

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO 1983-2375-CF-A

STATE OF FLORIDA,

Plaintiff,

-vs-

GARY BENNETT, JR.,

Defendant-Movant.

_____/

**DEFENDANT'S REPLY TO STATE'S RESPONSE TO
3.850 MOTION FOR POSTCONVICTION RELIEF**

The State's response establishes the need for an evidentiary hearing to determine the defendant's claims.

THE DEFENDANT'S CLAIM IS NOT TIME BARRED

Significantly the State does not dispute that John Preston, who testified at the Defendant's trial that his dog Bar detected the defendant's scent on the murder weapons, was a fraud. Instead, the State maintains the defendant's claim that his conviction was secured through the use of John Preston's perjurious testimony is time barred. According to the State the defendant should have brought his action within two years of the 2004 revelation of the DNA evidence in State v Dedge, Case No. 02-000135-CFA which the State says "irrefutably disapproved the testimony of dog handler John Preston." [State's Brief, p.13, hereinafter "Sb, p.____"]

In making its argument the State completely ignores the fact post Dedge the conviction in State v Dillon, Case No. 05-1981-CF-

001746-AXXX-XX remained inviolate; and in Dedge "There was doubt as to the accuracy of the dogs and there was testimony that they were incorrect 40% of the time." Dedge v State, 723 So.2d 322, 323, dissenting opinion (Fla. 5th DCA 1998) In Dedge, the defendant Bennett understands, Preston's dog allegedly picked up the scent of Mr. Dedge on a bed sheet where the victim was sexually assaulted. The DNA evidence discovered in Dedge in 2004 did not concern the bed sheet but instead hairs and semen.

On the other hand, in Dillon Preston's dog allegedly picked up the scent of Mr. Dillon on a bloodstained tee shirt that all parties agreed was worn by the perpetrator during the murder. It was from this tee shirt that Preston maintained his dog picked up the scent of Mr. Dillon. The tee shirt was subjected to DNA testing and it was determined that Mr. Dillon's DNA was not present on it.

Clearly, the evidence in Dedge did not conclusively establish that Preston was a fraud because at the time the DNA evidence was developed in Dedge the conviction of Dillon and the testimony of Preston in that case remained inviolate; and there was evidence, the particulars of which are unknown, that dogs are wrong 40% of the time.¹ It was only after Preston's testimony in Dillon was debunked through DNA evidence that Preston was proven to be a fraud, and the State never disputes that Preston was a fraud in its

¹ Undersigned counsel sought to review the court file in State v Dedge and was told by the Clerk's Office that the file was destroyed and no longer exists.

response.

Recognizing that the DNA evidence in the Dillon case is the event upon which the time begins to run for the defendant to file his motion, the State questions when the defendant learned of the DNA test results in that case. The defendant learned of results after Mr. Dillon was released and his conviction vacated or when the results were publicly released. It was only with the public release of the information that the defendant could have learned of the results and that was sometime after November 14, 2008.

Clearly, the event which started the running of the two year time period was the public disclosure sometime after November 14, 2008 that the conviction in the Dillon case was vacated and dismissed based on the DNA results of the testing of the tee shirt worn by the perpetrator.

THE DOG SCENT EVIDENCE WAS CENTRAL TO THE STATE'S PROSECUTION OF THE DEFENDANT

The remainder of the State's response consists of an analysis of the other evidence in Mr. Bennett's case amid the Assistant State Attorney's expression of his various personal beliefs and opinions without any evidentiary support in the record, including but not limited to, the following: (1) he has never encountered a wrongful conviction save for a possible burglary conviction by an individual who obviously had committed a host of other crimes [Sb, p.8]; (2) he is convinced of the defendant's guilt [Sb, p.16]; (3) the polygraph examiner who administered the polygraph to the

defendant and found him to be truthful "experience and common sense tell[s] you he had other duties and did not administer polygraph examinations on a regular basis" [Sb, p.26]; (4) "that the blood in the room [the murder scene] was from weapon cast off. The killer would not have been covered in blood..." [Sb, p.27]; (5) the victim's daughter Mary Parkins was "at least borderline retarded" [Sb, p.29]; and (6) the "defendant's history of schizophrenia and possible homosexual activity would" explain the rage expressed in the murder [Sb, p.31].

Regarding the analysis of the evidence, the State simply ignores critical facts in the record in attempting to portray the fraudulent dog scent evidence as insignificant and the fingerprint and palm print evidence standing alone as overwhelming.

Within a day or two of the brutal July 13, 1983 murder of Helen Nardi, the alleged fingerprint and palm print belonging to the defendant was known to the police and was the reason the defendant was repeatedly interrogated beginning on July 15, 1983. The defendant, however, was not arrested until October 15, 1983 after the return of an indictment resulting from a grand jury proceeding in which the State relied on fraudulent dog scent evidence allegedly gathered during the September 9, 1983 dog scent lineup to secure the return of the indictment.

Following indictment and the defendant's arrest and incarceration a second dog scent lineup was conducted by the State

in an effort to strengthen their case by diminishing possible attacks on the September 9, 1983 lineup.

At trial the prosecution maintained the fraudulent dog scent evidence was like a fingerprint and that it disproved the defendant's denials because his scent was on the murder weapons. [R673 to R677]

Clearly, the dog scent lineup evidence was a significant part of the State's case, the State opened on it arguing it proves the murder weapons "were held in the hand of the defendant as he killed Susan Nardi" [R20 to R24]; the State then called five separate witness, Detective Augustus Williams [R373 to R385; R388 to R398], Investigator Wayne Porter [R405 to R421], Investigator Charles Wilson [R429 to R431], John Preston [R436 to R485], and Kenneth Stayer [R488 to R498] to testify about the alleged dog scent evidence; and finally, the State summed up on it saying it was just like a fingerprint. [R673 to R677]. Any idea that the dog scent evidence was insignificant and unimportant is belied by the prosecution's conduct throughout the case and the trial record. The fact that Mr. Bennett's trial counsel, Lawrence Litus, who the defendant claimed was ineffective for a host of reasons, including essentially doing nothing to attack the dog scent evidence until the middle of trial, testified he did not think the dog scent evidence significant, is nothing more than testimony based on self interest. [Sb, p.25]

Clearly the fingerprint evidence was an important piece of evidence but it was not the end all and be all of the prosecution but was instead used in conjunction with the dog scent evidence as proof that the defendant's fingerprint did not have an innocent explanation. The dog scent evidence, the trial prosecutor told the jury in summation, "It's a fingerprint. The scent of a human being is just as much a fingerprint as that on those doors...He was in the bedroom where the body was. He can't explain that and his scent is on two murder weapons and he denies that." [R676 to R677]

Try as it will, the State cannot rewrite the record in this case. The dog scent evidence was at the center of the prosecution and the jury was told it was as reliable as a fingerprint in identifying the perpetrator when in fact it was a complete fraud.

CONCLUSION

WHEREFORE, for the reasons stated above and in the defendant's prior submission the defendant prays that this Court grant all relief to which he is entitled in this proceeding, including but not limited to:

- A An evidentiary hearing on the allegations made herein,
- B An opportunity to amend the motion as necessary,
- C An opportunity to reply to any pleading filed by the State,
- D The authority to exercise compulsory process, including the issuance of subpoenas for the production of witnesses and documentary evidence, and to undertake pre-hearing discovery as may

be necessary for the proper development of facts,

E That his conviction and sentence be vacated,

F That the indictments of Gary Bennett, Jr. related to the murder of Helen Nardi be dismissed with prejudice,

G That he be immediately released from State custody, and

H All other and further relief that the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished via Federal Express to Lawson Lamar, State Attorney, by Dick K. Jucknath, Assistant State Attorney, Office of the State Attorney, Ninth Judicial Circuit of Florida, 415 North Orange Avenue, Orlando, Florida 32802, on October 28, 2011.

Paul Casteleiro

Respectfully submitted
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