

1657

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

November 5, 1985 --

THE COURT: Yes, sir.

MR. VANCE: -- and a memorandum in support of that motion which is in the second file of this case.

THE COURT: Yes, sir, I have it right here citing the Frye case.

MR. BUTLER: Are we ready to proceed, Your Honor?

THE COURT: Excuse me?

MR. BUTLER: Are we ready to proceed?

THE COURT: Yes, sir.

MR. BUTLER: We call Captain Weyenberg.

(Whereupon an instrument was marked (for identification as State's (Exhibit No. 23.

D A N W E Y E N B E R G, recalled as a witness on behalf of the State, having been duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. BUTLER:

Q For the record, you are the same Dan Weyenberg that has previously been sworn and testified in this cause?

A Yes, I am.

1 Q And I believe, your testimony was that you are the
2 chief deputy for McLennan County?

3 A Yes, sir.

4 Q And that you have been employed in that capacity
5 for a number of years?

6 A Yes, sir.

7 Q Were you so employed on or about the fourth day of
8 May, 1983?

9 A Yes, I was.

10 Q And subsequent to that, on the 5th and 6th days of
11 May, 1983?

12 A Yes, sir.

13 Q On those days, did you attend work and perform
14 your duties as required?

15 A I am sure I did. If they were normal working days,
16 yes, sir.

17 Q Captain, let me show you what has been marked for
18 identification purposes as State's Exhibit No. 23
19 and ask you if you can identify that, please?

20 A Yes, sir, I can.

21 Q What is it, please?

22 A It is a motion to compel for taking of teeth
23 impressions.

24 Q And does it have a directive as to whose teeth
25 impressions you are to take?

- 1 A Yes, sir, it says that I am to take the -- get the
2 teeth impressions of David Spence, the Defendant.
- 3 Q All right, at that time, was David Wayne Spence a
4 prisoner in the McLennan County jail?
- 5 A Yes, sir, he was.
- 6 Q All right, and as such, was he in your care, custody
7 and control?
- 8 A Yes, sir.
- 9 Q All right, and does -- is that order signed by anyone?
- 10 A Yes, sir, by Judge George Allen, presiding judge,
11 Waco.
- 12 Q All right, and he is the presiding judge of what
13 court?
- 14 A 54th District Court.
- 15 Q All right, and what day did he sign it?
- 16 A Order was signed on the 4th day of May, 1983.
- 17 Q Did you, in fact, comply with that order?
- 18 A Yes, sir, I did.
- 19 Q And when did you do that?
- 20 A The order was executed on the 5th day of May, 1983,
21 at 8:35 p.m.
- 22 Q All right, and would you explain to the Court,
23 if you would -- at this time, we will offer what
24 has been marked for identification purposes as
25 State's Exhibit No. 23 into evidence.

1 MR. VANCE: We have no objection
2 for the purpose of this hearing only.

3 THE COURT: All right, it will
4 be admitted.

5 (State's Exhibit No. 23 was then
6 admitted into evidence.)

7 Q Would you explain for the Court, please, exactly
8 how you went about fulfilling the orders of that
9 motion to compel?

10 A Once I received the order, I proceeded to the jail
11 with two other people and contacted David Spence and
12 told him what we wanted and got the teeth impressions.

13 Q What two people are you speaking of when you said
14 there were two other people with you?

15 A It would be J. L. Crawford and a Dr. Brinkman.

16 Q And who is J. L. Crawford?

17 A He is the investigator with the District Attorney's
18 office in Waco.

19 Q And who is Dr. Brinkman, if you know?

20 A He is the local dentist, I believe, out of McGregor
21 in Waco.

22 Q What happened after you got to the -- after you got
23 Mr. Spence down from the cell?

24 A I explained to him that what I wanted was an
25 impression of his teeth and that I had an order to

1 go ahead and obtain it.

2 Q And did you, in fact, obtain the impression of his

3 teeth?

4 A Yes, sir, I did.

5 Q How was that done?

6 A Dr. Brinkman and J. L. Crawford did what you normally

7 do when the dentist will make an impression of your

8 teeth.

9 If you have missing teeth like you are going

10 to have some plates or anything like this, it is

11 just a complete full mouth impression.

12 Q And were you present while this was being done?

13 A Yes, sir.

14 Q What did Mr. Spence do or say when you told him what

15 you wanted?

16 A Best I recall, he was wanting to know what we

17 wanted them for.

18 Q And what, if anything, did you tell him?

19 A I told him I had a court order compelling me to take

20 them.

21 Q What, if anything, did he then do?

22 A Mr. Spence seemed very nervous. I went ahead and

23 secured a new toothbrush since his was upstairs in

24 his cell, the area where he was, and some toothpaste

25 so that he could brush his teeth prior to the

- 1 impressions being taken.
- 2 Q Now, you say he appeared to be very nervous. Would
3 you describe for the Court what it was you observed
4 that caused you to draw that conclusion?
- 5 A Hands were shaking, he was having problems getting
6 the toothpaste on the toothbrush.
- 7 Q Did he readily consent to having the impressions
8 made of his teeth?
- 9 A No, sir, he did not.
- 10 Q What, in fact, did he do?
- 11 A He wanted to protest it.
- 12 Q All right, and did he, in fact, protest it?
- 13 A To me, yes, sir.
- 14 Q And in what manner?
- 15 A Best I recall, I think, I gave him a copy of the
16 motion to compel, and I believe, either then or
17 later on, he wrote on there that he was doing it
18 under protest.
- 19 Q He did not physically resist you?
- 20 A No, sir, he did not.
- 21 Q And was the process or procedure completed without
22 any incident?
- 23 A None to my knowledge, no, sir.
- 24 MR. BUTLER: Pass the witness,
25 Your Honor.

CROSS EXAMINATIONQUESTIONS BY MR. VANCE:

1
2
3 Q Captain -- is it, Weyenberg?

4 A That is fine, yes, sir.

5 Q How long did this process take from the time you
6 entered his presence until you left?

7 A I will have to give you just a rough estimate. I
8 don't recall how long it took for the impression
9 to dry, but once all that was done, there was a
10 normal examination that a dentist will give you,
11 going through and checking each tooth for cavities
12 and missing teeth and stuff like that.

13 I would say, somewhere probably about 30
14 minutes, roughly.

15 Q I need to pinpoint you more accurately on -- at
16 the point in time that Mr. Spence objected to the
17 taking of these teeth impressions. Was this
18 earlier in the proceedings?

19 A Mr. Vance, I really don't remember what stage of
20 it that this was done, that he objected to it.

21 Q Did he also request that his attorney be present?

22 A I don't recall that, Mr. Vance.

23 Q Do you remember him writing anything down indicating
24 his objection to this motion to compel and a request
25 for an attorney?

1 A I believe, he wrote something down on the copy I
2 gave him and wanted a witness, and to the best of
3 my knowledge, I believe, I signed it.

4 Q So he did object to the taking and requested, you
5 said, a witness. Could it have been his attorney?

6 A No, I think, I signed it as a witness that he was
7 saying he was protesting it.

8 Q Could he have requested his attorney be present?

9 A It is possible, yes, sir.

10 Q This motion to compel, did you consider this to
11 be a search warrant?

12 A No, sir, I just considered it to be a court order
13 from a Judge telling me to take the impressions.

14 Q Does it list any particular exigent circumstances
15 in this motion to compel that requires this dental
16 taking or this teeth impression?

17 A I don't follow your --

18 Q Are you familiar with search warrants?

19 A A little, yes, sir.

20 Q Have you ever help draft a search warrant?

21 A You are talking about probable cause?

22 Q Yes, sir.

23 A Yes, sir.

24 Q Did you see any type of probable cause set out in
25 this motion to compel teeth impressions?

1 A No, sir.

2 Q Okay, were you informed -- or let me back up a
3 minute. When you make a warrantless arrest, do
4 you normally do that based on some kind of exigent
5 circumstances?

6 MR. BUTLER: Judge, I am going
7 to object to that as not relevant to this hearing.

8 MR. VANCE: Your Honor, it can
9 be in light of the law that we are about to argue.
10 It is either going to be a search warrant or it is
11 not going to be, and that is important in arguing
12 the validity of this entire proceedings.

13 If it is a search warrant, it
14 will fall under the provisions of 18.01 and 18.02 of
15 the Texas Code of Criminal Procedure, which would
16 require one particular set of circumstances. If it
17 is, in effect, a warrantless search, naturally, there
18 are going to have to be exigent circumstances under
19 that particular situation, and he may not even know
20 the answer. I am just seeing if he knows.

21 THE COURT: All right, Captain,
22 if you can, go ahead and answer the question. Otherwise,
23 you may explain your answer or the fact that you
24 don't answer the question.

25 Q Were you made aware of any exigent circumstances

1 requiring you to take the teeth impressions of
2 the Defendant?

3 A No, sir, I was not. I took the Court as being an
4 order from our District Judge compelling that the
5 impressions be taken, and accepted it as such.

6 MR. VANCE: I have no further
7 questions, and as long as he limits it to that and
8 not any statements made by the Defendant. Your Honor,
9 I hate to do this, but the Defendant has informed
10 me he thinks he has the motion which he signed up in
11 the jail, and we would really need that for the
12 record.

13 We can introduce it at a later
14 time with the prosecutor's permission and the
15 Court's, the one he has just referred to --

16 THE COURT: I understand what
17 you are talking about. If you have got it, I don't
18 mind putting it in the record later on as an exhibit
19 for the record but not for purposes of the jury's
20 consideration.

21 MR. VANCE: I understand that.
22 It depends on your ruling, but I will need it as
23 an exhibit in regard to this hearing.

24 MR. BUTLER: Judge, we have no
25 objection to him admitting it for purposes of the

1 exhibit for this hearing at a later time.

2 I certainly do not want to
3 incur any further delays.

4 THE COURT: Well, that is my
5 understanding. It will just be put in --

6 MR. VANCE: I just want
7 permission.

8 THE COURT: All right, we will
9 do that as soon as he can produce a copy of it.

10 MR. VANCE: I have no further
11 questions of the witness.

12 THE COURT: All right.

13 MR. VANCE: It is my understanding
14 that this is the extent of his testimony.

15 THE COURT: Pursuant to the
16 court order, he went to the jail along with the
17 dentist and took the impression.

18 MR. BUTLER: That is correct,
19 Your Honor.

20 THE COURT: Fine. Captain, you
21 may step down, and you will want him on standby.

22 MR. BUTLER: He will be our first
23 witness when the jury comes back.

24 THE COURT: All right, who is
25 the next witness?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. BUTLER: That is all we have
pursuant to this motion.

THE COURT: All right.

MR. VANCE: We will call the
Defendant pursuant to this motion.

THE COURT: All right.

MR. VANCE: With the limited
purpose of this motion.

He has already been sworn, I
believe.

THE COURT: Not at the trial.

D A V I D W A Y N E S P E N C E, called as
a witness on behalf of the Defendant, having been
duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. VANCE:

Q Would you state your name for the record, please?

A David Wayne Spence.

Q And you are the Defendant in Cause No. 15,976 for
which we are on trial here today?

A Yes.

Q I will direct your attention back to May 4, 1983.

Where were you at that time located?

A McLennan County jail.

Q And do you recall Captain Weyenberg coming to your --