IN THE SUPREME COURT OF FLORIDA

EARL WYCHE,

Petitioner,

v.

CASE NO. SC04-1509
L.T. No.: 1D03-5211

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

CONSTITUTIONS

OTHER

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AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

This brief is being filed pursuant to the Order of this Court issued on October 19, 2006, directing the parties to serve supplemental briefs specifically addressing the applicability and impact of section 943.325, Florida Statutes on the issue raised in this case, to wit: the trial court's denial of Petitioner's motion to suppress saliva swabs and related DNA test results, where Petitioner's consent to the taking of the swabs was obtained through the use of impermissible police trickery in violation of his constitutional rights.

The record on appeal consists of five volumes. Citations to Volume I, containing copies of the pleadings and orders filed in this cause, shall be by the letter "R" followed by the appropriate page number[s] in parentheses. Citations to Volume

II, containing a transcript of the jury selection proceedings; Volumes III and IV, containing a transcript of the jury trial; and Volume V, containing the sentencing proceedings, shall be by the volume number in Roman numerals, followed by the appropriate page number[s] in parentheses. A current copy of "Inmate Population Detail" for Earl V. Wyche from the Department of Corrections website is attached as an appendix and will be referred to as "App."

STATEMENT OF THE CASE AND FACTS

Petitioner, EARL WYCHE, was charged by information with Count I, burglary of a structure; Count II, grand theft; and Count III, criminal mischief (R-102). The case proceeded to jury trial.

Prior to trial, defense counsel filed a motion to suppress evidence of saliva swabs taken by Investigator Clint VanBennekom of the Lake City Police Department on December 11, 2001 (R-49-53). The motion alleged *inter alia* that the police used trickery in obtaining Mr. Wyche's consent to the taking of the saliva swabs in violation of his right against unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution, citing to ***State v. McCord,*** 833 So.2d 828 (Fla. 4th DCA 2002). Specifically, the motion alleged that on December 11, 2001, while Investigator VanBennekom was investigating an unsolved sexual assault, and after Mr. Wyche was detained by another officer for a violation of probation in Columbia County, VanBennekom used trickery to obtain Mr. Wyche's consent to give two saliva cotton swabs (R-49); that during a deposition on September 29, 2003, Investigator VanBennekom stated that "the courts had not prohibited the use of trickery" at the time that he spoke to Mr. Wyche; that VanBennekom further stated he did not believe he told Mr. Wyche that he was a suspect in a rape

case, but instead talked to him about a burglary at Winn Dixie (R-49-50); and, that the saliva swabs taken from Mr. Wyche were first compared to the samples in Investigator VanBannekom's open sexual assault case, where no match was obtained, and then, at the request of Investigator Moody, VanBennekom had the FDLE compare the swabs to samples from a robbery at the Pink Magnolia, where an alleged match was obtained. The motion further alleged that any use of the saliva swabs taken from Mr. Wyche "or the results thereof" at his trial in this case would "constitute the fruit of the poisonous tree of the prior unconstitutional search," and should be suppressed (R-50). The state filed a response alleging ***inter alia*** that the defense motion to suppress was untimely filed after jury selection; that the motion was unfounded because the objected to seizure occurred on December 1, 2001, when no Florida cases had ruled to suppress evidence obtained by means of trickery; that ***McCord*** was not decided until December 11, 2002; and, that ***"McCord*** not being held to be retrospective in application and, police officers not being expected to be prescient, the motion should be denied on its face." The state further argued that the deception employed by the police here rendered the defendant less likely to consent rather than more likely, and that under the inevitable discovery doctrine, the state could obtain additional DNA samples through discovery (R-71-73).

At a hearing on the motion, the court stated that defense counsel should be allowed to respond to the state's argument that the motion should be denied on its face, adding, "And we'll see if we even get to the motion to suppress" (III-7). Defense counsel disagreed with the state's assertion that the motion to suppress was not timely filed, pointing out that the motion was based on the testimony of Officer VanBennekom at his deposition on September 29th and was filed just two weeks later. Counsel went on to explain that while the officer stated in that deposition that he engaged in trickery which, at the time he did so, had not been "outlawed or prohibited," this statement alone was not enough for a motion to suppress. She immediately began trying to find out what VanBennekom had been referring to, or to find any case law that outlawed trickery. However, it was not until she was reviewing cases in preparation for trial that she came across ***McCord***, which she then determined was most likely what Officer VanBennekom had been referring to when he made that statement (III-8). As to the motion being filed after jury selection, counsel pointed out that the jury had not been sworn and the proceedings were still in pre-trial, thus double jeopardy had not attached (III-8-9). Counsel next pointed out that this was a legitimate issue for Mr. Wyche, and, that depending on how the court ruled on the motion to suppress, it would be an issue for appeal (III-9). After stating it was going

to hold under advisement the state's reply to the motion to suppress, "which is to deny it on its face," the court asked if counsel for the State and Mr. Wyche could stipulate as to the undisputed facts in their respective motions. Defense counsel stated that the defense would stipulate "that the testimony it would elicit from Officer VanBennekom would be that he engaged in trickery in order to get Mr. Earl Wyche to consent to a saliva swab. And that was the basis for the motion" (III-10). The prosecutor stated that Officer VanBennekom had been investigating a rape, but told Mr. Wyche that he was investigating a burglary at Winn Dixie, one that did not exist and was thus fictitious (III-11). The court clarified this, stating, "He [VanBennekom] related that to the defendant and asked for some type of swab to get DNA sample, and the defendant then consented to that. And actually, he was trying to obtain the swabs for a rape investigation." (III-11). At this point, defense counsel addressed the remaining objections in the state's reply. As to the argument that the "trickery" employed by Officer VanBennekom was "no harm/no foul," counsel argued that what ***McCord*** implies is that, had the consent to the initial swab been voluntary rather than obtained by the use of what counsel characterized as "voluntary trickery," the swab could have been used for any other open investigations (III-12). Counsel noted that in ***McCord*** the court actually refers to

Washington v. State, 653 So.2d 362, 364 (Fla.1994), where the police obtained the defendant's consent to obtain some type of physical evidence for an active case without telling the defendant that they were actually going to use it, not only for that case but for other active cases as well, and the court said that in those circumstances it was allowed. Counsel pointed out that this was not the same circumstance as occurred in Mr. Wyche's case. Here, Officer VanBennekom was actively investigating a rape case and he engaged in trickery to get Mr. Wyche to consent to giving the saliva swabs for use in that case. The officer was not actively investigating the burglary alleged in the instant case, and, in fact, used a fictitious burglary at Winn Dixie as a ruse in order to get Mr. Wyche's consent. Since the underlying consent was invalid, the state could not then proceed to use the swabs in other ongoing cases, to include the burglary alleged here (III-13). As to the state's inevitable discovery argument, counsel pointed out that the alleged incident occurred on December 5th of 2001, and while there may have been some suspicion that Mr. Wyche was involved, no warrant was issued until they obtained the DNA in October of 2002. Under the State's inevitable discovery argument, they would have had the basis to secure a warrant for Mr. Wyche before waiting for the results of the DNA to come back. Instead, they took the DNA improperly obtained by means of a ruse on

December 11th, seven days after the alleged burglary, and submitted it to FDLE, but did not issue a warrant for Mr. Wyche until after the DNA results came back ten months later. Counsel argued that had this been the product of an actual discovery, they would have issued the warrant early on in the case. Counsel further argued that, since they had no basis beyond vague tips to issue the warrant until the connection with the blood, there would have been no inevitable discovery in this case (III-14). With regard to the State's argument that this was being retroactively applied, counsel pointed out that ***McCord*** "is just clarifying what the law was at the time," in other words, ***McCord*** does not change what the law was in December of 2001, it clarifies what the law was at that time, by explaining "what the law was and has been" (III-13). The court denied the defense motion to suppress and granted the State's motion, then stated for the record that it would have done so, even if the state had not replied to the motion and asked that it be denied on its face (III-20); the court's Order denying the motion states, "Additionally: State motion for denial on its face granted" (R-82).

When the State called Investigator VanBennekom at trial, defense counsel renewed her earlier objection to the introduction of the saliva swabs based on the consent issue, and the court's ruling remained the same (III-157). VanBennekom

testified that he collected a saliva sample from Earl Wyche (III-158-59). After describing the procedure he used when collecting the sample, which was turned into Evidence at the Lake City Police Department (III-159), he testified that the purpose of collecting the sample was to send it to the FDLE crime lab for DNA analysis (III-160). On cross-examination, VanBennekom testified that he took the saliva swab on December 11th (III-163), and that he never actually interviewed Mr. Wyche with regard to this case, the one involving a burglary at the Pink Magnolia (III-164).

A laboratory analyst with the FDLE crime lab in Tallahassee testified that during the course of his duties he received some evidentiary samples from the Lake City Police Department for DNA comparison. He identified State's Exhibit 2 as the items he had received (IV-176-77). When the state sought to introduce the contents of the exhibit into evidence, defense counsel renewed her earlier objection. The court's ruling remained the same, and the exhibit was admitted (IV-178). After being received as a serological expert in the explanation of DNA (IV-178-79), the witness testified that two of the three samples tested positive for the presence of blood, while one of the samples did not (IV-184-86). He then identified State' s Exhibit 3 as a cotton swab taken from the inside of Mr. Wyche's cheek to be used as a "standard" for purposes of DNA analysis (IV-186). He testified

that he performed DNA analysis on State's Exhibits 2 and 3 and compared the two profiles (IV-187-88). When the State offered into evidence printouts of the DNA profiles, the court noted defense counsel's continuing objections to the admission of this and all related evidence (IV-189-90). The witness then testified that once he had determined there was a match between the two samples, he performed a statistical analysis "to generate a frequency of occurrence of that particular profile" (IV-200), and, based on the match between the profile identified as being from Mr. Wyche and the other two samples, a frequency of occurrence for the Black population was estimated "as 1 in 3.8 quintillion" (IV-201).

Defense counsel renewed her objection to the admission of the saliva swabs when the State rested its case, and again at the close of all evidence, at which time the court stated it would adhere to its previous ruling (IV-205, 297-98).

The jury found Mr. Wyche guilty of all three counts as charged in the information (IV-347; R-83).

As to burglary as charged in Count I, Mr. Wyche was sentenced as an habitual felony offender to 10 years in the Department of Corrections, with credit for 220 days time served; as to Count II, he was sentenced as an habitual felony offender to 5 years probation; and, as to Count III, he was sentenced to 220 days time served (V-22-23; R-120-27).

On direct appeal to the First District Court of Appeal, Petitioner's conviction and sentence were affirmed in an opinion dated June 20, 2005, certifying conflict with ***McCord.***[1] ***Wyche v. State***, 906 So.2d 1142, 1148 (Fla. 1st DCA 2005).

Notice of intent to seek discretionary review was filed by Petitioner on August 22, 2005; amended notice was filed on August 26, 2005.

On August 25, 2005, this Court issued an order postponing its decision on jurisdiction and directing Petitioner to file his initial brief on the merits on or before September 19, 2005; upon Petitioner's motion, the time for filing the initial brief was extended until October 10, 2005. Petitioner timely filed his initial brief raising a single issue:

> THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS WHERE POLICE USED TRICKERY TO GET PETITIONER TO WAIVE HIS CONSTITUTIONAL RIGHTS.

The Court accepted jurisdiction by its order issued January 3, 2006, and heard oral argument on March 9, 2006.

On October 19, 2006, the Court issued an order directing the parties to serve supplemental briefs "addressing the applicability and impact of section 943.325, Florida Statutes," on the issues in the case."

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[1] ***State v. McCord***, 833 So.2d 828 (Fla. 4th DCA 2002).

Petitioner timely filed his Supplemental Brief on November 7, 2006, but neglected to include an attachment referenced in the argument, and an Amended Supplemental Brief was subsequently filed. However, by its order of November 14, 2006, the Court struck the Supplemental Brief and directed petitioner to file an Amended Supplemental Brief, adhering to the format set forth in the Court's order.

This brief follows.

SUMMARY OF THE ARGUMENT

Petitioner argues that because he was not subject to the requirements of section 943.325, Florida Statutes on December 11, 2001, section 943.325 has no applicability or impact on the issue before the Court, to wit: the trial court's error in denying Petitioner's motion to suppress evidence of the saliva swabs obtained on December 11, 2001, and DNA test results relating to those saliva swabs that were obtained ten months later, where Petitioner's consent to the taking of the saliva swabs was obtained through the use of impermissible police trickery in violation of his constitutional rights.

ARGUMENT

ISSUE PRESENTED

SECTION 943.325, FLORIDA STATUTES, IS INAPPLICABLE TO THE ISSUE BEFORE THE COURT SINCE PETITIONER WAS NOT SUBJECT TO THE REQUIREMENTS OF THAT STATUTE IN DECEMBER OF 2001 WHEN THE POLICE USED TRICKERY TO OBTAIN HIS CONSENT TO THE TAKING OF DNA SWABS.

Summary of relevant facts

On December 11, 2001, while Petitioner was detained in the jail on an alleged violation of probation in an unrelated case (R-49), Investigator VanBennekom used trickery to obtain Petitioner's consent to give two saliva cotton swabs for use in yet another unrelated case. After Petitioner was charged on October 16, 2002, with burglary in the instant case (R-1-2), based on a DNA comparison obtained using the saliva swabs that were obtained By Officer VanBennekom ten months earlier, defense counsel filed a motion to suppress evidence of the swabs and DNA test results related to the swabs (R-49-50), on grounds *inter alia* that Petitioner's consent to the taking of the saliva swabs had been obtained in violation of his right against unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. Following a hearing on the motion, the State stipulated that Officer VanBennekom had been investigating a rape, but told Petitioner that he was investigating a burglary

at Winn Dixie, one that did not exist and was thus fictitious (III-11). The court clarified this, stating, "He [VanBennekom] related that to the defendant and asked for some type of swab to get DNA sample, and the defendant then consented to that. And actually, he was trying to obtain the swabs for a rape investigation" (III-11). Counsel argued that because the officer was not actively investigating the burglary alleged in the instant case, and, in fact, used a fictitious burglary at Winn Dixie as a ruse in order to get Petitioner's consent, the underlying consent was invalid and therefore the State could not proceed to use the swabs in this case (III-13). The trial court denied the defense motion to suppress (III-20).

Merits

Section 943.325, "Blood specimen testing for DNA analysis" was created by the Legislature in 1989, effective date, January 1, 1990, and provides in pertinent part that "[a]ny person convicted in this state on or after January 1, 1990, of any offense or attempted offense as defined in chapter 794, relating to sexual battery, or of any offense or attempted offense under chapter 800, relating to lewd and lascivious conduct shall, upon conviction, be required to submit two specimens of blood to a Department of Law Enforcement designated testing facility as directed by the department." *See* Ch. 89-335, § 1, at 2132, Laws of Fla. Section 943.325 was amended in 1993, effective date July

1, 1993, to include any person convicted in this state on or after that date, "of any offense or attempted offense described in s. 782.04, relating to murder." *See* Ch. 93-204, § 9, subsection (1)(a)(b) of section 943.325, at 1864, Laws of Fla. Although amendments were made to section 943.325 in 1994, they did not affect subsection 1, and are thus not pertinent to this discussion. *See* Ch. 94-90, § 3, at 311, Laws of Florida. In 1995, subsection 1 of section 943.325, effective date June 15, 1995, was amended to read that "[a]ny person convicted, or who was previously convicted and is still incarcerated, in this state of any offense or attempted offense defined in chapter 794 [sexual battery], chapter 800 [lewdness/indecent exposure], s. 782.04 [murder], s. 784.045 [aggravated battery], s. 812.133 [carjacking], or 812.135 [home-invasion robbery], and who is within the confines of the legal state boundaries, shall be required to submit two specimens of blood to a Department of Law Enforcement designated testing facility as directed by the department." *See* Ch. 95-283, § 52, subsection 1 of section 943.325, at 2683, Laws of Fla.

Petitioner was convicted of burglary in Columbia County case #95-472, and sentenced on November 9, 1995, to four years probation (R-100-101; 103-04). The judgment and sentence reflects that he was <u>not</u> required to submit DNA samples pursuant to section 943.325 upon his conviction in

that case (R-100). The record reflects that on August 26, 1999, he was sentenced to prison for 1 year, 11 months, and 15 days in case no. 95-472, which, given the time frame, indicates that he was sentenced to prison in that case upon violating his previously imposed probation, and that his "out-of-custody" date was May 1, 2000 (R-104). The record reflects that Petitioner's next felony conviction was for possession of cocaine in Columbia County case no. 01-826, and that he was sentenced in that case on October 30, 2001 (R-95-99). The judgment and sentence reflects that he was not required to submit DNA samples pursuant to section 943.325 upon his conviction in that case, and that he was given a "time-served" sentence of 35 days as to each count (R-95, 97-98). The Florida Department of Corrections website reflects that on October 30, 2001, Petitioner was also placed on two years probation in case no. 01-826. (See App.).

Accordingly, there is documentary evidence establishing that on December 11, 2001, Petitioner had not previously been required to submit samples of his DNA pursuant to section 943.325 based on his convictions prior to that date. Further, on December 11, 2001, he was not then subject to the requirements of section 943.325, since he was being held in jail on an alleged violation of his probation for possession of cocaine, a third-degree felony

offense which has never been included in the list of enumerated offenses in any version of section 943.325, Florida Statutes.

CONCLUSION

Petitioner was not subject to the requirements of section 943.325 on December 11, 2001, when Investigator VanBennekom, who wanted and/or needed Petitioner's DNA for a sexual battery investigation he was conducting, tricked Petitioner by means of a total fabrication, to wit: he told Petitioner that he was a suspect in a non-existent crime for the express purpose of obtaining his consent to the taking of saliva swabs for DNA testing. Ten months later, Petitioner was charged with burglary in the instant case based on a DNA comparison using the improperly obtained saliva samples. Accordingly, this Court should find that section 943.325 has no applicability or impact on the issue of the trial court's error in denying Petitioner's motion to suppress evidence of the saliva swabs obtained on December 11, 2001, and DNA test results relating to those saliva swabs that were obtained ten months later, where Petitioner's consent to the taking of the saliva swabs was obtained through the use of impermissible police trickery in violation of his constitutional rights.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Charlie McCloy, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to petitioner, Earl Wyche, #871760, Wakulla W.C., 110 Melaleuca Dr., Crawfordville, FL 32327, on this ____ day of December, 2006.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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