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Va. Supreme Court of Appeals
Richmond, Va.

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Record No. 6792

In the Supreme Court of Appeals of Virginia at Richmond

ALPHEUS E. AVENT

v.

COMMONWEALTH OF VIRGINIA

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6792

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

ALPHEUS E. AVENT, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Hustings Court of the City of Richmond
Samuel B. Witt, Jr., Judge

Upon the petition of Alpheus E. Avent a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond on the 2nd day of May, 1967, in a prosecution by the Commonwealth against the said petitioner for a felony (Indictment No. 3—Statutory Burglary); but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

Mr. Justice Snead took no part in the consideration of this case.

RECORD

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page 1-A }

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cs-140111

COMMONWEALTH OF VIRGINIA)
City of Richmond) To-Wit:

No. 6827

TO ANY POLICE OFFICER

WHEREAS, G. R. Martin has this day made complaint and information on oath, before me, the undersigned, a Justice of the Peace of said city, that Alpheus Avent did on the 4th day of October, 1966:

Unlawfully and feloniously break and enter in the night time a certain storehouse known as Friedman Marks Clothing Store, 1400 W. Marshall St., and did steal, take and carry away clothing to the value of $1000.00, property of said concern.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the Police Court of the City of Richmond, the body of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon

G. R. Martin, J. E. Fitzgerald, pc.

Stuart B. Childress—Address 1400 W. Marshall St. as witnesses.

Given under my hand and seal, this 18th day of Nov., 1966.

A. W. * * * (SEAL)
Justice of the Peace

* * * * *

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* * * * *

IN THE HUSTINGS COURT OF THE
CITY OF RICHMOND

* * * * *

The GRAND JURORS of the Commonwealth, for the body E. Avent on the 4th day of October in the year one thousand of the City of Richmond, on their oaths present that Alpheus nine hundred and sixty-six at the said City, and within the jurisdiction of the Hustings Court of the City of Richmond.

A certain storehouse of Friedman-Marks Clothing Company, Incorporated, there situate at number 1400 West Marshall Street, the said storehouse not there adjoining to or occupied with a dwelling house, unlawfully, feloniously and burglariously did break and enter, with intent then and there unlawfully, feloniously and burglariously to commit larceny therein; and clothing of the aggregate value of $1000.00, of the goods and chattels and property of the said Friedman-Marks Clothing Company, Incorporated, then and there in said storehouse being found, did then and there unlawfully, feloniously and burglariously steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia.

G. R. Martin)
J. E. Fitzgerald) Pd in #2
Stuart B. Childress
Robt. D. Hobson pc.
Donald C. Rigney pc.

(Witnesses sworn and sent
(by the Court to the Grand
(Jury to give evidence.

THOS. R. MILLER

* * * * *

AN INDICTMENT

for

A FELONY

A True Bill

P. G. Chewning, Foreman

* * * * *

page 5 }

* * * * *

And at another Hustings Court held for the City of Richmond, at the Courthouse, on the 2nd day of May, 1967, the following order was entered:

* * * * *

The said defendant was this day again led to the bar in the custody of the Sergeant of this City and was represented by Attorneys L. D. Wilder and D. Dorset and A. Conrad Bareford represented the Commonwealth. And having plead not guilty to Statutory Burglary as charged and the said defendant having moved the Court to strike the evidence of the Commonwealth as being insufficient for the finding of a judgment of guilty and this case having been continued to this day as entered herein on April 27, 1967, and the Court having this day heard arguments on said motion doth overrule same. And having heard all of the evidence, the said defendant renewed his motion to strike the evidence of the Commonwealth, which motion the Court doth also overrule and the said defendant notes an exception. And having heard the arguments of counsel the Court doth find the said defendant guilty of Statutory Burglary as charged and doth ascertain his term of confinement in the Penitentiary at five years.

And thereupon the said defendant moved the Court to set aside the judgment as being contrary to the law and to the evidence and to grant him a new trial, which motion the Court doth overrule and to which action of the Court in overruling his said motion, the said defendant notes an exception and time is allowed him not to exceed sixty days in which to file his bills of exception.

Whereupon it being demanded of the said defendant if anything for himself he had or knew to say why the Court should not now proceed to pronounce judgment against him according to law, and nothing further being offered or alleged in delay thereof, it is the judgment of this Court that the said Alpheus E. Avent be confined in the State Penitentiary for a term of five years, this being the period by the Court ascertained. And it is ordered that the Sergeant of this City do, when required so to do, deliver the said defendant from the jail of this City to the Superintendent of the Penitentiary, in said Penitentiary to be confined and treated in the manner prescribed by law; said term to be credited by the time spent in jail awaiting trial.

And thereupon the said Alpheus E. Avent is remanded to jail.

* * * * *

page 6 }

* * * * *

NOTICE OF APPEAL

To the Honorable Thomas R. Miller, Clerk of the Hustings Court of the City of Richmond:

Comes now Alpheus Avent, defendant in the above-styled case, by counsel, and gives notice of appeal from the judgment rendered against him on May 2, 1967.

ALPHEUS AVENT

By DAVID C. DORSET
Counsel

* * * * *

page 7 }

* * * * *

ASSIGNMENTS OF ERROR

To the Honorable Thomas R. Miller, Clerk of the Hustings Court of the City of Richmond:

Comes now Alpheus Avent, petitioner in the above styled

case, by counsel, and assigns the following errors related to his trial of May 2, 1967, as required by Rules of Court 5:1, Section 4.

1. The Court erred in overruling defendant's motion to strike the Commonwealth's evidence made when the Commonwealth rested.

2. The Court erred in overruling defendant's motion to strike the Commonwealth's evidence made at the end of all of the evidence.

3. The Court erred in ruling that Donald C. Rigney was qualified as an expert in fingerprinting.

4. The Court erred in admitting into evidence the opinion of Donald C. Rigney concerning the comparison of a fingerprint of the defendant with that found on the piece of glass at Friedman Marks Clothing Company, Incorporated.

5. The Court erred in admitting into evidence a fingerprint chart prepared by Donald C. Rigney.

page 8 } 6. The Court erred in overruling defendant's motion to set aside the verdict of the jury as contrary to the law and the evidence.

7. The Court erred in holding against the defendant in that the holding was contrary to the Due Process clause of the Fourteenth Amendment of the Constitution of the United States.

ALPHEUS AVENT

By DAVID C. DORSET
His Counsel

Received & Filed Jun. 22, 1967 Hustings Court Clerk's Office.

L. A. S., Deputy Clerk

* * * * *

page 9 }

* * * * *

And at the same Hustings Court held for the City of Richmond, at the Courthouse, on the 3rd day of May, 1967, the following order was entered:

* * * * *

Notice of Appeal for the judgment of this Court entered May 2, 1967, having been filed by the defendant, the Court doth appoint David C. Dorset, a competent attorney practicing before this Court to assist the said defendant in preparing his appeal to the Supreme Court of Appeals.

* * * * *

page 13 }

* * * * *

AFFIDAVIT

I, Alpheus Avent, being first duly sworn, depose and say:
1. That I am the plaintiff in error in the above-styled case.
2. That this affidavit is submitted pursuant to Sec. 19.1-289 of the Code of Virginia.
3. That I am unable to pay, or to secure to be paid, the costs of printing the record in this case.

Given under my hand and seal this 2nd day of May, 1967.

ALPHEUS AVENT (SEAL)

* * * * *

page 14 } JUDGE'S CERTIFICATE

I, Samuel B. Witt, Jr., Judge of the Hustings Court of the City of Richmond, do certify that I have investigated the financial status of Alpheus Avent, the above-named plaintiff in error, and I am of the opinion that he is unable to pay, or to secure to be paid, the costs of printing the record in this case.

Given under my hand this 11th day of January, 1968.

SAMUEL B. WITT, JR.

* * * * *

page 3 } NOTE: Hearing on April 27, 1967, before the Honorable Samuel B. Witt, Jr., Judge.

PRESENT:
A. Conrad Bareford, Esq.
Attorney for the Commonwealth

David Dorset, Esq.
Lawrence D. Wilder, Esq.
Attorneys for the Defendant

Alpheus Avent, the Defendant, in person and by counsel.

The Clerk: . . . . . Alpheus Avent. The defendant is represented by Mr. L. D. Wilder and Mr. David Dorset. Mr. Wilder and Mr. Dorset, are you prepared for trial?

Mr. Wilder: Yes.

The Clerk: Mr. Bareford, for the Commonwealth, you are prepared for trial?

Mr. Bareford: Yes, sir.

The Clerk: Alpheus Avent, you stand indicted in Indictment No. 3 in that on the 4th day of October, 1966,
page 4 } in the City of Richmond, Virginia, a certain storehouse of Friedman-Marks Clothing Company, Incorporated, situated No. 1400 East Marshall—rather, West Marshall Street, the said storehouse not there adjoining to or occupied with a dwelling house, you unlawfully, feloniously and burglariously did break and enter with intent then and there to unlawfully, feloniously and burglariously commit larceny therein, and clothing of the aggregate value of one thousand dollars of the goods, chattels and property of the said Friedman-Marks Clothing Company, Incorporated, then and there in said storehouse being found, you did then and there unlawfully, feloniously and burglariously steal, take and carry away against the peace and dignity of the Commonwealth of Virginia, how do you plead to this charge?

The Defendant: Not guilty.

The Clerk: Do you wish to be tried by His Honor, the Judge, or by a Jury?

The Defendant: By the Judge.

The Clerk: Answer His Honor's questions, please.

page 5 } By The Court:

Q. What is your name?

A. Alpheus Avent.

Q. How old are you?

A. Twenty-three.

Q. And you are the person named in the indictment read to you, you are that person?

A. Yes, sir.

Q. You understand that on a plea of not guilty as charged, you are entitled to have a jury try your case, if you so desire, you understand that?

A. Yes, sir.

Q. And your decision to be tried by the Court instead of a jury comes after consultation and advice with your counsel, Mr. Dorset and Mr. Wilder?

A. Yes, sir.

Q. You fully discussed your case with them?

A. Yes, sir.

Q. You are satisfied with their services?

A. Yes, sir.

Q. And I understand from counsel that you are ready for trial?

page 6 } Mr. Wilder: We are ready.

The Court: All right.

The Clerk: The Commonwealth's Attorney waive the Jury trial?

Mr. Bareford: Yes, sir.

The Court: I understand then that this is just on this one case.

Mr. Bareford: Yes, sir, Judge, and then we've got some more, but I think they probably want separate trials—

The Court: All right, sir, well, we'll see what this brings forth.

NOTE: At this time, the witnesses were sworn.

STUART B. CHILDRESS, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Bareford:

Q. All right, sir, would you state your name and

page 7 } occupation, please?

A. Stuart B. Childress, Personnel and Purchasing, Friedman-Marks Clothing Company.

Q. All right, Mr. Childress, were you so employed on October the 4th, 1966?

A. I was.

Q. Now, is Friedman-Marks Clothing Company at 1400 Marshall Street?

A. Yes, sir.

Q. Is that in the City of Richmond?

A. *Q* Yes, sir.

Stuart B. Childress

Q. Now, did anything unusual happen on the 4th day of October, 1966?

A. We were burglarized.

Q. Well, now, what do you mean by burglarized?

A. We had twenty—about fifty-six coats and a hundred and twenty pairs of pants stolen.

Q. Fifty-six coats?

A. And a hundred and twenty pairs of trousers.

Q. Now, do you have any idea how—I assume that these were taken out of your plant?

A. Taken out of the building.

page 8 } Q. Do you have any idea as to how entry was gained?

A. Entry was gained by breaking the window on, I think it's McKinney Street,

Q. All right, sir?

A. entering the building by breaking the window.

Q. Now, is this window on the first floor, second floor—

A. This window is on the first floor, but it's about seven feet from the ground.

Q. Seven feet from the ground?

A. Yes, sir.

Q. All right, sir, now did you do any investigation on this at all, Mr. Childress, is there anything that you can tell us?

A. Well, when we discovered, when we discovered the following morning that the clothing was missing and the window was broken and there was a rock thrown through the window and I think the rock was still on the steps, we immediately called the City Police and Burns Detective Agency.

Q. And they responded?

A. Yes.

Q. Now, and you took an inventory at that time?

page 9 } A. At that time, we did not know because in the large place like that we have probably a hundred thousand garments hanging, we had to go through and take an inventory and find out what was missing.

Q. And—

A. it was a few days later before we found out.

Q. All right, did you get an actual dollar value?

A. I would assume, roughly, that the value of the stolen goods was between fifteen hundred and eighteen hundred dollars.

Q. All right, sir.

Stuart B. Childress

By The Court:
Q. Is that wholesale or retail?
A. That would be wholesale cost.

By Mr. Bareford:
Q. All right, sir, is there anything you can add other than that?
A. Other than—the Burns Detective Agency, I say, responded and the City Police responded. Detective Fitzgerald came up, and I think fingerprints were taken, the whole area was scanned and very well gone over.
page 10 } Q. Well, now, do you know the defendant, Alpheus E. Avent?
A. I do not know him.
Q. Does he work for Friedman-Marks?
A. No, he doesn't.
Q. Has he never worked for Friedman-Marks?
A. Not to my knowledge and I've been there thirty-two years.
Q. All right, sir, would he have any business being on the premises or—
A. He would not.
Q. All right, sir, thank you, answer Mr. Wilder or Mr. Dorset.

CROSS EXAMINATION

By Mr. Dorset:
Q. Mr. Childress, you say an inventory was taken after the break-in was discovered?
A. (No response heard)
Q. And that inventory indicates fifty-six coats—
A. Fifty-six sport coats and a hundred and twenty pairs of trousers, to the best of your knowledge.
page 11 } Q. Now, how long before that had an inventory been taken?
A. Well, sir, if I might explain
Q. Yes, sir?
A. without direct questioning. We take an inventory, for instance when a suit or a pair of trousers go through our factory it has a cut number—cut number one and cut number two, and we know the given amount of trousers or coats in that particular cut and these coats had a cut number and they had a bundle number and they had a customer identification

and there were several days from the time they move to the point where the theft took place until they got in the Shipping Department we found that we were short a given number of suits or trousers for customer delivery. We had to check it back.

Q. Now, you say this window, which street does this window—

A. McKinney—it's McKinney, yes.

Q. Now you say it was seven feet from the ground?

A. About seven feet from the ground.

Q. Did you measure it?

A. No, I did not, I'm judging.

Q. Now, is it seven feet from what point of the

page 12 } window to the ground?

A. I would say it's seven feet from the bottom of the window, from the casement to the ground.

Q. I see, but you haven't measured, you are just guessing?

A. I'm guessing.

Q. Did you, yourself, take the inventory or did somebody else take it?

A. The person in charge of the Shipping Department took the inventory, shipping clerk.

Q. I see, so the information that you have is based upon what somebody else told you?

A. The information that I have, sir, is information based on an inventory and given to the insurance company.

Q. I see, but somebody else took this—

A. That's right.

Q. these figures, you didn't do this yourself?

A. I did not take the actual inventory.

Q. No further questions. That's all, thank you.

By The Court:

Q. I want to ask you a question, was the in-

page 13 } ventory taken in the usual course of business?

A. The inventory, yes, yes.

Q. Have you got a record that you have testified to, is that a record in your—in the office of the—

A. The inventory and the figures that I quoted are figures that after we took the inventory, the figures that we came up with and those were the figures that were sent to the insurance company and they, of course, made adjustments based on—

Q. Private company—they are records of your company?

A. Yes, records of the company.

Q. All right, go ahead.

Mr. Bareford: Thank you, sir.

By Mr. Dorset:

Q. One other question I have, Your Honor. Do you have in your possession any records of the Company showing this inventory?

A. Not in my possession, but I can get them.

The Court: Do you all want them brought back down from Friedman-Marks, I don't know that that makes—

page 14 } Mr. Bareford: We are not going on the value or anything anyway, Judge—

The Court: I don't think it makes any difference but if you all insist for your purposes or whatever.

Mr. Dorset: No, we don't, we don't want them.

The Court: All right.

Mr. Dorset: just inquiring whether he had them.

The Court: All right.

A. Yes, there are records.

Q. But you don't have them?

A. No.

Witness stood aside.

HERBERT LEON PRYOR, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Bareford:

Q. State your name and—

page 15 } A. Herbert Leon Pryor.

Mr. Wilder: If it please the Court, under the circumstances, seeing the defendant or witness, rather, garbed as he is, I would imagine that he is incarcerated presently, and, secondly, I think at this time that he ought to be warned that what he says might be used against him and whether he has been tried or not or is awaiting trial—

The Court: Well, I'll find out from him.

Herbert Leon Pryor

By The Court:
Q. You have been tried for an offense?
A. Yes, sir.
Q. And is that offense involved in what you are going to try—to testify to today?
A. I understand.
Q. Is there any further matters that—in connection with that that you would be subject to be punished for or you in full—
A. What I understand.

Mr. Wilder: I didn't understand his answer, Your Honor.

Q. And that you don't have to—
page 16 } A. I fully understand.

Mr. Wilder: I know you understand, but then you—
The Court: Well, just a minute—

Q. You understand you don't have to testify,
A. I understand.
Q. if you feel that anything you might say would incriminate you,
A. I understand.
Q. you understand that, all right?

Mr. Wilder: I'd like to question him further, Your Honor, as to whether he is aware that what he says here today might affect his parole one way or the other?
Mr. Bareford: Now, Judge, I don't think that's true.
The Court: I don't know, do you know whether—
Mr. Wilder: I said it might.
Mr. Bareford: I don't think that's true, Your Honor, I don't think that this transcript of this trial will go into his records at all.
page 17 } Mr. Wilder: I don't think that's up to us, Your Honor, that's up to Parole.
The Court: I don't think that's necessary for him, I'm satisfied that he is fully aware of the right to remain silent and so—you understand that?
A. I do.

By Mr. Bareford:
Q. Would you state your full name, please?
A. Herbert Leon Pryor.

Herbert Leon Pryor

Q. Herbert Leon Pryor?
A. Yes, sir.
Q. Now, Herbert, where are you right now?
A. In the Hustings Court, Part One, of the City of Richmond, City Hall.
Q. I understand that, I mean but where do you reside, where do you sleep at night?
A. Virginia State Penitentiary.
Q. All right, now, what are you in the Penitentiary for, Herbert?
A. Burglary.
Q. Burglary?
page 18 } A. Yes.
Q. Now, have you been tried and convicted of a charge of breaking and entering Friedman-Marks Clothing Store on October the 4th, 1966?
A. Yes, sir.
Q. And that trial is over, is that right?
A. Yes, sir.
Q. Now, Herbert, when—did you, on October 4th, 1966, did you have an occasion to see Alpheus Event—Avent?
A. I take the Fifth *Commendment* on that.
Q. You don't want to answer these questions?
A. Fifth *Commendment.*
Q. All right.

Mr. Bareford: Judge, he's taken the Fifth Amendment, he doesn't want to testify, but I don't think that that would be a proper plea.
The Court: Well, I think he can take it if he wants to do it, I mean, I don't—
Mr. Bareford: Well, I mean I don't want to
page 19 } belabor the point, but I'd like to point out to the witness that he's already been tried and he can't incriminate himself.
Mr. Wilder: This is his witness.
The Court: Just sit down.
Mr. Bareford: And I just wanted to make that point to the witness that it's already—that the trials are over, that's why I asked the questions leading into the—
The Court: Well, if he feels, if you feel that you might incriminate yourself by answering that question, you are perfectly within your rights to refuse to answer on the grounds that it might tend to incriminate you.

A. Yes, sir.
The Court: And is that your answer?
A. That's my answer.
The Court: All right.
Mr. Bareford: That's all.

Witness stood aside.

page 20 } ROBERT D. HOBSON, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Bareford:
Q. State your name and occupation, please, sir?
A. Robert D. Hobson, Patrolman, Richmond Bureau of Police.
Q. All right, Mr. Hobson, how long have you been with the Richmond Police?
A. Thirteen and a half years.
Q. All right, sir now were you so employed, then, on the 4th day of October, 1966?
A. Yes, I was.
Q. And did you have an occasion to respond to 1400 West Marshall Street on October the 4th, 1966?
A. Yes, sir, I did.
Q. Now, would you tell us, please, sir, you responded there in response to a report of an alleged breaking and entering?
A. That's correct.
Q. Now, when you responded, what did you do
page 21 } in your investigation on this offense, please, Mr. Hobson?
A. Well, I investigated all the items—all the places that had been apparently ransacked or where the merchandise had been stolen, where, where, where the mer—

The Court: Just confine it to one, to what they are being tried for, that's Friedman-Marks.
Mr. Bareford: Well, that's what we are talking about, Judge.
The Court: Well, he said all the places—
Mr. Bareford: He was talking about the places inside the plant.

Robert D. Hobson

A. All the places that were—

The Court: All right.
Mr. Wilder: Very well.

Q. All right, sir, now, did you—in your investigation, did you have an occasion to dust for fingerprints?
A. Yes, sir, I dusted the alleged point of entry,
Q. All right?
page 22 } A. which was a window. There was glass broken out of the window and was lying inside on the steps, the window was over steps going down, presumably, into the basement. The—I dusted it and fingerprints were lifted. Those prints were filed and at a later date, on the request of Detective Fitzgerald, those fingerprints were compared with the fingerprints of Alpheus Avent, which were found to be identical.
Q. Now, where was this broken glass that you dusted, Officer Hobson?
A. It was lying inside of the building on steps, the window is—was over some steps, which went down like, as I said, presumably into the basement
Q. I see.
A. and the glass was lying inside of the building on those steps.
Q. All right, sir, now how many prints were lifted off of this glass?
A. Well, I have—well, I have a series of prints, but we just compared one with Avent's print, Avent's fingerprints that we had on file.
Q. I see, but you got, you got more than one print, is that correct?
A. More, more than one print, yes, sir.

page 23 } By Mr. Dorset:
Q. You said more than one print?
A. More than one print, in other words, more than a single print, there was a series of prints as you can see on this card.

By Mr. Bareford:
Q. And is that a picture of the actual dusting, right there?
A. There—these are the actual latents that were lifted.
Q. All right, sir, let Mr. Dorset and Mr. Wilder see those.

Robert D. Hobson

A. The information is on the back of the sheets also where they were lifted from.

By Mr. Wilder:

Q. These are different pieces of glass, are they?

A. They were all window glass. They were all from the same area, they were different pieces of glass, but they were all in that immediate area from that one broken window.

Mr. Wilder: Your Honor, we would have no objection to it at this time for purposes of identification and
page 24 } reserve the right to be heard on it later, at the time of cross-examination.

The Court: All right.

Mr. Bareford: I'm getting ready to introduce it into evidence, Judge.

The Court: All right.

Mr. Wilder: Well, the Judge—the Court can always, even on cross-examination,

The Court: You can do that.

Mr. Wilder: throw it out.

Mr. Bareford: All right, sir, well, I want to introduce those to the Court, please.

By Mr. Bareford:

Q. Now, were you present when these were compared with the fingerprint of the defendant, Avent?

A. No, sir.

Q. You were not present?

A. No, Officer Rigney, the other officer that is called as a witness, he is the one that actually chart—he and I charted this, he—I made the lift, he checked the latent. I was off the day that Officer Fitzgerald requested, or Detective Fitzgrald, requested that Avent's prints be checked.

Q. All right, sir.

page 25 } Mr. Wilder: If it please the Court, I move that all the witnesses' testimony as to the—

The Court: Well, I'll let it in subject to establishing that these prints are—have been examined.

Mr. Bareford: All right, sir, answer Mr. Wilder or Mr. Dorset.

Robert D. Hobson

CROSS EXAMINATION

By Mr. Wilder:

Q. Now, I understand that you lifted the prints and did no comparison of them at all?

A. I responded—I responded to the scene, I—

Q. I understand that, I said did you take the prints?

A. when Detective Fitzgerald called me,

Q. I didn't—

Mr. Bareford: Judge, I think that the man is entitled to give an explanation.

The Court: Well, he asked him to verify the question, did you lift the—you are the one that lifted?

page 26 } A. Yes, sir, I am the one—

Q. And you did not compare them?

The Court: He said—

A. I did not compare them at the time, I compared them when they were being charted, but I did not make the original comparison because I was off that day and Officer Rigney made the comparison, but I—I can—I can verify that the prints that I lifted are the same prints that were—

Q. Given to Officer Rigney?

A. Beg your pardon?

Q. The prints that you lifted were the same prints given to Officer Rigney?

A. The prints that I lifted were the prints that we keep on our—on a permanent file.

Q. Yea, but you never compared them?

A. I compared them later, I didn't make the original comparison but I compared them later.

Q. Now, how did you compare them?

A. By the same method Mr. Rigney, we have a magnifying glass, we have metal pointers, we take the fingerprint, the fingerprint card and the latent, which is the fingerprint introduced into evidence, we compared them under a magnifying glass and pick points that are identical.

page 27 } Q. Now, what do you—

A. On this particular print, we picked fourteen points that we had charted and we can give you many more, if you want—

Robert D. Hobson

Q. Now, what were you looking for, specifically?

A. Well, what we call points in fingerprinting, I think it's known under, in fact, it is known under the name as the Galton Point System, we are looking for ending ridges, dots, islands, bi-furcation, tri-furcation, that's the terminology that we use.

Q. How about whorls?

A. Whorls do not enter into this, whorls are used for the over-all classification.

Q. How about loops?

A. Loops are not used, now this particular print is a loop, but that does not enter into the comparison of fingerprint.

Q. Now, what did I understand you to say how long you had been working with fingerprints?

A. Working with fingerprints four years.

Q. Now, who did you receive your training from?

page 28 } A. I received my training within the Department.

Q. Did you go to school for it?

A. There is no school to my knowledge, on fingerprinting except correspondence school, which is, I think, the—it's a school out of New York that gives a correspondence school, but all our training is given within the Department.

Q. Have you done any work for the Federal Government?

A. Never.

Q. Have you done any for the United States Army?

A. Never.

Q. Navy?

A. Never.

Q. Any branches other than the—within the Department?

A. Not on fingerprinting, no.

Q. Do you classify yourself as an expert?

A. Yes, sir, I have been cleared by Courts, I have testified in other cases and I have been cer—qualified expert *within* the Courts.

page 29 } Q. Well, how long did it take you to qualify?

A. Well, there is no definite time, it's just—the Courts ask you and you testify and if they, they qualify you as an expert.

Q. When was the first time you qualified as an expert in any Court?

A. Oh, I really don't know, I have testified in numerous—I say numerous, several cases on fingerprinting

Q. How about—

A. but I don't know when the first—

Q. about three years ago?

A. Well, I wouldn't like to say, I really don't know, but I have testified in courts and cases previous to this on charts.

Q. I'm not debating that, Officer, I'm just

A. I—

Q. trying to find out when it was you first considered an expert?

A. I really couldn't tell you, because I don't know.

Q. Well, when did you first consider yourself
page 30 } one after having studied in the Department?

A. When I testified to my cases in court, but I can't tell you when that first case was if my life depended on it.

Q. Well, was it three years, four years?

A. I'd say roughly two and a half to three years, but I could check back and pull my first chart that I made if you—

Q. So about two and a half or three years after you studied in the Department, you were an expert?

A. That's correct.

Q. Who did you study under, Sergeant Blaylock?

A. Sergeant Parks and Detective Blaylock, or rather, Sergeant Parks was the one that actually taught me, he was my supervising officer, Blaylock is a detective like myself.

Q. Were there any other person's prints on the glass?

A. We didn't check for any further prints, we checked for Avent's prints and his prints were found on the glass.

Q. Well, didn't you have some other prints to
page 31 } compare there, if you wanted to?

A. It wasn't necessary, since we found one print that compared to—compared with Avent's, that's all that's necessary.

Q. You didn't think it necessary to check the other prints that you did have here in Court?

A. Against Avent?

Q. Yes?

A. No, indeed, because one print is just as positive identification as I had all ten.

Q. Suppose you found one print of his and the other prints that you have there belonged to someone else, what would you—

A. I'd still say that Avent was definitely the man that put his fingerprints on that glass inside the building.

Q. Well, you could say his prints was found on it, couldn't you?

Robert D. Hobson

A. Was found on the glass.

Q. You couldn't say anything else?

A. I said the only thing I could say that Avent was the man that put the fingerprint on that glass and that glass was found inside the building.

Q. Now, was this glass on the outside or inside?

page 32 } A. On the inside of the building.

Q. Now, how do you know when it was on the ground when you found it?

A. It wasn't on the ground, it was on the steps,

Q. Well, it was inside—

A. inside that building.

Q. Well, was that glass—was that part of the glass facing inside or out?

A. I beg your pardon?

Q. Was it facing inside or out to the—to the—

A. Oh, you mean where the fingerprint,

Q. to the street?

A. was it on the inside or outside?

Q. Yes?

A. I gathered it was on the inside for the simple—

Q. Well, how did it get out there?

A. for the simple reason of the weather, the elements of the weather.

Q. What were the elements of the weather?

page 33 } A. I mean the elements of weather on the glass, the outside of a glass will have more of a film on it, dirt on it, than inside.

Q. It could have been clean as far as you know,

A. It's possible.

Q. couldn't it? So you don't know—

A. This was an assumption, but it was on the glass.

Q. I'm not asking you to assume, Officer, I'm asking you if you know?

A. What I know, that his fingerprint was on that glass.

Q. Well, do you know whether it was on the inside or outside?

A. I couldn't positively swear to it, no.

Q. All right, now, how about the other prints, were they on the inside or outside?

A. They were on the glass, that's all I can tell you.

Q. Well, how big a piece of glass was it, do you have the glass here with you?

A. No, I do not.

page 34 } Q. Would you describe it to the Court?

Robert D. Hobson

A. Just a broken piece of window glass.

Q. Well, approximately how big?

A. Mr. Wilder, I couldn't tell you if my life depended on it, I didn't measure it, and we don't keep glass, but his fingerprint was on the glass.

Q. Well, let me ask, was it as large a piece as your hand?

A. I don't remember, usually they are, because a small piece of glass you can't get fingerprints off for the simple reason you don't have the surface available.

Q. Now, you checked Officer Rigney, is that right, to make certain he was correct?

A. That's correct, yes.

Q. Is it customary for you all to check each other?

A. Normally we do, yes, just as a course of action we do, but—

Q. He didn't check your lifting, did he?

A. Didn't check my lifting, no, indeed.

Q. Why?

A. I was the only one at the scene, I was the street man that day and I was the one sent to the scene.

page 35 } Q. All right, now, was he there when you compared them?

A. Was who there?

Q. Officer Rigney?

A. I don't remember if he was there that day I looked at them or not, I know like I said, I was off the day that Officer Fit—Detective Fitzgerald requested Avent's prints be checked.

Q. How long has he been doing fingerprints?

A. I don't know, he can answer that for you better than I—

Q. Longer than you?

A. No, less time.

Q. Very well. Now, did you see the window?

A. Did I see the window?

Q. Yes?

A. That the glass came out of?

Q. Yes?

A. Yes, I did.

Q. Do you know whether the glass came out of that window?

page 36 } A. I believe that's the question I was asked by Mr. whatever—

The Court: Well, answer the question.

A. when he called me—no, sir, the glass was not checked as far as a refractometer test or spectograph test.

Q. Did anybody try to put it together to see if it came out of there?

A. No, indeed.

Q. All right. So let me see if I understand you, you don't know whether the glass came out the window and you don't know whether the print was on the inside or the outside?

A. That's right.

Q. I have nothing further.

RE-DIRECT EXAMINATION

By Mr. Bareford:

Q. Where was the glass in relation to the window, Officer?

A. Directly under the window.

Q. Were there any other windows around there?

A. There was one, I don't—I couldn't say off-
page 37 } hand—

Q. Were there any other broken ones around there?

A. Not to my knowledge, no.

Q. Well, if glass were broken out of the window that you saw broken, where would the logical place for

Mr. Wilder: I object.

The Court: Let him tell where the glass was, he's already testified to that, there was the window.

Mr. Bareford: That's all, that's all.

Mr. Wilder: I have nothing further.

Witness stood aside.

DONALD C. RIGNEY, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Bareford:

Q. State your name and occupation, please, sir?
page 38 } A. Donald C. Rigney, Patrolman, Richmond Bureau of Police.

Q. All right, Mr. Rigney, how long have you been a patrolman with the Richmond Police?

A. Approximately seven years.

Donald C. Rigney

Q. Now, were you so employed on October the 4th, 1966?
A. Yes, sir.
Q. Now, did you have an occasion in your line of work to compare some fingerprints of the defendant, Alpheus Avent, with some prints turned over to you by Officer Hobson?
A. I think we ought to clarify the point, these prints were not turned over to me by Officer Hobson, they were on file, on file.
Q. All right?
A. I took them out of file at Detective Fitzgerald's request and compared them with the defendant's finger—
Q. Well, now, they are the fingerprints that have been introduced in here today,
A. Yes, sir.
Q. as being the ones that were taken from
page 39 } A. Yes, sir.
Q. Friedman-Marks? Now, did you make a comparison on these prints?
A. Yes, sir.
Q. Now, would you please point out to the Court—well, first explain to the Court how these comparisons are made and point out to the Court your results?
A. The latent that we have is compared with a fingerprint of a suspect, so to speak, the—

By Mr. Wilder:
Q. You said so to speak?
A. The latent fingerprint is compared with a suspect.

By Mr. Bareford:
Q. With a suspect?
A. The fingerprint is compared for the fingerprint. You take one latent fingerprint and you search the fingerprints, there is ten fingerprints, as most people know. You start looking and try to find his fingerprint, we search under a character point system, which is called a Galton Point Sys-
page 40 } tem, we try to find islands, dots, bifurcations, ending ridges that compare with each other. I did this and I don't—I didn't start charting the fingerprint that day, which was October 23rd, that Detective Fitzgerald requested this, October 23rd, 1966. I don't really know how many days later it was, two or three days, I think, when I started actually charting the fingerprint. I took a photograph of the latent and a *fingerprint* of the known fingerprint and a

photograph of the known fingerprint, blew these up in the dark room, which is also our job, compared them after they were enlarged to this size, and they are identical.

Mr. Dorset: Objection, he hasn't been qualified as an expert, he hasn't—

The Court: Let him qualify.

Q. All right, in order—how long have you been working with fingerprints, Officer Rigney?

A. About a year and a half.

Q. All right, sir, and what kind of training have you had along these lines?

A. Just within the Bureau.

Q. And what does that entail?

A. Supervision by an experienced person. There's no formal school that I know of that we are sent to, we are not required to go to a school, there's no time element

page 41 } involved, it's just training within the Bureau.

Q. All right, now, who are some of the men that you have worked with?

A. Officer Hobson, Officer Blaylock, Winstead, Officer Winstead, Sergeant Horner, Lieutenant Parks.

Q. Well, now, are these men considered ex—fingerprint experts?

Mr. Dorset: I object.

Mr. Wilder: I object to that.

Mr. Bareford: Now, Judge, I think that this man can testify whether or not these men are considered experts.

Q. Have they ever testified as experts before in a Court of law on fingerprints?

A. To my knowledge, they all have.

Q. All of them?

A. Yes.

Q. Have you ever testified before in a Court of law,

A. Yes, sir.

Q. as a fingerprint expert?

A. Yes, sir.

Q. All right, sir, Judge, I think this qualifies him.

page 42 } The Court: All right, go ahead.

Mr. Wilder: I object.

Donald C. Rigney

The Court: You may have an objection.

Mr. Dorset: I object to any opinion by this witness on the grounds that he has not been qualified as an expert.

The Court: Well, the Court thinks he is, I don't know that there is any—that you've got to go to the University of Wisconsin or Chicago or some place else and stay for fifteen or twenty years to make you an expert. I think that his experience and training was sufficient to qualify him in my judgment, all right, sir.

Mr. Dorset: Exception.

The Court: You may have an exception.

Q. All right, sir, now Officer Rigney, when you compared these fingerprints, how many points did you chart that were similar or the same?

A. I have the chart with me, there is fourteen identical characteristics or points.

Q. Now, how many identical characteristics do you need in order for you to be convinced in your own mind

page 43 } that it was the same man?

A. I don't believe there's been a definite number of points established in the State of Virginia, but we usually like to have at least twelve.

Q. Twelve. Could you have charted more?

A. Yes, sir.

Q. All right, would you show the Court the chart that you have and explain to them the points that are similar or identical, please—you can stand up and face the Judge here.

Mr. Wilder: I think we ought—has this been introduced?

Mr. Bareford: Well, if it hasn't, I'll introduce this into evidence.

Q. All right, go ahead, Officer.

A. This photograph on this side is a photograph of the latent fingerprint lifted at the crime scene. This photograph on this side is the photograph of the known fingerprint which was taken from the master fingerprint card we keep in the file.

The Court: All right, of the defendant?

A. Number nine ring finger, be the left finger,

page 44 } the left ring finger. Now we start comparing these

Donald C. Rigney

by looking at the latent fingerprint for one of these certain characteristics. I found an ending ridge, marked it number one, the same spot number one on the known fingerprint. The second characteristic, I found was a bifurcation the same spot on the known fingerprint another bifurcation, and we work around it clockwise until we found, I found fourteen and I consider this sufficient, this is the chart.

Q. Did you identify every one of them?

A. Yes, sir.

Q. All right, sir.

The Court: All right, do you wish to introduce that?

Mr. Bareford: Yes, sir, Judge.

The Court: All right.

Mr. Bareford: I'll introduce that and mark it Commonwealth's Exhibit.

Mr. Wilder: We would object to it for the same reason.

The Court: All right.

Q. In your opinion, then, the fingerprint found at the scene of the crime was the same as the fingerprint of the defendant, Alpheus Avent?

A. Yes, sir.

page 45 } Q. All right, answer Mr. Dorset or Mr. Wilder.

CROSS EXAMINATION

By Mr. Wilder:

Q. Now, when did you first testify as an expert in any court?

A. I believe it was June, 1966.

Q. June of 1966?

A. I'd have to check to be sure.

Q. Have you testified any time since then?

A. No, sir.

Q. Only time—you testified twice, one time and this time?

A. Yes, sir.

Q. And at that time, you hadn't been studying any more than four or five months, had you?

A. I had been in the Identification Section since September, 1965.

Q. September, 1965. And what do you do when you study, just somebody tells you what to do or what?

A. Well, nobody tells you what to do, nobody

page 46 } tells you anything to do—

Donald C. Rigney

Q. What do you do, just linger around in the lab or what?

A. We work out fingerprint cards as they come through the window from the lockup, or our two jobs primarily are fingerprinting and photography.

Q. Before you went in there, did you know anything at all about it?

A. No, sir.

Q. So somebody had to teach you?

A. Yes, sir.

Q. Who was responsible for teaching you?

A. Lieutenant Parks, Sergeant Horner and the other three patrolmen.

Q. All right, now, how long—you serve an apprentice, don't you—apprenticeship?

A. I think we've established there is no definite time element involved.

Q. Well, you are not telling the Court that you could go there this week and then next week come out there and be an expert, are you?

A. I didn't say that.

Q. I'm asking, could you?

page 47 } A. I could say that I had no occasion to do so.

Q. So the answer is what?

A. That a more experienced man would have handled the particular case at that time.

Q. All right, now, would you consider yourself a more experienced man now?

A. By what do you mean, more experienced?

Q. The same thing you meant by saying when you said it a moment ago?

A. I am more experienced than I was when I went in there, yes.

Q. Do you think that in a very serious matter a more experienced man would be called upon rather than you?

A. No, sir.

Q. You are as experienced as any of the others?

A. Yes, sir.

Q. Sergeant Blaylock?

A. Not in time, no, sir.

Q. I say—you are as experienced, though?

page 48 } A. I am qualified to testify in Court, that's all that's necessary.

Q. Don't keep telling me—

A. I have no experience.

Donald C. Rigney

Mr. Bareford: Now, Judge, I think the Court's ruled on it.

The Court: I have, too, why did you go into it?

Mr. Wilder: I understand, Your Honor, an expert isn't qualified—once he's qualified, there's no such thing—

The Court: Well, let me ask you a question,

Mr. Wilder: Yes, Judge.

The Court: isn't it entirely the use of the eye-sight to identify things on prints?

Mr. Wilder: It is.

The Court: Well, now, what great education does a man have to have—

Mr. Wilder: Oh, I'm not saying that he has to have a whole lot of education, but

The Court: All right, well, go ahead now.

page 49 } Mr. Wilder: I can cite the Court that what is usually considered an expert in the field of fingerprint examination is someone who has performed services for one of the branches of the Government, the Armed Services.

The Court: You can point out to attack him, if you want to, errors in his findings if you want to, to disprove his character as an expert.

Mr. Wilder: I couldn't point it out, Judge, because I don't know, I'm not an expert at fingerprint—I couldn't say what he found was improper and what—

The Court: Well, doesn't he show the points that he makes on this—this exhibit they compared with that, does that take an expert to look at that and not be able to pass on it?

Mr. Wilder: On some of it, I'm going to ask him a question on Number eleven.

Q. Hold that, will you, and turn it so the Court can see, turn it around this way—hold it like that. Now, look at eleven, you see how this line comes on up and almost merges there and here you are saying those are the two

page 50 } same lines,

A. Yes, sir.

Q. now, if you notice, as you get here, this next line right behind seems to take a swerve, this one blocks out, is there any reason for that?

A. You went on one line on this one and a different line on this one.

Q. This is the print that was lifted?

A. Yes, sir.

Donald C. Rigney

Q. Why would that one be so dark?
A. The degree of pressure would tend to widen the ridges of the finger.
Q. Well, isn't quite a bit of pressure applied when you put your fingers down after they are inked?
A. For a person to ink and roll a set of fingerprints?
Q. Yea, rolling and take them and do it just like that, don't you?
A. It's not necessary to put more pressure than just the weight of the fingers.
Q. Don't they usually take the finger and hold it like this and put one over top of it and print it like that?
A. It's not pressed, that's wrong—
page 51 } Q. They don't do it like that, though, do they?
A. You can do it.
Q. But what—are you familiar with the taking of fingerprints?
A. Yes, sir.
Q. You are not saying that they don't roll the print or print it, are you?
A. The only way I can explain it is to show you how one has to be taken.
Q. How one has to be taken, I'm asking you how the print was taken?
A. I did not take this set of fingerprints.
Q. So you don't know how it was taken, do you?
A. I didn't take this set of fingerprints.
Q. Were they taken with any pressure?

The Court: If he couldn't know, how would he know?
Mr. Bareford: Well, he says he doesn't know.

Q. No, I'm talking about—now, so you don't
page 52 } know how much pressure was applied?
A. On this particular set of known fingerprints, no, sir, I don't.
Q. You don't know whether pressure was applied on the pane either, do you?
A. No.
Q. So what would make you—so what would account for all this darkness and thickness in the ridges, aren't one of the sets of ridges thicker than the other?
A. Well, it could be foreign matter of some kind on the—
Q. Could be a lot of things?

Donald C. Rigney

A. It could be, yes, sir.

Q. And also some of that print is obliterated so you can't see portions of identification, isn't that right?

A. Yes, sir.

Q. If you had all of that you would be in a better position to give an opinion, wouldn't you?

A. No, sir, we have enough as it is.

Q. Oh, you wouldn't be in a better position?

A. We have enough as it is.

page 53 } Q. But I asked you, would you be in a better position?

Mr. Bareford: I think he's answered, Judge.

Mr. Wilder: He hasn't answered my question.

The Court: Well, why would he be in a better position, if he says ten or twelve is sufficient, if he got fourteen, would that make it any—

Mr. Wilder: It would certainly make it better, that's all I'm asking, Judge.

Mr. Bareford: That's an opinion Mr. Wilder has got, now, I think—

The Court: All right, well, ask him the question and

Q. If you had—

The Court: and if he's satisfied with twelve, why that's the answer.

Q. Now, the fact that you are satisfied with something, doesn't mean that you couldn't get more conclusive proof, is it?

Mr. Bareford: Well, now, he's arguing with the witness, Judge.

page 54 } Mr. Wilder: I'm asking him a question, that's not argument.

The Court: Sit down, go ahead ask him.

A. Would you repeat your question, please?

Q. I say the fact that you are satisfied with something doesn't mean that you are—that it wouldn't be more conclusive if you had more proof, would it?

The Court: That's self-evident, Mr. Wilder,

Donald C. Rigney

Mr. Wilder: Judge, I'm attacking his credibility, I want to hear him—

The Court: if you see a man shoot another man and then he don't confess to it, of course, if he confesses to it, it would be greater proof, wouldn't it?

Mr. Wilder: Where it is self-evident to the Court and to myself, the witness is obviously having some reluctance with it, he hasn't answered it yet and I'm attacking his credibility.

The Court: All right.

Mr. Bareford: He's answered three times, but page 55 } he hasn't answered it like Mr. Wilder wants it.

By The Court:

Q. All right, he wants to know that if you got fourteen points instead of twelve, would that be a better identification?

A. No, sir, my answer is no, if the Court accepts what we have here, why should we want more.

Q. Well, he asked you would it be better if you got fourteen instead of twelve?

A. It might be to him but it wouldn't be to us.

Q. All right.

Mr. Wilder: All right, I have nothing further.

Mr. Bareford: That's all.

RE-DIRECT EXAMINATION

By Mr. Bareford:

Q. Oh, wait a minute, let me ask you this: You didn't try to identify any smudge spots or anything on this, did you?

A. No, sir, we cannot do that.

page 56 } Q. All right, that's all.

Witness stood aside.

Mr. Bareford: That's the Commonwealth's case, Judge.

The Court: All right.

Mr. Dorset: If Your Honor please, we move to strike the evidence and I'd like to have more time with Mr. Wilder to discuss our argument.

The Court: All right, you want to take—

Mr. Wilder: Five minute recess.

The Court: All right, we'll take a recess.

NOTE: At this time, a short recess was had, after which:

page 57 } The Court: All right.

Mr. Dorset: If Your Honor please, the defense moves to strike the Commonwealth's evidence on the grounds the Commonwealth has not proven beyond a reasonable doubt that the defendant broke and entered the Friedman-Marks, stated in the indictment. In this regard, we point out to the Court that the other prints on the glass were not identified. There was no evidence that the glass matched with the window glass, no evidence whether it was on the inside or the outside of the glass, and there's no evidence that the window was broken that night. The man from Friedman-Marks testified that they found a window broken the next—that morning, after the notice of some evidence that it had been burglarized. There's no—he did not testify, there is no other evidence that window whether it was broken or not, the day before.

Now, in these—there's no clear fingerprint cases in Virginia that I can find, but in the other States where fingerprint evidence, which is circumstantial evidence,

page 58 } there has got to be proof beyond reasonable doubt from the circumstances. In this regard, I'd like to cite to the Court 28 A. L. R. 2d, starting at page 1155. This is an annotation on fingerprints and this section, 1155, deals with cases where there was insufficiency, and this statement is made:

Where it appears that they were at the scene of the crime, fingerprints other than those identified as the defendant's and which are neither identified nor explained, the proof of defendant's prints is not sufficient to support a conviction. And the general statement of the law is quoted from a North Carolina case, *State* v. *Mitten,* 1948, 228 N. C. 518, 46 S. E. 2d 296. The Court declaring in fact that fingerprints corresponding to those of the accused were found in the place where a crime was committed is without probative force unless the circumstances are such that the fingerprints could only have been impressed at the time the crime was perpetrated, though the testimony that the print of the left thumb of one accused of breaking and entering with intent to commit

page 59 } larceny and of larceny appeared. Upon the outside of a piece of glass which originally occupied the position near the knob of the front door of the place, which was a public place, had no legitimate tendency to show that he was present when the shop was broken and entered and the coins taken therefrom. Now this case is a little bit

different factual situation, it is true. Every case would dealing with fingerprints. But the principle is there and it stays there that unless the circumstances are such, all the circumstances, all the evidence, that the fingerprint could have only been impressed at the time the crime was perpetrated, the fingerprints alone are not enough. In this case, there's not one shred of evidence linking the defendant with this place, and there was no evidence also that any other glass was broken or unbroken in the place as to definitely establish that the window, which was near the glass, was on the floor, was the window that was broken into. I feel that in light of all the evidence, the Commonwealth has not shown beyond a reasonable doubt defendant's guilt for reasons that

page 60 } I have stated.

The Court: What have you got to say about it?

Mr. Bareford: Well, Judge, of course, I don't agree with Mr. Dorset in some of his interpretations of the facts. In the first place, I asked Officer Hobson where the glass was found and he said it was found right under the window that was broken.

The Court: One thing that sticks in my mind is the fact that, is that true that simply the fingerprints of the party is not sufficient to—

Mr. Bareford: Well, now, Judge, I haven't read the article that Mr. Dorset has cited, of course, he—

The Court: That's 28?

Mr. Bareford: A. L. R. 2d, and of course, he's—it's broken down to sufficiency and insufficiency, and of course, he's taken these at random out the text as far as insufficiency is concerned.

The Court: Well, I'd like to look at that thing

page 61 } before I decide this particular case, because it isn't —there's no question about the fact that except, but for the fingerprints, there's no connection with the defendant with the breaking and entering.

Mr. Bareford: Well, you've got—

The Court: I do think, I mean from the circumstances I'm satisfied that his fingerprints were on there, I think that's very true and I—but if that be insufficient to establish the presence there, if that be insufficient under the law, then of course, that's another question.

Mr. Bareford: Well, Judge, would you like to

The Court: I'll try—

Mr. Bareford: give us a chance to write a memorandum or just give the Court an opportunity to read the section he cited or set it down for—

The Court: Well, I'd like for you to give me—look up some law and comment on that holding in 28 A.L.R. 2d.

Mr. Bareford: All right, sir.

The Court: 1155?

page 62 } Mr. Wilder: Beginning at 1155 and going over to 1157—

The Court: And, let's see, this is the last day we've got in this Term—

Mr. Bareford: Well, the Judge, if the Court doesn't want written briefs, we could probably do it anytime, but if you want it written, we'd need about a week.

The Court: Well, I don't know there's any—what I want is your comment on, on—I'll look at 28 A. L. R. myself,

Mr. Bareford: Yes, sir.

The Court: but I'd like to have your comments on that, and I think that possibly—

Mr. Wilder: Now, Judge, we—that's all right.

Mr. Bareford: Judge, we are going to try some cases on May the 2nd, would you like to do it that day?

The Court: All right.

Mr. Bareford: Would that suit you all?

Mr. Dorset: What do you want to do?

The Court: I don't know that you—I mean all

page 63 } I wanted to know if he's got any—what his reaction to the—is to the authority that you cited, and if his reaction is that he don't have to show anything but the man's fingerprints on it and that it was a breaking and that there was the element of larceny from the place, if the fingerprints are sufficient or insufficient, that's what I want—

Mr. Bareford: Yes, sir, well, the question really would be, then, Your Honor, as to whether the print was impressed at the time of the commission of the alleged felony.

The Court: Well, I don't know, that's circumstantial evidence that I can consider, I mean, I'm not suppose to just take the other horn of the dilemma, but I would like to know for my own education on the question. All right, do you want —you all don't intend to put on any, if I understand you don't—

Mr. Wilder: No, we don't—no evidence.

Mr. Bareford: Judge, we've got about four more cases here against Mr. Avent and we would go ahead

page 64 } and ask the Court to *noll prosse* them.

The Court: You want to *noll prosse* them at this time?

Mr. Bareford: Yes, sir.

The Court: All right, you—do you have any objection?

Mr. Wilder: Never, Judge.

The Court: All right.

Mr. Dorset: So I understand it that you are not expecting any other memos from us?

The Court: I don't either, I mean I think that—I mean what—

Mr. Bareford: Excuse me, I was just going to tell them that if they came up here on the 11th, that we would have Avent up here, just go ahead.

The Court: That's at eleven o'clock, May the 2nd.

Hearing concluded.

page 65 } NOTE: Hearing on May 2nd, 1967, before the Honorable Samuel B. Witt, Jr., Judge.

PRESENT:

A Conrad Bareford, Esq.
Attorney for the Commonwealth

David Dorset, Esq.
Lawrence D. Wilder, Esq.
Attorneys for the Defendant

Alpheus Avent, the Defendant, in person and by counsel.

The Court: . . . . . hearing on this matter in which the—at which time the defendant renewed its motion to strike the evidence for the reasons set forth in the argument, primarily, as I recall it, that the presence of the defendant's fingerprints on the glass was not, standing alone, was not sufficient to prove that he was guilty of breaking and entering as charged, is that correct?

page 66 } Mr. Dorset: Under all the circumstances shown, yes, sir.

The Court: Under all the circumstances. Well, I have considered and read primarily the annotation in 28 A. L. R. 2d, 1155, and while I recognize that there's quite a conflict of authority on the question of whether a person's fingerprints are sufficient to—alone are sufficient to—for the court to find him guilty, I—as I say, recognize a conflict of authority, but the case—that is, where the fingerprints are found in a public building and where there was found other fingerprints in those particular cases that the court held that simply finding the defendant's fingerprints on it without more in such a place would not be sufficient, but there is uncontradicted evidence that it was his fingerprint and the circumstances—of course, it's been established that there had been a

breaking and entering and the sole problem is the question of whether or not the finding of his fingerprints without more would be sufficient. I feel that it is sufficient and

page 67 } consequently, I overrule your motion to find the defendant not guilty for insufficiency of the evidence.

Mr. Dorset: I respectfully except to the ruling of the Court for the reasons stated.

The Court: All right, now.

Mr. Wilder: No evidence.

The Court: No evidence, I understood, stand up.

Mr. Wilder: Your Honor, you do understand that the motion is a dual motion at the conclusion of the Commonwealth's evidence and the defense in not putting on any evidence now renews the motion

The Court: I understand.

Mr. Wilder: and excepts to the Court's ruling.

The Court: All right, stand up: The Court now finds you guilty as charged and sentences you to serve five years in the State Penitentiary.

Mr. Wilder: If it please the Court, we move to set the verdict aside as being contrary to the law and the

page 68 } evidence and to order a new trial in conformity with the law and the evidence.

The Court: All right, sir, I overrule your motion.

Mr. Wilder: We note exception.

The Court: I understand that he's had some suspended imposition of sentence, but you are all are not involved in those particular cases.

Mr. Bareford: It's William White, George William White, Judge.

The Court: Well, will you get in touch with him?

Mr. Dorset: Judge, I might point out to the Court that this is—this is the second conviction for the defendant and—during the recent few months, and the first conviction involving the twenty years has been appealed and very possibly this one will be appealed, I don't think it be proper to consider the suspended sentence until those appeals, the first appeal is disposed of and until the time has run for filing an appeal in this case.

The Court: Well, of course, Mr. Dorset, you

page 69 } recognize that the question of revocation of the sentence does not require, necessarily absolute conviction, but that his conduct is such as justify the Court on any reasonable basis to set aside the probation, but I think I prefer to let Mr. White present that question, but I appreciate your services, both you and Mr. Ryder, I mean Mr.

Wilder, and I will take that under advisement at that time. Thank you.

Hearing concluded.

page 70 } CERTIFICATE

I, Edward C. Earle, Jr., do hereby certify that I have on this 24th day of May, 1967, faithfully and accurately, to the best of my ability, transcribed the foregoing testimony and other incidents of trial, in the case of *Commonwealth* v. *Alpheus Avent,* recorded by electronic equipment in the Hustings Court of the City of Richmond.

EDWARD C. EARLE, JR.

page 71 } We do hereby certify that the foregoing is a true and correct transcript of the evidence and proceedings in this case.

A. CONRAD BAREFORD
Attorney for the Commonwealth

DAVID C. DORSET
Attorney for the Defendant

LAWRENCE DAVID WILDER
Attorney for the Defendant

I do hereby certify that the foregoing transcript of the evidence was tendered to me on the 23rd day of June, 1967, and signed by me this 23rd day of June, 1967.

SAMUEL B. WITT, JR.
Judge of the Hustings Court of the City of Richmond, Virginia

I, L. A. Schumann, Deputy Clerk of the Hustings Court of the City of Richmond, Virginia, certify that the foregoing evidence in the case of *Commonwealth* v. *Alpheus Avent* was delivered to me on this 23rd day of June, 1967.

L. A. SCHUMANN
Deputy Clerk of the Hustings Court of the City of Richmond

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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