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WHEN A YOUNGSTER MAKES A MISTAKE and is arrested for committing a crime, should that act, committed while he is still a juvenile, appear and reappear, to haunt the offender for the rest of his life? There are some people in this country who say that we are not tough enough with our young people. But even they would not want the life of a young person marred forever by a mistake which he made as a juvenile.

Scope of the Problem

The problem for discussion in this paper is whether or not evidence of a prior juvenile conviction—a juvenile record—may ever, or should ever, be admitted in evidence in an adult legal proceeding. Alternatively, statutes (e.g., in the State of Ohio) specify that it may not, while the line of cases herein presented indicates that there are times when evidence of a prior juvenile conviction may be, and ought to be, admissible evidence in a later adult proceeding.

As indicated, the statutes of the State of Ohio, like those of California and New York for instance, are quite specific as to what things may or may not be done with the record of a juvenile proceeding.

In Ohio, for example, when a Juvenile Court judgment is rendered against an offender, that disposition or other evidence of the proceeding is not admissible as evidence against the child in any other court proceeding except as to sentencing or as to granting probation.[1]

In New York, likewise, under the Family Court Act adopted in 1962, the fact that a juvenile has appeared before the court in a prior proceeding, or any admission made by such person in Family Court, is not admissible as evidence against him in any other court.[2]

In California, also, the juvenile proceeding is not of public record, as only interested parties may inspect the petition and reports of the probation officer.[3]

Protection of Juveniles

Generally, care and protection are intended to be afforded youthful offenders. In California, the avowed purpose of the court is to offer care and guidance to the youth, and to preserve (or attempt to provide)

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1 Ohio Rev. Code § 2151.358.

2 N.Y. Fam. Ct. Act § 783 (McKinney 1963).

3 Calif. Welf. and Inst. Code § 827 (West 1966).

a wholesome family life for him.[4] In fact, provision is made in California to prohibit the youth from coming in contact with adult offenders.[5]

In Ohio, five different types of juveniles and juvenile offenders have been defined by statute,[6] and it is interesting to note that, statutorily at least, none of the five types are classified as criminals.[7]

One whose car has been stolen, or whose daughter has been molested, may, with considerable cause, advocate severe punishment of the criminal, since the age of the offender hardly mitigates the loss. The logic of this reasoning escapes many state legislators, and they blame society for the criminal activities of youth. Whether or not it be warranted, juvenile offenders are not criminals in Ohio. A similar provision is found in California, where it is not a crime for a youthful offender to be adjudged a ward of the court,[8] and in New York, where there is no forfeiture of personal rights for merely being adjudicated delinquent by the Family Court.[9]

Judge Zimmerman, in an Ohio Supreme Court case involving a sixteen year old who was indicted by the grand jury for first degree murder and who was tried as an adult, elaborated on the view that children who break the law or commit crimes are not criminals. He explained that misdeeds of children are not viewed by the court as criminal in nature, nor treated as actions of adults. Instead, emphasis is placed upon favorably influencing the child through the employment of care and correction.[10]

Ohio Jurisprudence points out that the purpose of the Juvenile Court Law is to "save minors of tender years from prosecution and conviction on charges of misdemeanors and crimes and to relieve them from the consequent stigma attached thereto . . ." [11] Other states, notably California and New York, attempt to provide statutorily for care and additional protection to be afforded to youthful offenders.[12]

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[4] *Id.* § 502.

[5] *Id.* §§ 507, 508, 509, 510.

[6] Ohio Rev. Code § 2151.02 Delinquent child defined.
§ 2151.021 Juvenile traffic offender defined.
§ 2151.022 Unruly child defined.
§ 2151.03 Neglected child defined.
§ 2151.04 Dependent child defined.

[7] *Supra* n. 1.

[8] Calif. Welf. and Inst. Code § 503 (West 1966).

[9] N.Y. Fam. Ct. Act § 782 (McKinney 1963).

[10] Malone v. State, 130 Ohio St. 443, 5 Ohio Op. 59, 200 N.E. 473 (1936).

[11] 33 Ohio Jur. 2d, Juvenile Courts § 4 (1958).

[12] *Supra,* n. 2, 3, 4, 5, 8, 9, and *infra,* n. 16, 17.

Treatment of Juveniles

In caring for delinquents, the emphasis has been placed upon rehabilitation, re-training, and general programs of restoration, in an attempt to direct a misguided youth. These developments are helpful in solving the problem, but their effectiveness is of questionable value.[13]

California provides by statute that the juvenile's probation officer should recommend a disposition of the case to the judge,[14] and further has a code section permitting destruction or sealing of the juvenile's record after five years.[15] And the legislature in Ohio, following the California provision, permitted as recently as 1969, that delinquents and unruly children (two of the five classes of juveniles under supervision of Juvenile Court) may apply to the court for expungement of their record; or the court may initiate this proceeding on its own.[16]

Thus, currently in Ohio, California, and New York, the trend is to afford protection to the wayward youth, to try to provide help for him as an individual through counseling and rehabilitation, and to aid the delinquent in later life, particularly by permitting expungement or sealing of the juvenile record.

Presumption of Character

In spite of all that is being done to protect and provide care for juvenile delinquents,[17] too many *have* (regardless of the reason), broken the law. We are cognizant of the courts desire on the one hand to prevent the crime cycle from repeating itself and to allow for the young person involved to have a second chance—a practice which ought to be maintained.

In the opinion of this writer, the court's decision in the recent case of *State v. Hale*,[18] was a correct and valuable one. It facilitated

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[13] Personal interview with Mr. William H. Hill. He received his M.A. in Social Work from the University of Michigan in May, 1969. Currently, he is employed at the Bureau of Juvenile Placement, Ohio Youth Commission. He has worked in the field of Juvenile Correction for five years.

[14] Calif. Welf. and Inst. Code § 581 (West 1966).

[15] *Id.* § 581.

[16] *Supra,* n. 1.

[17] Protection comes both from the state legislature (outlined in notes 1, 2, 3, 4, 5, 6, 7, 8, 9, 16, 17, 18 *supra*) and by case law case (cited in note 10 *supra*) and by Federal Case law as evidenced by recent decisions, notably, In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) wherein it was held that procedural safeguards of due process are applicable in juvenile proceedings, and U.S. v. Costanzo, 395 U.S. 441 (1968) which held that the burden of proof in a juvenile case, although a civil proceeding, is that of proof beyond a reasonable doubt. *See also,* In re Whittington, 13 Ohio App. 2d 11 (1967), 42 Ohio Op. 2d 39, 233 N.E. 2d 333 (1967), *vacated* in, In re Whittington, 391 U.S. 341, 20 L. Ed. 2d 625 (1967). Query as to the benefit offered to the juvenile defendant, however, since much of the judicial informality is lost by the requirement of strict application of legal tests and doctrines.

[18] State v. Hale, 21 Ohio App. 2d 207, 50 Ohio Op. 2d 340, 256 N.E. 2d 239 (1969).

justice and aided the court in arriving at the truth, even though this involved exposing the existence of a juvenile record, seemingly contrary to the intent of the Ohio legislature.

The relevant facts of the case are as follows: The defendant, Jewell Hale, was convicted of murder in the first degree. At trial, his mother testified that he never had been in trouble with the police. A minister, one Landis C. Brown, testified that the defendant was a good boy, and, "This is the first time we ever heard about Jewell, anything wrong." One Susie Allen testified for the defense to the effect that this was Jewell's first offense.

In rebuttal, the state called Mr. Andrew McFarland, the Clerk of the Franklin County Juvenile Court, who testified that Jewell Hale had previously been charged with breaking and entering in the night season, and that he subsequently had been found to be delinquent and placed on probation. Also, a Franklin County probation officer identified the record as being that of Jewell Hale and testified that he had served as probation officer for Jewell Hale. The trial court overruled defense counsel's motion for mistrial, and permitted the testimony to stand.[19]

The question then that arises is that of the general presumption of good character of any defendant. By *general character of a party* is meant the reputation which he carries, or the estimation of him by the members of the community where he has lived.[20] Generally, the reputation of the defendant is limited in this manner.[21]

The law regarding character presumption is rather well settled. Ohio case law indicates that presumption favors the defendant's character and his good reputation. Until the defendant offers evidence of his good character, the state, in its case in chief may not offer evidence of his bad character or reputation.[22] Other authority generally holds that the same is true.[23]

Elaborating on the question of character, and speaking for the Second Circuit Court of Appeals, Judge Learned Hand pointed out that generally the prosecution is not permitted to introduce any kind of evidence of a defendant's evil character in order to establish guilt.[24]

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[19] *Id.* However, *see contra* Malone v. State, 130 Ohio St. 443, 200 N.E. 473 (1936).

[20] Griffin v. State, 14 Ohio St. 55 (1862); Booker v. State, 33 Ohio App. 338, 169 N.E. 588, 7 Ohio L. Abs. 652 (1929).

[21] People v. Van Gaasbeck, 189 N.Y. 408, 82 N.E. 718 (1907).

[22] State v. Cochrane, 151 Ohio St. 128, 84 N.E. 2d 742, 38 Ohio Op. 575 (1949); State v. Ross, 92 Ohio App. 29, 108 N.E. 2d 77, 62 Ohio L. Abs. 562, 49 Ohio Op. 196 (1952); Sabo v. State, 119 Ohio St. 231, 163 N.E. 28 (1928); State v. Pigott, 1 Ohio App. 2d 22, 33 Ohio Op. 2d 56, 197 N.E. 2d 911 (1963).

[23] Greer v. U.S., 245 U.S. 559, 38 S. Ct. 209, 62 L. Ed. 469 (1918); People v. Greenwall, 108 N.Y. 296, 15 N.E. 404 (1888); State v. Remick, 156 Wash. 19, 286 P. 67 (1930).

[24] Nash v. U.S., 54 F. 2d 1006 (2d Cir. 1932).

Following Learned Hand's reasoning, an Ohio case which involved a juvenile charged with two counts of first degree murder, including killing a police officer, held that the law does not automatically fasten guilt upon an accused person merely by the introduction of character evidence which indicates that the defendant is predisposed to commit a criminal act.[25]

Other case law points out that the accused in a criminal case is limited in presenting evidence that would prove such traits of character that tend to make it improbable that he would or could have committed the crime charged.[26] Another limitation is that the defendant is barred from using one particular good action to establish his character in general. Evidence of specific acts of conduct of a person upon particular occasions, bearing upon his character, is usually held to be inadmissible.[27] Additionally, evidence of the accused's good reputation can be objected to on the ground of remoteness in time, but the resolution of this question is left to the discretion of the trial judge.[28]

Further, it has been held that the reputation of a defendant is of a special nature; if it is of a defendant who enjoyed a fine reputation in Tennessee, where he spent summer vacations, but was domiciled and resided in another state, his Tennessee reputation is not competent to establish his general reputation.[29]

The development of an interesting line of old New York cases almost a century ago suggests some problems earlier faced by the court, which reflect modern rules as they are still law in New York. In *Brandon v. The People,* the court held that where a defendant takes the stand in her own behalf, she becomes a competent witness, and whether or not her character is in issue, she may be compelled to answer questions on cross-examination about her past.[30] The *Brandon* decision was followed and held to be controlling in the case of *Connors v. The People.* In writing that decision, Chief Justice Church pointed out that if a defendant volunteers and consents to be a witness, he temporarily occupies that position and subjects himself to all duties and obligations thereof. Since he is a volunteer, he cannot complain if he gives evidence which bears against him, because the primary cause of his testimony arises from the fact that he is a volunteer.[31] And finally,

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[25] State v. Ross, *supra* n. 22.

[26] *Id.*

[27] State v. Dickerson, 77 Ohio St. 34; 82 N.E. 969 (1907); State v. Cochrane, 151 Ohio St. 128, 38 Ohio Op. 575, 84 N.E. 2d 742 (1949).

[28] Strader v. State, 208 Tenn. 192, 344 S.W. 2d 546 (1961); People v. Green, 217 Cal. 176, 17 P. 2d 730 (1932).

[29] State v. Farley, 112 Ohio App. 448, 176 N.E. 2d 232 (1960).

[30] Brandon v. The People, 42 N.Y. 265 (1870).

[31] Connors v. The People, 50 N.Y. 240 (1872), *but see* People v. Crapo, 76 N.Y. 291 (1879).

the Chief Justice himself, writing six years after the *Connors* decision, distinguished that case in *People v. Brown,* where he found that in spite of the fact that a defendant becomes a witness and may thereby subject himself to the duties of a witness, he does not waive his rights as a defendant in the case, and he may not be compelled to answer certain questions.[32]

At what point in the proceedings does character become an issue in the trial? Character can become an issue when defense counsel offers evidence of general good reputation, as is done in an opening statement to the jury,[33] or by a single statement made by the defendant himself about his character or reputation;[34] or, as in an Ohio case involving an adult indicted for murder, if he offers himself as a witness and testifies in chief, he is subject to a legitimate and pertinent cross examination. [35]

Cross-examination and Judicial Discretion

Once character becomes an issue, the burden of going ahead with the evidence falls on the prosecutor. But, as with the limits on the presumption, there are also limits on the prosecutor's right of cross examination. One such limitation is that the testimony must not go beyond the scope of the defendant's case in chief, unless specially warranted. In determining Ohio law on this point, for example, it is clear that if evidence of the accused's good character upon a trait involved in a particular case is presented by the accused, then by introducing that evidence, the accused opens the question of his character and the state may properly rebut such testimony—pertaining to the character trait of the accused.[36] The state may not, however, introduce evidence not intimately and directly connected to the case on trial.[36a]

Another limitation on cross examination involved an interesting juvenile case somewhat parallel to the case of *State v. Hale,*[36b] where the defendant was permitted by the trial court, and over the objections of the prosecuting attorney, to testify as to where and how he had spent the previous years of his life. In his narration, the defendant neglected to mention his incarceration at the Boys Industrial School while still a juvenile. Upon cross-examination, the prosecutor was permitted to inquire as to this part of the defendant's history. Thus, the

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[32] People v. Brown, 72 N.Y. 571, 28 Am. Rep. 183 (1878).
[32a] Ferguson v. Georgia, 365 U.S. 570, 5 L. Ed. 2d 783, 81 S. Ct. 756 (1961).
[32b] State v. Williams, 337 Mo. 884, 87 S.W. 2d 175, 100 A.L.R. 1503 (1935).
[33] Sabo v. State, *supra* n. 22.
[34] Jackson v. State, 29 Ohio App. 416, 6 Ohio L. Abs. 248, 163 N.E. 626 (1928).
[35] Hanoff v. State, 37 Ohio St. 178, 41 Am. R. 496 (1881).
[36] Booker v. State, 33 Ohio App. 338, 7 Ohio L. Abs. 652, 169 N.E. 588 (1929).
[36a] State v. LaPage, 57 N.H. 245 (1876).
[36b] State v. Hale, *supra* n. 19.

defendant can waive the presumption which is in his favor.[37] However, in that case, no juvenile record was introduced—hence there was no problem with the statutory prohibition on admitting such evidence. The same is true in Michigan, where it was held reversible error to refuse to allow cross-examination of an accused's daughter as to the mere existence of her juvenile record in order to impeach her credibility.[37a] Generally, evidence of character may be used to attack the veracity of a witness or to prove specific facts in issue.[38]

It is upon the shoulders of the trial judge to determine when a cross-examination question will be permitted to be asked of the defendant, and when an answer will be compelled, and whether or not the rights of the defendant are being violated.[39] The status of the law regarding judicial discretion in Ohio was defined by Judge Johnson when he commented that the court has the discretion to limit cross-examination of the defendant on matters not relevant to the issue for the purpose of judging the character and credit of the defendant from the defendant's own voluntary admissions.[40] However, rules of evidence indicate that it is perfectly permissible, and well within the limitations of the Confusion of Issues and Unfair Surprise doctrines, to question the defendant as to specific acts of misconduct on cross-examination.[41]

In a New York case it was held that the court in which a case is tried may, in the exercise of its discretion, exclude disparaging questions not relevant to the issue, put on cross examination for the purpose of impairing a person's credit, and it may, in its sound discretion, allow such questions where there is reason to believe they may tend to promote the ends of justice.[42] The same is true in Ohio, where it was held that on cross examination, pertinent questions about the past life of the defendant may be asked of the defendant, or of the witnesses, for the purpose of affecting the credibility of either the defendant or the witnesses.[43]

And evidence of a prior offense committed by the defendant, identical to the one for which he is now being tried, is not prejudicial if the trial judge limits use of evidence to the credibility of the witness,[44]

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37 State v. Marinski, 139 Ohio St. 559, 23 Op. 50, 41 N.E. 2d 387 (1942).

37a People v. Smallwood, 306 Mich. 49, 10 N.W. 2d 303 (1943).

38 Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213 (1948).

39 City of Piqua v. Collett, 78 Ohio L. Abs. 216, 151 N.E. 2d 770 (1956).

40 *Supra* n. 35.

41 3 Wigmore on Evidence, § 981 (3d ed., 1940).

42 Third Great Western Turnpike Road Company v. Loomis, 32 N.Y. 127, 88 Am. Dec. 311 (1865), *re-aff'd* Greton v. Smith, 33 N.Y. 245.

43 State v. Baldridge, 75 Ohio L. Abs. 549, 144 N.E. 2d 656 (1956).

44 State v. Deboard, 116 Ohio App. 108, 21 Ohio Op. 2d 398, 187 N.E. 2d 83 (1962).

although evidence of collateral offenses is insufficient to establish either probable guilt of the defendant or substantive evidence of the matter on trial, and its admission constitutes reversible error.[45]

Occasionally, however, an overzealous prosecutor may go too far in his cross-examination, and may get a result such as that found in an old Ohio case where the prosecutor asked pertinent questions about the past life of the defendant, Wagner, for the sole purpose of discrediting him in the eyes of the jury. The prosecutor failed to produce any evidence that the convictions resulted from the inquired-about indictments, since no convictions ever had resulted. This type of questioning is considered prejudicial to the defendant and will not be permitted.[46] And it is the kind of thing that prosecutors are continually attempting to circumvent.[47] For example, a defendant may be asked, but cannot be compelled to answer, how many times he has been arrested in the past.[48] A prosecutor may not ask a defendant if he had ever robbed a store prior to the present robbery trial[49] (which would have been reversible error had not the trial judge instructed the jury as to how to weigh this evidence), nor may a prosecutor ask a defendant if he had ever been *tried* for attempted theft,[50] (which was prejudicial error and hence reversible), nor may he inquire about indictments without substantial proof that such indictments exist.[51]

Similarly, if testimony is presented, and is relevant, but unconnected to the case being tried, and it appears prejudicial to the rights of the accused, error will result if no corrective measure is taken and the error becomes apparent.[51a] Should evidence be presented which is flagrantly violative of the rights of the accused, with no objection on the part of the defense counsel nor any applicable or pertinent jury instructions, the defendant in such case will be deemed to have been denied right to counsel, in the wake of this reversible error.[51b]

Historically, the scope of cross-examination dictates that cross-examination is not limited to the subject matter of the examination in chief, but is open to all matters pertinent to the issue on trial.[52] Thus, while some jurisdictions prohibit questioning of the accused as to his prior arrests, it may be permissible,[52a] particularly when the

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[45] State v. Watson, 20 Ohio App. 2d 115, 49 Ohio Op. 2d 152, 252 N.E. 2d 305 (1969).
[46] Wagner v. State, 115 Ohio St. 136, 24 Ohio L. Rev. 456, 4 Abs. 358, 152 N.E. 28 (1926).
[47] Columbus v. Mercer, 118 Ohio App. 394, 25 Ohio Op. 290, 194 N.E. 2d 901 (1963).
[48] Coble v. State, 31 Ohio St. 100 (1876).
[49] State v. Witsel, 144 Ohio St. 190, 29 Ohio Op. 374, 58 N.E. 2d 212 (1944).
[50] Ohio v. Crawford, 17 Ohio App. 2d 141, 46 Ohio Op. 2d 175, 244 N.E. 2d 774 (1969).
[51] *Supra* n. 46, 47.
[51a] State v. Peters, 12 Ohio App. 2d 83, 41 Ohio Op. 2d 160, 231 N.E. 2d 91 (1967).
[51b] State v. Cutcher, 17 Ohio App. 2d 107, 46 Ohio Op. 2d 156, 244 N.E. 2d 767 (1969).
[52] Legg v. Drake, 1 Ohio St. 286 (1853).
[52a] People v. Cunningham, 300 Ill. 376, 133 N.E. 270 (1921).

defendant himself testifies and thereby makes himself an ordinary witness.[52b]

The Confrontation

Recalling that a defendant may place his character in issue in a proceeding merely by calling witnesses to testify as to his character, thereby waiving the presumption of character which is in his favor,[53] and perhaps subjecting himself to a liberal cross-examination to test the validity of such testimony,[54] there seems to be no reason why these same rules of evidence do not apply equally to adults with juvenile records. That, however, is a special case which involves a statutory requirement forbidding the use of a juvenile record to discredit a defendant.[55] Thus, we return again to the problem. Under what circumstances, if any, is it permissible to admit evidence of a prior juvenile conviction in a later adult proceeding? It is precisely this conflict, the presumption vis-a-vis the statute, to which the case of *State v. Hale,* addressed itself.

The Resolution

In an effort to overcome testimony which tended to establish the non-existent good character of the defendant, the court held that where a defendant or defense witness raises the issue of the defendant's character, and the court in its discretion refuses to permit reasonable cross-examination on such issue, the introduction of a juvenile record as direct evidence to meet such character issue is not prejudicial error.[56]

To those who would argue that some other means could have been found to rebut the testimony of the defendant's mother, his minister, and Miss Allen, one must reply that a trial is not meant to be mainly a contest between lawyers, nor a show for a panel of jurors. Rather it is supposed to be an attempt to find the truth.[57]

Conclusion

While children do need to be afforded protection, and not to be subjected to treatment as harsh as that given to adult offenders, nevertheless they ought not be allowed to hide forever behind the shield of youth. When a crime has been committed, we should not pretend that it has not happened. Protection for youth, yes, but not at the expense of our social and judicial system.

[52b] People v. La Verne, 84 Cal. App. 685, 258 P. 463 (1931).
[53] *Supra* n. 44.
[54] Lee v. State, 21 Ohio St. 151 (1871).
[55] *Supra,* n. 10.
[56] *Supra* n. 55.
[57] 3 Schweitzer, Trial Guide 1426 (1945).