

IN THE SUPREME COURT OF FLORIDA

EARL WYCHE,

Petitioner,

v.

CASE NO. SC05-1509

STATE OF FLORIDA,

Respondent.

_____ /

On Discretionary Review from the District
Court of Appeal, First District of Florida

SUPPLEMENTAL ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS

On December 11, 2001 (R1:49, ¶2) a police investigator (VanBennekom) told Wyche he was investigating a Winn Dixie burglary which had not actually occurred, but did not tell Wyche he was suspected in rape which had happened. VanBennekom requested Wyche's consent to a mouth-swab for a saliva sample; Wyche consented. (T3:11-12).¹ The DNA in the saliva matched DNA in blood found at the gift shop where Wyche had worked (T4:179-202), but exonerated him of the rape. (R1:50; T4:269-72).

When he consented to the swabs, Wyche was in custody for violating probation in "Columbia County case 01-826 CF." (R1:49, ¶2). That motion also indicated he was on probation *Id.* In that case, he pled guilty to cocaine possession and another offense. (R:95). To prove Wyche was an habitual felon, the State adduced two prior criminal judgments. One was the Columbia County case (01-826) just noted. In the other (Columbia County case 95-472), Wyche pled guilty to the second degree felony of burglary of a dwelling before the saliva swabs were taken. (R:100, 104).²

¹The record consists of one volume of filings cited (R:[page no.]); and four volumes of transcript cited (T[vol. no.]:[page no.]). State-supplied emphasis is noted as [e.s.]. Wyche's supplemental initial brief is cited (SuppIB, p.__).

²This court can rely on Wyche's criminal history as shown on DOC's website. See Shadler v. State, 761 So.2d 279, 282-4 (Fla. 2000) (using information from the "internet web page" of DHSMV to conclude DHSMV is a law enforcement agency), *cert. den.*, 531 U.S. 924 (2000).

SUMMARY OF ARGUMENT

Wyche pled guilty to a burglary in 1995, and was "convicted" for purposes of §943.325, Florida Statutes (2001). The 1995 burglary was a crime under §810.02, Florida Statutes. Therefore, under §943.325 (2001), he was required to provide saliva ("other biological specimens") for DNA analysis.

Wyche had no reasonable expectation of privacy in saliva, compared to the State's interests in apprehending criminals, etc. Consent was not necessary. Applying the 2001 statute to him did not implicate the Fourth Amendment. Any nominal trickery in obtaining the swabs did not abridge the Fourth Amendment. The trial court, by denying suppression, reached the right result. Its ruling must be upheld.

ARGUMENT

WHETHER THE STATE COULD HAVE TAKEN SALIVA SAMPLES AS BIOLOGICAL SPECIMENS PURSUANT TO §943.325, FLORIDA STATUTES (2001), WITHOUT WYCHE'S CONSENT.

This court's October 19, 2006 order directed the State to file a supplemental answer brief "specifically addressing the applicability and impact of section 943.325, Florida Statutes, on the issues in the case." That statute requires certain individuals to provide blood or other biological specimens for DNA analysis.

Here, saliva swabs were obtained in December 2001, while Wyche was under unchallenged arrest for violating probation. At that time, the relevant part of §943.325 provided:

§943.325 Blood or other biological specimen testing for DNA analysis.--

(1)(a) Any person who is convicted or was previously convicted in this state for any offense or attempted offense enumerated in paragraph (b), ... who is either:

1. Still incarcerated, or

2. No longer incarcerated, or has never been incarcerated, yet is within the confines of the legal state boundaries and is on probation ...,

shall be required to submit two specimens of blood or other biological specimens approved by the Department of Law Enforcement to a Department of Law Enforcement designated testing facility as directed by the department.

(b)1. Chapter 794, chapter 800, s. 782.04, s. 784.045, s. 810.02, s. 812.133, or s. 812.135. [e.s.].

Under §943.325(1)(c), "any person" includes an adult under DOC supervision. Under §943.325(10)(e), the local law enforcement agency which had custody over a person "shall assist in the [collection] procedure," and may use reasonable force, if necessary; so long as the collection procedure is done in a "reasonable manner."³

Subsection (11) addressed the situation of a "convicted person" required to submit specimens, but who had not done so. Under that subsection, "any law enforcement agency" could apply to the circuit for an order to authorize taking of the specimens. Such order was to be issued upon probable cause. Of importance here, subsection (13) provided:

[If] a law enforcement agency ... fails to strictly comply with this section or to abide by a statewide protocol for collecting ... other approved biological specimens, such failure is not grounds for challenging the validity of the collection or the use of a specimen, and evidence ... may not be excluded by a court.

Therefore, the State's failure to obtain a warrant of itself did not require suppression.

³Under §943.325(9)(d), FDLE was to adopt rules addressing, among other things, "the proper procedure for state and local law enforcement ... to collect and submit ... "other approved biological specimen samples[.]" See FDLE rule 11D-6.001(2), Fla. Admin. Code (defining "other approved biological specimen" as "epithelial cells collected from the cheek in the oral cavity utilizing an FDLE-approved swab collection kit"); and rule 11D-6.003(2) (describing procedures for collecting "other approved biological specimen[s];" that is, "oral swabs").

Among other past crimes, Wyche pled guilty to burglary of a dwelling under §810.02, Florida Statutes. (R:100, 116). Under §943.325(10)(d), such plea is treated as a "conviction." See *id.* ("For the purposes of this section, conviction shall include ... entry of a plea of nolo contendere or guilty, regardless of adjudication[.]"). Consequently, §943.325 required him to provide saliva swabs as "other biological specimens."

Nothing indicates Investigator VanBennekom obtained a court order for Wyche to provide the saliva swabs at issue. However, under subsection (13) that circumstance does not require suppression. Everything else indicates the swabs were obtained without force. Nothing in Wyche's motion to suppress alleges any defect in the collection procedure or later DNA analysis, or complains about the apparent failure to get a court order. Instead, the motion acknowledges a benefit to Wyche, that no match was obtained in the sexual assault case. (R:50, ¶3).

Application of the statute to Wyche does not abridge the Fourth Amendment, because he had no reasonable expectation of privacy against providing a saliva sample by oral swab; compared to the State's interest in apprehending criminals, absolving innocent persons, etc. See L.S. v. State, 805 So. 2d 1004, 1008 (Fla. 1st DCA 2001), *rev. den.*, 821 So. 2d 297 (Fla. 2002) (concluding: "[A] 'convicted' person, as defined in section

943.325, has no reasonable expectation of privacy with respect to the taking of a blood sample for DNA testing that outweighs the state's interests"); Smalley v. State, 889 So. 2d 100, 105 (Fla. 5th DCA 2004) (same); Gonzalez v. State, 869 So. 2d 1231 (Fla. 2nd DCA 2004) (finding no merit in argument that §943.325 is unconstitutional). See also United States v. Kincade, 379 F.3d 813, 830-1 (9th Cir. 2004) (en banc), cert. den., 544 U.S. 924 (2005) (contrasting the "special needs" and "totality of circumstances" approaches to analyzing compulsory DNA statutes [compiling cases], and upholding application of federal statute to "certain conditionally-released federal offenders").⁴ Cf. Wyche v. State, 906 So. 2d 1142, 1147 n.2 (Fla. 1st DCA 2005) [decision below] (noting there "should be no different treatment of DNA from fingerprint samples and ... and fingernail scrapings [cite omitted].").

It does not matter whether Wyche's consent was voluntary or involuntary in light of the investigator's representations. See *id.* at n.2 ("The issue of deception is irrelevant when consent

⁴The Kincade majority held the Fourth Amendment was not violated by the federal statute, but only a plurality agreed on the rationale. Compare 379 F.3d at 832, 835-9 (five judges using a totality-of-the-circumstances analysis); with 379 F.3d at 840-2 (one judge using a special needs analysis). The court declared: "[W]e today realign ourselves with every other state and federal appellate court to have considered these issues--squarely holding that the [federal] DNA Act satisfies the requirements of the Fourth Amendment." *Id.* at 839.

is not required."). He had no right under the Fourth Amendment to refuse to provide saliva samples. Although his consent was not required, the fact it was obtained led to a very minimally intrusive procedure--oral swabbing with no force necessary.

Neither of Wyche's prior criminal judgments required him to provide blood or other specimens. (R:95, 100). When he committed the 1995 burglary, he was not required to do so under the 1995 version of §943.325. However, the requirement that he do so, in the 2001 version of §943.325, was in place when VanBennekom requested consent to the swabs.

In any event, §943.325 applies retroactively. See Morrow v. State, 914 So. 2d 1085, 1086 (Fla. 4th DCA 2005) (concluding §943.325 applies retroactively, and observing that the statute "does not alter the elements of Morrow's criminal conduct or increase the penalty for his crime"). That Wyche was not required by statute or judgment to provide DNA samples when he committed the 1995 burglary is immaterial.

CONCLUSION

The State could have taken saliva samples as "biological specimens" pursuant to §943.325, Florida Statutes, without Wyche's consent; and without abridging the Fourth Amendment. The trial court reached the right result by denying suppression. Its ruling must be upheld.

CERTIFICATES OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this SUPPLEMENTAL BRIEF has been sent by U.S. mail to Wyche's attorney: **G. KAY WITT**, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301; on November ____, 2006. I also certify this brief complies with Fla.R.App.P. 9.210.

Respectfully submitted,

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