SHERIFFS--POLICE OFFICERS--FINGER-PRINTS: When the sheriff or police officer is entitled to finger-print and photograph without incurring personal liability. Admissibility of photographs and finger-prints in evidence in criminal cases.

January 10, 1936.

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Honorable C. A. Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We acknowledge your request for an opinion dated December 27, 1935, which reads as follows:

> "Several municipalities of the County of St. Louis are planning a unified bureau of identification through which the police departments will operate. They have requested an opinion from your department on the following subjects.
>
> "When is a department within its legal rights in photographing a prisoner, and when is it within its legal rights in fingerprinting a prisoner?
>
> "They wish to know if they can photograph and fingerprint anyone picked up on suspicion by the Police Department without danger of suit, and they wish to be fortified with an opinion on the matter from you."

Section 3794 R. S. Mo. 1929 provides:

> "Any person convicted of a felony, which shall not be set aside or reversed, may be subjected by or under the direction of those in whose custody he is to the measurements, processes and operations practiced under the system for the identification of criminals, commonly

> known as the Bertillon signaletic system. Such force may be used as necessary to the effectual carrying out and application of such measurements, processes and operations; and the signaletic card and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law."

Section 3795 R. S. Mo. 1929, provides:

> "No one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication shall incur any liability, civil or criminal, for anything lawfully done under the provisions of section 3794 of this article."

Section 3796 R. S. Mo. 1929, provides:

> "The enforcement of the provisions of this article by the authorities in charge of the state penitentiary, police department and others having the custody of those convicted of a felony which shall not be set aside or reversed, is hereby made mandatory."

The three above statutory provisions apply where the prisoner in custody has been convicted of a felony and said conviction has not been set aside or reversed. In cases where finger-prints and photographs are desired by police and sheriffs of one arrested who has never been convicted of felony we must look to the Constitution, Common Law and other provisions of the Statutes.

12 Corpus Juris, page 997, Section 415 reads in part as follows:

> "The police power is an attribute of sovereignty and exists without any reservation in the constitution, being founded on the duty of the state to protect its citizens and

> provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly governments, because necessary to the proper maintenance of the government and the general welfare of the community. On it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. * * * * The constitution presupposes the existence of the police power and is to be construed with reference to that fact."

12 Corpus Juris, page 908, Section 416 reads in part as follows:

> "It has been found impossible to frame, and is indeed deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto, the power being coextensive with the necessities of the case and the safeguards of the public interest. Notwithstanding the impossibility of exact definition of the scope of the police power, numerous efforts have been made to define its scope in a general way. It has been said that the scope of the police power is as broad as the public welfare and that the police power is the broadest in scope of any field of governmental activity. * * * *
>
> "The police power extends to the protection of the lives, health, comfort, and quiet of all persons, and the

> protection of all property within the state. * * * *
>
> "All natural persons within the state, and all corporations doing business within the state or created thereby, hold their property and engage in their business subject to the police power of the state.* * * *
>
> "The mere fact that a law restrains the liberty of citizens of the state, or the liberty of citizens of the United States, does not render it unconstitutional.
>
> "The police power is not exhausted by being once exercised on any subject falling within its scope. The right to exercise the police power is a continuing one."

12 Corpus Juris, page 928, Section 440 reads in part as follows:

> "* * * * The fourteenth amendment to the constitution of the United States provides, 'nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law'; and thus adds to the express limitations on the power of the states. It does not deprive the states of their police power, however; and, subject to the limitations expressed therein, the states may continue to exercise their police powers as fully as before the adoption of the amendment."

Article II, Section 23 of the Missouri Constitution provides in part:

> "That no person shall be compelled to testify against himself in a criminal cause,* * * *."

Article II, Section 30 of the Missouri Constitution provides:

> "That no person shall be deprived of life, liberty or property without due process of law."

The purpose of obtaining finger-prints and photographs of persons, by the State agencies, in the exercise of police power, is for comparison of genuine photographs and finger-prints with purported likenesses. It is for the purpose of comparing the genuine with the disputed writing in order that suspected criminals may be apprehended and prosecuted. If this comparison affords a circumstance relative to the issues of a criminal cause, our Legislature has provided in Section 1751 R. S. Mo. 1929, as follows:

> "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

In the above section the Legislature presupposes that, within constitutional and common law limitations, genuine finger-prints and genuine photographs are available as evidence in a criminal cause.

On the other hand, pursuant to constitutional rights, our Legislature has provided in Section 3692 R. S. Mo. 1929, the following:

> "* * * *Provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify, * * * "

In this State compulsory incrimination is frowned upon by the Constitution, and in State v. Thomas, 250 Mo. 189, l. c. 212; 157 S. W. 330, our Supreme Court said:

> "We are aware that it is generally held that the constitutional guaranties against being compelled to testify against one's self do not apply to facts elicited by an officer through interrogatories propounded to a prisoner out of court, but we are convinced that the distinction is often more apparent than real. Both the Federal and State Constitutions are always liberally construed so as to prevent compulsory self-crimination."

Where self-incriminating evidence is voluntarily obtained from a person on trial or examination, then such evidence is properly admissible against an accused. In other words by voluntarily allowing genuine photographs and finger-prints to be taken of one's person, then that person on trial will not be heard to assert any constitutional or statutory protection that the evidence was obtained by compulsion.

In the case of State v. Sexton, 147 Mo. 89, l. c. 100; 18 S. W. 452, our Supreme Court said this about forcing evidence from an accused:

> "The testimony as to tracks being found 'in the brush' near the scene of the homicide, and that according to the dying declaration of Stark, defendant emerged from that brush when he presented the revolver and demanded Stark's money, and that the shoes of defendant fitted those tracks, was competent evidence (1 McClain's Crim. Law, section 408), and the admissibility of such evidence was not affected by the fact that two or three days had elapsed between the time of the shooting and the fitting of the shoes to the tracks; that was for the consideration of the jury; they were to give to the correspondence between the shoes and the tracks such weight as they though it to be entitled. Nor was

> the use of defendant's shoes for the purpose indicated, any violation of his constitutional rights, since he surrendered his shoes upon request of the sheriff. If they had been forced from him and then used against him, a different question might be presented not necessary to be now considered."

Involuntary self-incriminating evidence obtained from a person charged with crime is condemned by our courts and the Federal and State Constitutions are always liberally construed so as to prevent compulsory self-crimination.

The right to take a photograph and finger-print from the person of an accused, after his arrest by the officer making the arrest, and use same as evidence, is almost synonymous with the right to take papers from the person of the accused after arrest, and use same as evidence.

In the case of State v. Sharpless, 111 S. W. 69, 212 Mo. 176, l. c. 199, the Supreme Court held it proper to take papers from accused at the time of arrest, and use the same in trial against the accused. The Court said:

> "The rule applicable to this proposition is nowhere more clearly stated than in State v. Flynn, 36 N. H. 64, cited by the Massachusetts court in the quotation heretofore made. That court, speaking through Judge Bell, treated this question in this way. He said: 'It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses,

> as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. If a party should have the power to keep out of sight, or out of reach, persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence which he has been compelled to furnish against himself. It is their own. It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his.' "

There are no Missouri cases bearing exactly on the question of admissibility in evidence of photographs and finger-prints, however we call you attention to the reasoning in People v. Sallow, 165 N. Y. S. 915, which influences us in our conclusion.

In the leading case of United States v. Kelly (1932) 55 Fed. 2nd. 67, that court held that Federal police officers can legally finger-print one, at the time of his arrest, for a misdemeanor by reason of the police power that enables the State or Federal Government to use all means necessary to identify criminals and detect crime, and at l. c. 68 the court said:

> "Such means for the identification of prisoners so that they may be apprehended in the event of escape, so that second offenders may be detected for purposes of proper sentence where conviction is had, and so that

the government may be able to ascertain, as required by section 29, title 2, of the National Prohibition Act, whether the defendant has been previously convicted, are most important adjuncts of the enforcement of the criminal laws.

"Any restraint of the person may be burdensome. But some burdens must be borne for the good of the community. * * * * The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest.

"Arrest upon probable cause and search of the person in connection with the arrest and seizure of evidences of crime have long been allowed. * * * * Yet the person arrested and thus humiliated may be entirely innocent. * * * *.

"Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification."

The above case cites cases showing that it was held lawful, though before conviction, to finger-print a person on arrest for a felony in the following states: Maryland, Indiana, Arkansas, District of Columbia, New Jersey and New York.

CONCLUSION.

Where the person arrested has been convicted of a felony and same has not been set aside or reversed, it is the duty of the police and sheriffs to photograph and finger-print the suspect, and the official does so without personal liability on his part. The Statutes above quoted are clear in such cases.

We are of the opinion that where the officer in the reasonable exercise of his police power desires to photograph and finger-print any person under arrest who is suspicioned of a felony and is being examined relative to his connection with said felony, said officer may properly do so in the performance of his duty, and violates no constitutional or personal right of the person under examination. However, discretion should be used and official authority should not be abused by inhuman and unreasonable exercise of this official authority to take photographs and finger-prints, for in such a case personal liability might attach to the officer taking the photographs and finger-prints.

There must be reasonable grounds for suspicioning a person of a felony before photographing or finger-printing him, and the mere fact that an officer encounters a stranger is not of itself grounds to suspicion him of a felony. There is no general license to officers to photograph and finger-print every person whom they arrest. There must have been a felony committed and the person arrested must understand that he is being examined relative to such felony and not on a general clean-up program where photographs and finger-prints are to be placed on record to be used in evidence in felonies which might be committed in the future. Legitimate police power is only coextensive with the necessities of the case and to properly safeguard the public interest.

We are of the further opinion that where photographs and finger-prints are obtained in the reasonable exercise of police power, they are admissible in evidence against an accused without violating any constitutional right inuring to the accused.

Respectfully submitted

APPROVED: WM. ORR SAWYERS
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