, Officer Hegg lifted latent fingerprints from a window and placed them on index cards. The latent fingerprint cards were admitted into evidence over no objection.

¶ 5 Stephanie Bodine, a qualified expert in latent fingerprint analysis, testified, in May 2017, she examined the latent fingerprints lifted in this case. After discovering a suitable latent fingerprint for comparison and processing that print for optimal analysis, Bodine compared the latent fingerprint to a known fingerprint of the homeowner and concluded the fingerprints did not match. She then used the Automated Fingerprint Identification System (AFIS) to compare a trace of the latent fingerprint with all known fingerprint standards of individuals living in Illinois. AFIS identified the top 10 possible fingerprint impression matches. Bodine reviewed the 10 fingerprint impressions to determine if an impression was close enough to the latent fingerprint to warrant a comparison with the known fingerprint card on which the impression was based. She concluded one of the fingerprint impressions warranted a review of the known fingerprint card. She retrieved the known fingerprint card for that impression from the Illinois State Police, Bureau of Identification. She testified the fingerprint card bore "the name Ronald R. Pettis." Bodine conducted a fingerprint comparison, which resulted in a match with the latent fingerprint and a fingerprint on the known fingerprint card.

¶ 6 During Bodine's testimony, the State sought to admit into evidence the known fingerprint card from the Bureau of Identification, to which the defense objected for lack of

foundation. Specifically, the defense asserted the State failed to lay a proper chain of custody for the known fingerprint card. The State acknowledged, "for chain of custody purposes ***, [Bodine] was not part of that analysis." The State asserted it would admit a different known fingerprint card through its next expert witness. The trial court sustained the defense's objection.

¶ 7 Tracy Moore, a qualified expert in latent fingerprint analysis, testified she examined the latent fingerprints in this case after Bodine. She testified the latent fingerprint identified by Bodine matched a known fingerprint recently submitted to the crime lab. Moore identified exhibit S, which was an envelope containing a known fingerprint card bearing the name of Ronald R. Pettis, and indicated she received exhibit S in a sealed condition. She identified exhibit T as the known fingerprint card bearing the name of Ronald R. Pettis. Moore compared the fingerprints on exhibit T with the latent fingerprint identified by Bodine. She testified exhibit T was in the same or substantially similar condition to when she conducted her comparison.

¶ 8 After Moore was asked as to the result of her comparison of the fingerprints on exhibit T with the latent fingerprint identified by Bodine, the defense objected for lack of foundation. The trial court sustained the objection. The State requested Moore's opinion be conditionally admitted as it intended "to complete authentication of the fingerprint with a later witness." The court held a sidebar, where the defense expressed concerns regarding the chain of custody of exhibit T. The State assured it would "tie up" the foundational issues and asserted it simply sought to introduce Moore's opinion a fingerprint on exhibit T matched the latent fingerprint and it would have Correctional Officer Joseph Berenz testify the next day the fingerprints on exhibit T were in fact defendant's fingerprints. The court indicated it believed the

State still had an issue with foundation, to which the State asserted, "The chain of custody foundation is going to be shored up when we have Officer Berenz testify that he was the one that printed the defendant, and Bruce Stark is going to testify that they sent this envelope to the lab." The State further asserted, "It is a chain of custody issue, but we plan on completing the chain of custody tomorrow." The court sustained the foundation objection, noting "there's been no chain of custody on that card." The State sought leave to recall Moore the next day, which the court granted.

¶ 9 On May 3, 2018, the jury trial continued. Joseph Berenz testified he was a correctional officer with the Vermilion County Sheriff's Department, which is located in the Public Safety Building. His responsibilities included occasionally taking fingerprints of inmates. He described the computer system used for taking fingerprints and his experience with that system. He indicated the system printed "like four copies of [fingerprint cards] that we keep." Officer Berenz testified, after the cards are printed, "we take [them] and go to our office and we have a little—a file that we just set [them] in, and at the end of the day the sergeant comes in and turns it all into records." Officer Berenz indicated the records department was also located in the Public Safety Building.

¶ 10 Officer Berenz testified he took defendant's fingerprints on January 10, 2018. He described the process he used to obtain defendant's fingerprints:

> "Well, when he came in here, came into the jail, I asked him the questions, name, address, and height, weight, and then I went to the machine and put that, entered it all into the machine and call him back there and I did his fingerprints individually, ***

and we got the hard copies that we kept and turned into records later on in the day."

When specially asked what he did with the fingerprint cards, Officer Berenz testified, "I took them back into my office and we have a file tray that we just set them all on and at the end of the day they all go up to records." Officer Berenz identified exhibit T as a fingerprint card he received from the computer for defendant. He testified exhibit T was in the same or substantially the same condition as it was on January 10, 2018.

¶ 11 On cross-examination, Officer Berenz acknowledged exhibit T had the last two numbers of a social security number scratched out and two handwritten numbers inserted, the arresting officer badge number scratched out and a new handwritten number inserted, and part of a miscellaneous number section scratched out. Officer Berenz testified he did not make these changes.

¶ 12 On redirect examination, Officer Berenz testified the computer-generated fingerprints were not changed on exhibit T.

¶ 13 Bruce Stark testified he was an evidence custodian for the Danville Police Department. Stark testified only one other employee, evidence technician Heidi Godley, worked under his supervision. He described Godley's general responsibilities as follows: "She'll go down to the evidence area, she removes evidence from the lockers, she brings it up, and then she places it into the locked vault within the police department."

¶ 14 Stark identified exhibit T as a fingerprint card he retrieved from the records department. Stark testified he placed exhibit T inside of an envelope when he retrieved it from the records department and then sealed the envelope. Stark identified exhibit S as the sealed

envelope. Stark testified exhibit T appeared to be the same document he recovered and placed in exhibit S. After he secured exhibit T inside exhibit S, Stark placed the exhibits inside an evidence locker. On March 15, 2018, Stark obtained the exhibits from the evidence vault and transported them to the state police crime lab. Stark testified exhibit S was in a sealed condition when he took it to the crime lab. On March 26, 2018, Stark retrieved the exhibits from the crime lab and returned them to the evidence vault. Stark testified both exhibits were in the same or substantially the same condition as when he last observed them.

¶ 15 On cross-examination, Stark testified he "processed" exhibit T on March 14, 2018. That is, he obtained exhibit T from the records department and placed it inside exhibit S and then placed exhibit S inside an evidence locker. Stark further testified Godley retrieved the exhibits from inside the evidence locker and then brought them to the evidence vault, where they both completed paperwork for the exhibits.

¶ 16 On redirect examination, Stark testified exhibit S was in the same sealed condition when he transported it to the crime lab on March 15, 2018.

¶ 17 Moore, recalled as a witness, testified she conducted a comparison using the latent fingerprint identified by Bodine to a known fingerprint standard submitted by Stark. Moore identified exhibit S as the envelope in which exhibit T was submitted. She indicated exhibit S was in a sealed condition when she received it. She identified exhibit T as the fingerprint card submitted inside of exhibit S, which bore the name Ronald R. Pettis. Moore testified she compared a fingerprint on the known fingerprint card to the latent fingerprint. After being asked as to the result of that comparison, the defense objected for lack of foundation, and the trial court held a sidebar.

¶ 18 During the sidebar, the defense initially asserted the chain of custody was insufficient because the State had not presented either testimony from Godley or testimony concerning what happened to the exhibits after they arrived at the crime lab. The State asserted the "[c]hain [was] sufficient," noting "we have presented everybody that has actually had contact with the items inside of the envelope." The defense argued it presented "proof of tampering" as exhibit T had unexplained writing on it. The trial court expressed agreement with the defense's comments, noting "[t]here's been no testimony about the altering of that card." The State suggested it would explain the writing through the testimony of Detective Jon Stonewall and, regardless, any writing went to weight rather than admissibility. The State further asserted the exhibits were "uniquely identifiable" and therefore it was not required to establish a chain of custody. The defense maintained chain of custody was "an issue" because of the alterations to exhibit T. The court concluded: "I have an issue with the print card because of the changes on the print card, but I agree that I don't think that has to do with the chain of custody and how it got to the state police crime lab, so I'm going to overrule your objection for foundation in this instance."

¶ 19 Moore testified her comparison of a fingerprint on exhibit T and the latent fingerprint resulted in a match, indicating the same person made both prints.

¶ 20 Detective Jon Stonewall testified he placed defendant under arrest on the morning of January 9, 2018. He took defendant to "book-in" around 11 a.m., completed a "book-in sheet," and requested a known fingerprint sample for defendant. Detective Stonewall testified he recognized exhibit T. He acknowledged the number 354 was crossed off under arresting officer and his badge number, number 384, had been handwritten in its place. Detective Stonewall

testified 354 was not a badge number on the current Danville Police Department roster.

¶ 21 Following this testimony, the State moved to admit exhibits S and T. The defense objected for lack of a sufficient chain of custody. A lengthy discussion then transpired between the State, the defense, and the trial court.

¶ 22 In support of its objection for lack of a sufficient chain of custody, the defense argued, in part, the State failed to produce any evidence as to (1) who altered the information on exhibit T or (2) the significant gap in time after exhibit T was placed in a file by Officer Berenz until Stark placed exhibit T into exhibit S. The defense also argued exhibit T was not a readily identifiable item, particularly given the alterations made to the card.

¶ 23 The State asserted exhibit T was a "unique item" and therefore a foundation could be established either through identification or a chain of custody. The State argued Officer Berenz's identification was sufficient for admission. The State also argued it offered a sufficient chain of custody. The State asserted exhibit T had not been "altered in any important aspect" and any gap in the chain of custody was insignificant. The State contended the defense's concerns went to weight rather than admissibility.

¶ 24 The trial court expressed concern with the "alterations" to exhibit T as well as the gap between January 10 and March 14, 2018. With respect to the alterations, the court stated:

> "[T]he only testimony I heard from [Detective] Stonewall was that he changed the badge number. But the social security number was changed. I think there was a couple other alterations and I have no evidence in front of me about who changed those. It had to have been changed by somebody."

The court found the changes to the social security number to be "significant" and the absence of any testimony about who changed the social security number could "possibly break the chain of custody if it went to another person that then altered the document." With respect to the gap between January 10 and March 14, 2018, the court stated:

> "What happened to them once they were taken to records? *** [H]ow they were kept in records, where they were kept? Who kept them? Were they under seal? Were they under lock and key?"

The court concluded, "I am going to deny the motion to admit Exhibits S and T."

¶ 25 After the oral pronouncement of the trial court's decision, the State requested a five-minute recess, which the court granted. Upon returning from the recess, the State informed the court it planned to file a certificate of substantial impairment to appeal the court's ruling refusing to admit exhibit T. The State asserted the court's ruling effectively suppressed its evidence and without that evidence it was impaired from proceeding with its case. In response, the defense asserted:

> "[W]hile the end result is that it ends up in their evidence not coming in, it's not in the manner of suppressing evidence. It's simply that they haven't laid the proper evidentiary foundation for the evidence. So in that way, it's not an appealable issue by the State."

The court questioned the State's argument as to whether its ruling effectively suppressed evidence. The court noted testimony about the exhibits was allowed into evidence and its ruling simply denied the introduction of the actual exhibits. The State contended it would be able to

proceed if the court allowed it to rely on the testimony from its experts in closing argument, to which the court indicated it would. The defense then made an oral motion to strike the testimony from the State's experts as the basis of their opinions had not been entered into evidence. The State indicated it tended to agree with the defense's motion and that was the basis of why it desired to appeal. The court stated: "Well, if that's what you both think, then I'm going to end the trial. So file your certificate." The court did not rule on defendant's motion to strike the testimony.

¶ 26 Later that day, the State filed a certificate of impairment and declaration of intent to file an appeal from the "mid-trial oral motion to suppress/exclude fingerprint evidence." The trial court also entered a docket entry, which provides, in part, the following:

> "The ruling by the [c]ourt in this case was a ruling on the admission of State's exhibits S and T and was based on a foundation objection as to chain of custody. The objection was two-pronged. The first part was based on a gap in the chain of custody which this [c]ourt found to be significant in time and scope. The second prong was that the [d]efendant's social security [number] had been altered without explanation. In an earlier sidebar where the [d]efendant had objected to [Moore] stating her opinion on the fingerprint evidence based on foundation, I had told the [S]tate that the [c]ourt was concerned about the gap in the chain of custody and the alteration and I was assured by the State that [an] [o]fficer[]s later testimony would address those issues.

> Based on that representation by the State I allowed [Moore] to render her opinion. [The] [o]fficer's later testimony did not address either issue. There is a [two] month gap in the chain of custody immediately after the [d]efendant's fingerprints were taken, put in a file on the corner of Officer Berenz's desk and taken by someone to the [r]ecords [department] sometime in January[] 2018. During this time period exhibit [T] was altered by someone and there was absolutely no testimony as to who altered the document, who had access to the document, where it was being kept, or how it was being kept. The evidence custodian, [Stark], indicates he retrieved it from the [r]ecords [department] on March 14, 2018. Based on that, I denied the States request to admit State's exhibits S and T. This was an evidentiary ruling. This was not a [m]otion to [s]uppress pursuant to [section 114-12 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/114-12 (West 2016))]. I did not declare a mistrial and jeopardy had attached."

¶ 27 On May 4, 2018, the trial court entered another docket entry, which provides, in part, the following:

> "The [c]ourt would further note that the [c]ertification and [d]eclaration of [i]ntent to [f]ile [a]ppeal is brought pursuant to Illinois Supreme Court Rule 604(a)(1) [(eff. July 1, 2017)] which references [section 114-12]. None of the factors in 114-1[2] have

> been met and in order to use suppression of evidence as a basis for their [m]otion, the State must comply with [section] 114-12(c) which requires the [c]ourt to make a finding on the timeliness of the motion then conduct a hearing on the merits of the motion and enter an order suppressing said evidence, if appropriate. None of those steps were taken. The only [m]otion heard was a motion to admit exhibits S and T. There was an objection based on chain of custody and that [e]xhibit [T] had been altered without explanation. That [m]otion was [denied] and then the State indicated that they would be filing a [c]ertificate of [i]mpairment. The State had not rested, at this point, and could have requested less drastic relief and chose not to. A copy of this docket is to be given to all counsel of record."

¶ 28 That same day, the defense filed a written motion to strike the testimony of the State's experts, and the State filed an amended certificate of impairment and declaration of intent to file an appeal.

¶ 29 On May 8, 2018, the State filed a notice of appeal.

¶ 30 On May 10, 2018, the defense filed a motion to strike the State's notice of appeal, arguing the State was not entitled to appeal the trial court's ruling as the ruling did not have the effect of suppressing evidence but rather merely controlled the manner in which it presented its evidence.

¶ 31 That same day, the trial court held a hearing where both the defense and the State

were present. The court initially noted it did not have jurisdiction as the notice of appeal had been filed and therefore it would not be ruling on any motions. The court allowed, however, both the defense and the State to make a comment on the record. The State did not address the substance of the defense's motion to dismiss the appeal. After allowing the parties to make a comment on the record, the court stated, in part, as follows:

> "Okay. This [c]ourt is not ruling on anything since the notice of appeal has been filed. I agree with the [d]efendant's motion to dismiss the State's notice of appeal, and I pretty much addressed that in the docket entry that I put in the court file. It was actually the evening after—the evening of the notice of intent—the certification and notice of intent that I made a docket entry and then I made a docket entry the very next day as well. I believe that there's merit in the [d]efendant's motion. Frankly, I believe that this court was ambushed by the State. I believe the State misrepresented itself in a sidebar regarding the issues of chain of custody that concern the [c]ourt, telling the [c]ourt that those issues would be tied up or completed after they were—their case had been presented, and those issues were not addressed by the State in any way. But be that as it may, the notice of appeal has been filed, and I am not ruling on [any motions]."

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, the State argues the trial court erred by denying its motion to admit evidence of defendant's fingerprints as exhibits T and S were readily identifiable pieces of evidence or, in the alterative, defendant failed to show the exhibits had been sufficiently tampered with to shift the burden of proof to the State.

¶ 35 Prior to reaching the merits of the State's argument, we must address our jurisdiction. The parties dispute whether we have jurisdiction over this appeal. The State suggests this case is similar to *People v. Drum*, 194 Ill. 2d 485, 743 N.E.2d 44 (2000), which found jurisdiction existed, and distinguishable from *People v. Truitt*, 175 Ill. 2d 148, 676 N.E.2d 665 (1997) (abrogated on other grounds by *People v. Miller*, 202 Ill. 2d 328, 335, 781 N.E.2d 300, 305 (2002)), and *In re K.E.F.*, 235 Ill. 2d 530, 922 N.E.2d 322 (2009), which found jurisdiction was lacking. Defendant disagrees, suggesting this case is similar to *Truitt* and *K.E.F.* and distinguishable from *Drum*.

¶ 36 Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2017) permits the State to appeal from an order having "the substantive effect" of suppressing evidence. Our supreme court has emphasized it is the substantive effect of the trial order's order, not the label of the order or its underlying motion, that controls appealability under Rule 604(a)(1). *Drum*, 194 Ill. 2d at 489. For purposes of this rule, an order suppresses evidence when "the order prevents [the] information from being presented to the fact finder." *Id.* at 492. Where an order solely impacts the means by which the State can present the evidence, the evidence has not been suppressed within the meaning of the rule. *K.E.F.*, 235 Ill. 2d at 540-41.

¶ 37 In *Truitt*, 175 Ill. 2d at 149-50, the State intended to use laboratory reports to establish the contents, identity, and weight of a controlled substance under section 115-15 of the

Criminal Code (725 ILCS 5/115-15 (West 1994)) instead of using live testimony. On defendant's motion, the trial court entered a pretrial order declaring section 115-15 unconstitutional and prohibiting the State from using that section to avoid presenting testimony from the person who analyzed the substance in question. *Truitt*, 175 Ill. 2d at 150. Our supreme court concluded the trial court's order did not have the effect of suppressing evidence because it did not "prevent any facts or opinions from being presented to the jury." *Id.* at 152. The order's sole impact was on "the manner in which those facts and opinions [could be] presented," as the order simply required the State to present testimony from an actual witness. *Id.* The supreme court dismissed the State's appeal. *Id.* at 153.

¶ 38 In *Drum*, 194 Ill. 2d at 491, the State sought to admit the prior testimony of two codefendants who indicated they would not testify at the defendant's trial. The trial court barred the use of the codefendants' prior testimony. *Id.* Our supreme court held evidence is suppressed within the meaning of Rule 604(a)(1) when the trial court's order "prevents [the] information from being presented to the fact finder." *Id.* at 492. The supreme court concluded the State could appeal the trial court's order because it "substantively bars the prior testimony of [the codefendants]; for the moment, the order prevents this information from being presented to the fact finder." *Id.* at 492.

¶ 39 In *K.E.F.*, 235 Ill. 2d at 533, the State sought to introduce a recorded statement of the victim under section 115-10 of the Criminal Code (725 ILCS 5/115-10 (West 2006)). The State called the victim as a witness but did not question the victim about the events underlying its charges or the contents of her statement. *K.E.F.*, 235 Ill. 2d at 533. The respondent's counsel objected to the admission of the recorded statement because the victim was unavailable for cross-

examination since she did not testify about the alleged incident. *Id.* The trial court denied the State's motion to admit the recorded statement, and the State indicated it wanted to pursue an interlocutory appeal. *Id.* at 535. In deciding whether to allow the interlocutory appeal, the court questioned the State's motives for wanting to appeal and noted the victim was available to testify to the events underlying the charges. *Id.* The trial court allowed the State to file a notice of appeal, and the appellate court dismissed the appeal. *Id.* at 537. Our supreme court affirmed the dismissal of the appeal because the trial court's order did not suppress the evidence. *Id.* at 540-41. In reaching that conclusion, the court stated the following:

> "[The] admissibility of the evidence in question was a matter entirely within the State's control. As in *Truitt*, the prosecution had the option of presenting live testimony to secure admission of the information it sought to introduce, an option that it declined to pursue. It seems clear to us that, as in *Truitt*, the sole impact of the [trial] court's order is on the *means* by which the information is to be presented." (Emphasis in original.) *Id.* at 540.

¶ 40 In this case, the State had options within its control to try to present its evidence. For the first time on appeal, the State asserts:

> "Had there been an additional witness to call to cure defense counsel's and the court's concerns with respect to the chain of custody, the State would have done so; absent such a witness, there was nothing more the State could have done to alter the court's reasoning."

As defendant argues, the State's assertion amounts to pure speculation based on the record presented. *C.f., Drum*, 194 Ill. 2d at 491 (where the State informed the trial court the witnesses were unavailable).

¶ 41 In fact, the record shows a witness existed that could have potentially alleviated the trial court's concerns. Officer Berenz testified the known fingerprint cards were taken to the records department at the end of each shift by a sergeant on duty. The State could have asked for a continuance to call the sergeant on duty on January 10, 2018. With this additional witness, the State may have been able to elicit testimony to alleviate the trial court's concerns and allow exhibits T and S to be entered into evidence. The State also had the option of presenting the testimony of evidence technician Heidi Godley.

¶ 42 Not only is it unclear whether the State could have succeeded in admitting exhibits T and S into evidence with the presentation of additional testimony, the State had alternative means to present the information it sought to admit. *Drum*, 194 Ill. 2d at 492 (an order suppresses evidence when "the order prevents [the] information from being presented to the fact finder"). It was undisputed a known fingerprint card from the Bureau of Identification bearing the name Ronald R. Pettis existed. The State could have asked for a continuance to call the witness who prepared that card. With this additional witness, the State may have been able to present alternative evidence of defendant's fingerprints.

¶ 43 From the beginning of the trial, the State knew the defense would be objecting to the fingerprint card, and the trial court had concerns about foundation. The State repeatedly asserted it would shore up the foundation with the next witness or the next witness thereafter. Despite these assurances, the time gap noted by the judge and the alteration of the social security

number were not answered or even addressed by the State. The State contends exhibit T was not altered in "any important aspect". A social security number is distinct, personal, and confidential. The alteration of the number was important enough for the State to address or explain.

¶ 44 Regardless of the correctness of the trial court's evidentiary ruling, it is clear the State had other avenues to pursue to present its evidence. As the trial court concluded, the State "could have requested less drastic relief and chose not to." We hold the trial court's denial of the State's motion to admit exhibits S and T for lack of a sufficient foundation did not effectively prevent the State from presenting evidence of defendant's fingerprints to the jury. The State failed to meet the requirements to appeal under Rule 604(a)(1), and we dismiss the appeal for lack of jurisdiction.

¶ 45 III. CONCLUSION

¶ 46 We dismiss the State's appeal for lack of jurisdiction.

¶ 47 Appeal dismissed.