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

---

ANSWER BRIEF OF RESPONDENT

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
Assistant Attorney General
Bureau Chief, Criminal Appeals
Florida Bar No. 796409

CHARLIE MCCOY
Senior Assistant Attorney General
Florida Bar No. 333646

Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 922-6674 (fax)

Counsel for Respondent

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page**

Other Authority

STATEMENT OF THE CASE AND FACTS

Case--Wyche was convicted for burglary of structure, etc. (R:83,120), and sentenced as an habitual felon to 10 years for that offense; with lesser sanctions for the other crimes. (R:122-6). He appealed to the First DCA, which affirmed. Wyche v. State, 906 So. 2d 1142 (Fla. 1st DCA 2005).

Wyche seeks review of the First District's decision, which found misrepresentation by the police alone did not make his consent to a saliva-swab involuntary, and did not require suppression of DNA test results. *Id.* at 1144. On this point, Wyche certified conflict with State v. McCord, 833 So. 2d 828 (Fla. 4th DCA 2002). *Id*.

Wyche issued June 20, 2005. The State moved for rehearing and clarification, which was denied July 21, 2005 and corrected the next day. Notice to invoke this court's discretionary jurisdiction was filed August 22, 2005.

Facts[1]--Wyche was in custody for violating probation. (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

[1]The State objects to Wyche's portrayal, as fact, matters from Investigator VanBennekom's non-record deposition.

The volume of filings is cited (R:[page no.]); the four volumes of transcript are cited (T[vol. no.]:[page no.]). State-supplied emphasis is noted as [e.s.].

had happened. VanBennekom requested Wyche's consent to a mouth-swab for a saliva sample; Wyche consented. (T3:11-12). 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. (R:50; T4:269-72).

SUMMARY OF ARGUMENT

This court lacks subject matter jurisdiction because the certified conflict is tantamount to "dicta conflict." If jurisdiction exists, review should be declined because such conflict does not impugn the hierarchy of the court system.

Police silence about a pending investigation, or mention of a comparable but fictitious investigation, does not render consent to search property involuntary. Therefore, the same conduct does not vitiate consent to a procedure so minimally intrusive as mouth-swab for a saliva sample. Suppression of DNA test results was correctly denied.

This court should declare that silence about pending investigations, or mention of a comparable but fictitious investigation cannot rise to coercion. The certified conflict must be resolved by approving Wyche and disapproving McCord.

ARGUMENT

ISSUE

DOES POLICE MENTION OF A FICTITIOUS INVESTIGATION OR SILENCE ABOUT AN ACTUAL INVESTIGATION MAKE A SUSPECT'S CONSENT TO A SALIVA-SWAB INVOLUNTARY? (Restated).

A. Jurisdiction Is Lacking Or Should Not Be Exercised

This court's August 25, 2005 order "postponed" a decision on jurisdiction. Accordingly, the State contends the court lacks subject matter jurisdiction; or, if jurisdiction exits, review should be declined.[2]

The decision below observed:

> The authority cited in McCord to support the statement that a "detective's misrepresentations as to the nature of the investigation may provide evidence of coercion," is United States v. Briley, 726 F.2d 1301 (8th Cir. 1984).
>
> * * *
>
> The dictum in McCord, relied on by the appellant in the present case, is a classic case of compounding and misapplying dicta, resulting in an incorrect statement of the law.

Wyche, 906 So.2d at 1144-6.

Wyche recognized McCord's incorrect statement of law resulted from "compounding and misapplying dicta," but certified conflict. Such conflict is tantamount to "dicta conflict" and does not establish subject matter jurisdiction. *See* Padovano, 2

[2]Determination of subject matter jurisdiction is *de novo*. *Cf.* Jacobsen v. Ross Stores, 882 So. 2d 431, 432 (Fla. 1st DCA 2004) ("Whether a court has subject matter jurisdiction is a question of law reviewed de novo.").

Florida Appellate Practice (2005 ed.) §3.10 ("[A]rticle V, section 3(b)(3) establishes jurisdiction on the basis of conflicting decisions. Thus, in a literal sense dicta conflict cannot exist." [e.s.; footnote omitted]).

This court has found jurisdiction based on conflict between its dicta and a district court decision. *See* Cowan Liebowitz & Latman, P.C. v. Kaplan, 902 So.2d 755 (Fla. 2005) ("That holding expressly and directly conflicts with our statements in KPMG and Forgione (albeit in dictum) implying a blanket prohibition against assignment of legal malpractice claims. Therefore, we accepted jurisdiction."), *citing* Watson Realty Corp. v. Quinn, 452 So. 2d 568, 569 (Fla. 1984) (accepting jurisdiction based on conflict between the district court opinion and dictum in an earlier Supreme Court decision).

It can be appropriate to find jurisdiction when a district court opinion conflicts with this court's dicta. Dicta by this are persuasive. *See* Aldret v. State, 592 So.2d 264, 266 (Fla. 1st DCA 1991), *quashed on other grounds*, 606 So.2d 1156 (Fla. 1992) ("[I]t is well established that dicta of the Florida Supreme Court, in the absence of a contrary decision by that court, should be accorded persuasive weight."). Concern for the hierarchy of the court system arises when a district court opinion conflicts, without satisfactory explanation, with dicta

by the state's highest court. However, such concern does not arise upon nominal conflict between misapplied dictum in an earlier district court opinion and the decision under review. If jurisdiction exits, review should be declined.

B. Standard of Review

Resolving the conflict between Wyche and McCord presents a question of law reviewed *de novo*. *See* Nelson v. State, 875 So. 2d 579, 581 (Fla. 2004) (describing the "point of conflict" and noting review of "this question of law is de novo"), *citing* State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001).

C. Merits

Consent Not Involuntary

Wyche was in custody for violating probation. (R:1:49, ¶2). He was asked for consent to a saliva swab, a quick and un-intrusive search of his person.[3] An investigator (VanBennekom) requested the swab, and mentioned a burglary of a Winn Dixie; which, in fact, had not occurred. VanBennekom did not disclose that Wyche was suspected of an actual rape. Wyche consented. (T3:11-12). The DNA obtained exonerated him of the rape (R:50;

[3]The minimal intrusiveness of a saliva-swab is implied by the fact Florida's "body cavity" search statute does not include the mouth. *See* §901.211(1), Fla. Stat. ("strip search" includes inspection of genitals, buttocks, female breasts, anus or undergarments).

T4:269-72), but matched DNA in the blood found at the gift shop where he had worked. (T4:179-202).

Wyche could not have felt coerced to clear himself of rape, as nothing shows he knew that investigation--not mentioned by the investigator--was underway. Because the Winn-Dixie burglary was the same type offense as the gift shop burglary, he was not pressured to clear himself of a fictitious but more serious crime. He does not claim he was promised leniency or was threatened, or that he was entitled to Miranda warnings not given. Nothing shows the investigator affirmatively represented only the Winn-Dixie burglary was being investigated, or that evidence implicating Wyche had been obtained in that burglary.

Wyche's consent was not coerced. *See* State v. Faulkner, 103 S.W.3d 346, 356 (Mo.Ct.App. 2003) (finding consent to DNA swabs voluntary, despite defendant's belief he would not go to jail for vehicle violations if he cooperated in a rape investigation, when he followed officers to station but was not in custody, etc.); McBride v. State, 2005 Tex. App. LEXIS 3561, 13-14 (Tex.App. 2005) (unpub.) (concluding consent to mouth swab was voluntary when defendant was told it was his "choice," but that upon refusal the officer would obtain a search warrant and take the defendant to the hospital for a blood sample).

Knowing he burgled the gift shop, Wyche consented. Implicitly, he contends he should have been told of every crime in which he was a suspect, or could become a suspect, in order for consent to be valid. No fair reading of pertinent caselaw requires as much. *See* Conde v. State, 860 So.2d 930, 952 (Fla. 2003), *cert. den.* 124 S.Ct. 1885 (2004) (observing, as to officer's "minimal" exaggeration of DNA evidence against the defendant: "This Court has held that police misrepresentations alone do not necessarily render a confession involuntary."). *See also* People v. Zamora, 940 P.2d 939, 942 (Colo. Ct. App. 1996) *cert. den.,* 1997 Colo. LEXIS 561 (Colo. 1997) ("Although deception by the police is not condoned by the courts, the limited use of ruses is supported by the overwhelming weight of authority." [compiling cases]).

Wyche was already in custody. Assume, instead, he was voluntarily talking to police. Premature disclosure of the actual burglary or rape would have revealed the extent of police knowledge; which, before probable cause to arrest, could motivate Wyche to leave and destroy evidence or intimidate witnesses. Requiring police to disclose every investigation potentially involving a suspect effectively requires them to act as attorneys for suspects, and has no support in the law. *Cf.* Johnson v. State, 660 So. 2d 637, 642 (Fla.1995), *cert. den.*,

517 U.S. 1159 (1996) ("[L]aw enforcement officers are representatives of the state in its efforts to maintain order, and the courts may not impose upon them an obligation to effectively serve as private counselors to the accused.").

It does not matter that the investigator fabricated the Winn-Dixie burglary. That burglary was not materially different from the gift shop burglary. It did not involve a weapon or violence, or an occupied structure; and did not pressure him to clear himself of a more serious crime. By mentioning a fictitious burglary, VanBennekom did not prematurely disclose an actual investigation. *See* Wyche, 906 So.2d at 1143 (noting another officer asked the swab be sent to FDLE for a comparison to blood drops found at the gift shop burglary).

Wyche distinguishes between confession and search cases, and claims he is "unaware" of cases holding police trickery is permissible to obtain a waiver of Miranda rights. He reasons that such trickery, "the effect of which is a waiver of Fourth Amendment rights," should be condemned by the courts. (initial brief, p.22-3). His unawareness has no bearing on anything.

In contrast to the condemnation Wyche seeks, the decision below noted several cases rejecting claims that police deception made consent involuntary. *See* Wyche, 906 So.2d at 1144-6, *citing or discussing*, Hoffa v. United States, 385 U.S. 293,302 (1966)

(informant did not reveal identity to defendant, who made incriminating statements); Zamora at 941-2 (police investigating child sexual battery lied about purpose of looking in defendant's apartment); U.S. v. Turpin, 707 F.2d 332, 334 (8th Cir. 1983) (rejecting argument consent to search house invalid because police did not tell defendant the victim had been killed and defendant was a homicide suspect).

The decision below quoted at length from Miami-Dade Police Department v. Martinez, 838 So.2d 672 (Fla. 3d DCA), *rev. dism.* 851 So.2d 729 (Fla. 2003). There, the court reversed suppression of evidence granted, in part, because the searching officers allegedly misrepresented that the object of the search was weapons, rather than money and drugs. In reaching its conclusion, the court compiled cases upholding searches of homes or baggage against claims the purpose or object of the search was misrepresented. *See id.* at 674-5. Wyche cannot persuasively explain why consent to a procedure so minimally intrusive as a saliva-swab should be treated differently from consent to search one's residence or baggage.

Next, Wyche urges his consent was involuntary because the investigator "lied . . . about the crime he was suspected of committing . . . to [get] consent to the taking of the DNA swabs." (initial brief, p.24-5). The State relies on its earlier

points. If misrepresentation, without more, does not taint a consent to search a suspect's home, such misrepresentation does not taint consent to a saliva swab.

Wyche relies on the dissent below to urge "egregious police misconduct, such as 'physical or psychological coercion, *intentional deception*, or a violation of a constitutional right' could cause the statement to be suppressed." Wyche, 906 So. 2d at 1149 [italics in Wyche], *quoting* Johnson, 660 So. 2d at 642. Because the dissent emphasized "intentional" deception, it appears Wyche considers the mention of a fictitious burglary to be the "egregious" conduct rendering his consent involuntary.

The better inference is that the investigator wanted to avoid premature disclosure of the gift shop burglary. To assume otherwise is to impugn police motives. *See* Wyche, 906 So.2d at 1144 ("The notion that deception is somehow morally reprehensible when practiced by the police in fighting crime unfairly impugns the motives of those seeking to uphold the law."). To assume "egregious" conduct defies common sense. At most, the officer told Wyche he was investigating a burglary which had not occurred. The "fictitious" crime was of the same type as the one Wyche committed. It did not possess factors, such as use of weapon or an occupied structure, making it more serious. Such conduct falls far short of "egregious."

Wyche may be contending all actual investigations must be disclosed. If so, his argument places an untenable duty on the police. They could not simply request consent, without saying more, but would have to disclose every investigation possibly involving the suspect. There would be no principled way to discern deliberate omissions from honest conclusions a person was not a suspect, in a given crime, when consent was sought. If a crime not committed by the suspect were mentioned out of caution, that crime would be just as "fictitious" to the suspect as one which never occurred. Any coercive effect would be the same. The police would be condemned for under-disclosure and over-disclosure. No reasonable reading of the Fourth Amendment compels such result. *Cf*. Johnson, 660 So.2d at 642 ("Police are not required to disclose every possible ramification of a waiver of rights to a detainee apart from those general statements now required by Miranda and its progeny.").

McCord Wrongly Decided

McCord was a state appeal from suppression of DNA evidence. A detective was investigating numerous armed robberies, the majority of which were committed by using bricks to smash the doors of convenience stores at gas stations. McCord, with a brick and bag, was stopped for allegedly casing a gas station.

Apparently released without incident, he was later held in county jail on unrelated charges. 833 So.2d at 829.

A detective met with McCord and advised him of his Miranda rights. He told McCord he was suspected in a rape case; the rape occurred at the same location of McCord's car on a certain date; and a saliva sample could exclude him from that investigation. Actually, the detective wanted to make a DNA comparison to blood recovered at one of the robberies. He did not tell McCord he was suspected in any of them. *Id.* The only coercive act was purely verbal--the mention of a fictitious rape. However, as the State has argued, falsehood about the nature of an investigation alone does not make consent involuntary.

Police misrepresentation alone does not make a confession involuntary. *See* Conde, 860 So.2d at 952 (concluding "minimal" deception of exaggerating the extent of DNA evidence, among other things, by police did not make confession involuntary); Davis v. State, 859 So.2d 465, 472 (Fla. 2003) (holding confession not involuntary when, among other things, the officers told the defendant they were investigating a missing person case when they knew the person was dead); Escobar v. State, 699 So.2d 988, 994 (Fla. 1997), *cert. den.,* 523 U.S. 1072 (1998 (rejecting the argument that Escobar's confession should have been suppressed because police deluded him by "falsely

stating that they had obtained physical evidence and by failing to inform him that he could be sentenced to death");[4] Fitzpatrick v. State, 900 So. 2d 495, 511 (Fla. 2005) (rejecting argument that Fitzpatrick's statements were product of a coercive interview, when the police falsely suggested they had a satellite image of him with the murder victim).

There is no logical distinction between mentioning a fictitious crime to obtain consent to a saliva-swab, and mentioning fictitious evidence or a false investigative purpose to obtain a confession. McCord was wrongly decided.

This court should first hold the police have no duty to disclose actual, pending investigations when seeking consent; so that police silence, without more, cannot rise to coercion. It should next hold that police mention of a fictitious but comparable crime cannot alone rise to coercion. Therefore, consent to a saliva swab based on such police conduct is not involuntary, and DNA test results need not be suppressed. Wyche must be affirmed and McCord disapproved.

[4]Abrogated on different grounds by **Error! Main Document Only.**Connor v. State, 803 So.2d 598 (Fla.2001), *cert. den.* 535 U.S. 1103 (2002).

CONCLUSION

If this court finds it lacks jurisdiction or that review is improvident, it should dismiss this appeal. If the merits are reached, it should make the holdings just suggested; affirm the decision below; and disapprove McCord.

CERTIFICATES OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this ANSWER 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 October ___, 2005. I also certify this brief complies with Fla.R.App.P. 9.210.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT R. WHEELER
Assistant Attorney General
Bureau Chief, Criminal Appeals
Florida Bar No. 796409

_____
CHARLIE MCCOY
Senior Assistant Attorney General
Florida Bar No. 333646
Office of the Attorney General
The Capitol, Suite Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300