

1 (Whereupon, an off the record discus-
2 sion was had, following which, the
3 trial continued in the Court's
4 Chambers out of the presence and
5 hearing of the jury as follows,
6 (to-wit:

7 THE COURT: Mike, raise your right hand.

8 (Whereupon, the witness was sworn.

9 JUDGE MICHAEL GASSOWAY

10 called as a witness on behalf of the State of Texas, and
11 having been first sworn, testified as follows, to-wit:

12 DIRECT EXAMINATION
13 (OUT OF THE PRESENCE OF THE JURY)

14 BY MR. FEAZELL:

15 Q Judge Gassoway, you were subpoenaed to bring some records
16 with you?

17 A Yes, sir.

18 Q Did you bring those records?

19 A I brought the only records I had pertaining to Ronnie
20 Lee Breiten.

21 MR. FEAZELL: All right. Just a second. I
22 need to get my file from outside.

23 (Whereupon, Court stood at ease
24 momentarily.)

25 BY MR. FEAZELL:

Q May I see the records that you brought, please?

A (Handing papers to Mr. Feazell.)

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Q Are there any more records that you brought with you?

A Pertaining to Ronnie Lee Breiten, there are not.

MR. BUTLER: Do you have any pertaining to anybody else anywhere?

A One other person.

MR. BUTLER: Who is that?

A I would have to look. A Mr. --

MR. FEAZELL: Bishop?

A -- James Russell Bishop.

MR. FEAZELL: May I see those, please, sir?

Your Honor, we would ask that these four separate documents be marked, and that copies be made, so that Judge Gassoway can have the originals back, and that copies be included in the record in this proceedings and reserved for appeal.

MR. HUNT: We have no objection, Your Honor.

THE COURT: All right.

You probably need to let him mark them.

THE WITNESS: Your Honor, I have no objection to you keeping those originals, as long as I can have them back for my records at a later time.

THE COURT: Well, he can make -- Morris can make copies of them in the morning.

MR. FEAZELL: In the morning.

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THE WITNESS: Surely. I don't have to have them back at any given time, other than I would like to have them -- preserve them for my records, at some given time.

(Whereupon, the instruments herein-
(after described were identified
(and admitted into evidence out of
(the presence of the jury as State's
(Exhibit 87 through 90.

MR. FEAZELL: Now, Judge, we're not offering -- it's understood that they're for the limited purpose of this hearing.

THE COURT: Right.

MR. FEAZELL: Mr. Bowen, will you mark these for me, also, please?

(Whereupon, the instruments herein-
(after described were identified as
(State's Exhibits 91 and 92.

BY MR. FEAZELL:

Q Judge Gassoway, I'm going to show you what has been marked as State's 91 and State's 92, and I'll ask you if that is a true and accurate copy of the orders that you signed, and whether or not that is your signature on the bottom?

A State's Exhibit No. 91 appears to be a photocopy of an order which I signed on June 19th. That is my signature.

Q Okay.

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A State's Exhibit No. 92 appears to be a photocopy of an order I signed on the 14th day of June, and that is my signature.

O All right. Okay. For the record, you are Judge Michael Gassoway, the duly elected Judge of County Court at Law No. 2 of McLennan County, Texas, is that correct?

A Yes, sir.

Q Judge, on State's 91, which appears to be a document entitled only "Order" signed by you, Judge Presiding, Michael Gassoway, "hereby orders and directs the Texas Peace Officers or employees of the Texas Department of Corrections in charge of the custody of Ronnie Lee Breiten, to produce said individual to Mr. Leon Chaney, or any other individual acting under his direction, for examination and the taking of head and pubic hair specimens from the said Ronnie Lee Breiten." Is that substantially what the order is in State's 91?

A To the best of my recollection, that is what the order says.

Q Judge Gassoway, what was the probable cause for issuing this form, this order?

A Information contained in the affidavit previously admitted to this Court.

O And is that solely what you based your decision on, was

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the information in the affidavit?

A Yes, sir.

Q And who presented that affidavit to you?

A Mr. Hayes Fuller. I believe on that one, it was only Mr. Fuller who had produced that affidavit and handed it to me and requested that order be signed.

Q All right. I believe State's 90, State's 89, State's 88 and State's 87, all that were just admitted, were all signed by Mr. L. Hayes Fuller, III, and all notarized by a notary public of the State of Texas. Is that as you recall it?

A As I recall it.

Q And was there any other probable cause other than the affidavit?

A The order that I signed was based only on the information contained in the affidavit.

Q Who was the peace officer, Judge, that you issued the order to?

A I did not issue it to a peace officer.

Q Why not?

A As I reviewed the Code of Criminal Procedure, I did not find that the requirement of that Code required it to be issued to a specific peace officer.

Q So, you're saying that you did review the Code of

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Criminal Procedure and found that it did not require to be issued to a peace officer?

A I always review the law applicable to the case before I sign one.

Q And did you do that in this case?

A I did.

Q Are you aware that, to take a hair sample requires a search warrant, rather than just an order of the Court, and requires an evidentiary search warrant?

A The provisions that I was looking under were the evidentiary search warrant provisions, and that order, basically was intended to be such.

Q Okay. And by what authority did you issue the order directing Mr. Breiten in Tennessee Colony, Texas, to submit to a search and seizure?

A By my authority as a magistrate for the State.

Q Okay. Is there any particular reason, Judge, why there is not a number on the top of the order or on the top of the affidavit in the cause number?

A No reason, other than I did not assign it one.

Q Is there any reason why this order and the affidavits were not filed with the clerk?

A I don't know what happened to the order after I signed it, I handed it back to Mr. Fuller. I don't know what

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happened after I had signed it.

Q Has there been a return filed, that you're aware of?

A Not to me.

Q If it had been, where would it be filed, sir?

A I don't know. It would be filed either in the District Clerk's Office or with me.

Q Okay.

A In most instances, when I issue a search warrant, the return of such search warrant is returned to me; but none has been returned, at this time.

Q Okay. Were you aware, Judge Gassoway, that this case was presently in trial in the 54th Judicial District Court of the State of Texas?

A Yes, sir.

Q Was there any reason why you did not mention these orders to the Judge of that Court, Judge Allen?

A I did not see any need to.

Q Is there any reason why you did not mention these orders, or the application for them, to the District Attorney of this county?

A No reason in particular.

Q All right. Did you review in your manual, or in the law, of the probable cause required for such an evidentiary search warrant?

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A I reviewed the Code of Criminal Procedure. I did not review the specific case law on point.

O Okay. And it's your testimony, that you accepted the unsubstantiated affidavit of L. Hayes Fuller, as the probable cause for issuing this warrant?

A The probable cause I found at the time I issued the order or the warrant, was the information contained in the affidavit alone.

O Okay. And in your opinion, Judge Gassoway, that constituted adequate probable cause?

A For the issuance of an order; yes, sir.

MR. FEAZELL: Your Honor, we would offer into evidence, for the limited purposes of this hearing only, State's 91 and 92.

MR. HUNT: We have no objection at all, Your Honor.

THE COURT: All right.

It is admitted, for the limited purpose of this hearing.

(Whereupon, out of the presence of (the jury, the above referred to (instruments were received in evidence (as State's Exhibits 91 and 92, and (copies of the same appear in this (record at the pages shown in the (Index hereof.

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BY MR. FEAZELL:

Q Judge Gassoway, did anybody ask you not to mention this affidavit or this order to the Court trying the case, or to the District Attorney?

A No.

Q All right. So, just on your own, you decided not to?

A They asked me if I would file -- if it was my policy to file the affidavits in my records, and I said, "Yes."

Q To file the affidavit in your records?

A In my records.

Q You mean, rather than to file the affidavit in the public record of --

A I never file the affidavits brought to me by the police officers for the issuance of warrants in public records, they're all held in my private records.

Q I understand. I was just asking you if that was what you understood their question to be?

A They asked me what I did with the affidavits. My answer was, "I held them in my files."

Q Okay. Did you provide them with a copy, Judge, of the search warrants, so that that copy could be served upon the person who was to be searched?

A I'm not quite sure I understand, Mr. Feazell.

Q Did you provide them a copy of that order which

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referred to as a search warrant, so that they could serve a copy of that warrant upon the person who was to be searched?

A At the time the affidavit was submitted to me and the order was requested to be signed, I signed an original only. There were no other copies of that order, and the original was handed back to them.

Q So, you signed --

A I never made any copies of that order.

Q Let me make sure I understand this right. You signed the original order only, handed the original back to them, and took the original --

A Took the original affidavit --

Q If I may?

A I'm sorry.

Q Took the original affidavit and filed that in your own personal court records?

A Correct.

Q And where are those personal court records kept?

A In the desk drawer of my desk. In the file cabinet drawer of my desk.

Q And it's your testimony, that there has been no Inventory or Return and no Return of the order filed back with you?

A That is correct. Since June 19, 1984, when the second of

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those two orders were signed, I have not received anything, you know, either of the orders, or any other communications, in regard to this case.

O Did you receive this prior to June the 19th?

A The one order that's dated on June 14th, I received, at that time. But other than that, I received no others. The only thing I have received in connection with this case, the only information and the only instruments, are all six instruments not on file in this case, and there are no others.

O Have you issued such orders in the past on behalf of the Defense attorneys?

A To my knowledge, this is the first time I have ever been requested by someone that was not a peace officer for a warrant.

Q All right.

A And that was why I researched the Code when it was first requested of me, because it was unclear to me that I could do that.

O Did you feel that it may be possibly something that should be brought up in a Motion for Discovery in the 54th District Court?

A That never occurred to me.

Q Do you think it's somehow now -- now that you think about

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it, do you think it's something that probably should have been considered by the Court having jurisdiction of the case that is presently in trial?

A Are you asking for my opinion?

Q Yes, sir.

A At the time that it was first suggested to me, I found it curious -- to begin with, curious -- because it was the first time I had ever been requested by someone other than a police officer for a warrant. But, then, I am not asked to issue that many warrants.

Q Uh-huh.

A But upon reflection now, yes, I find that it was probably unusual.

Q Okay. Did you ever suggest to the Defense attorneys that they contact Judge George Allen?

A In fact, I believe that was my first question of them when they first approached me.

Q And their response?

A That they had reviewed the Code and that they could ask a magistrate of the state to issue such a warrant, in their opinion, and that they were asking me to issue such.

Q That they had reviewed the Code. Did they show you in the Code where they found that?

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A They did not tell me the section to look at, they just had mentioned that they, in their opinion, had the legal right to ask for a search warrant.

Q Okay. And did you, on your own initiative, look it up?

A I on my own initiative found what I thought to be the appropriate section of the Code; yes, sir.

Q And where did you find that?

A I'm sorry that I can't tell you the exact code number. It was on search warrants -- evidentiary search warrants. I believe it is 38 or 39 chapter, 39.14, or something in that neighborhood. That could be the wrong number entirely.

Q Then, if you did look up the search warrants and look over that, you're fully aware of the requirements of an evidentiary search warrant?

A I thought myself to be, at the time.

Q At the time, you thought yourself to be?

A At this time, I believe that I am; yes.

Q All right. And in your opinion, Judge, these comply with all of the requirements of the evidentiary search warrant?

A I thought so, at that time, or I would not have signed the order.

Q And do you still think so, at this time?

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A Yes, sir.

Q The fact, Judge, that you thought it was unusual, the two Defense lawyers, the first time you had ever been asked to do one of these things by anyone other than a peace officer -- the fact that you were down there and you thought it unusual -- do you have an explanation, that you didn't tell the Judge of this Court, other than you just didn't feel like it?

A I don't have an answer to your question, because I don't really know that that thought ever occurred to me. Are you asking me why I didn't --

Q Yes, sir.

A -- come and tell Judge Allen?

Q Yes, sir..

A It just never occurred to me.

Q Did it ever occur to you why these gentlemen were asking you for it, rather than the Judge of this Court?

A As I've already testified, when they very first asked me, it occurred to me that they were asking me, as opposed to Judge Allen, and that's why I asked what the deal was. And they just said that they believed they had the right to ask any magistrate of the state to issue a warrant for evidence in any case.

Q So, you did think it unusual, but you still didn't care

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to tell the Judge about it?

A I didn't think that was my job, Mr. Feazell.

MR. FEAZELL: All right.

Pass the witness.

MR. HUNT: We have no questions, Your Honor.

EXAMINATION
(OUT OF THE PRESENCE OF THE JURY)

BY THE COURT:

Q Do you have a copy of the order issued on Bishop?

A No, sir. I did not keep a copy of any of the orders, just the affidavits. There was only one original of each order brought to me; which I signed.

Q As far as you know, is Leon Chaney a peace officer in the State of Texas?

A I do not have any knowledge of that.

MR. FEAZELL: If I could ask a question, Your Honor.

THE COURT: All right.

DIRECT EXAMINATION (RESUMED)
(OUT OF THE PRESENCE OF THE JURY)

BY MR. FEAZELL:

Q Do you know whether or not he works for the Sheriff's Office?

A The name sounds familiar to me, but I can't tell you whether he does or not, to be honest with you. I'm not

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sure I know the guy.

Q Were you told that Leon Chaney was a peace officer?

A If I had been told that, I probably wouldn't recall that; no. I don't recall the name Leon Chaney, specifically, from being told by hearsay or meeting the man. I don't know Leon Chaney.

Q But you were aware that Mr. Fuller and Mr. Hunt are not peace officers?

A I did not believe them to be peace officers.

Q Okay.

MR. FEAZELL: Go ahead, Judge. I'm sorry.

THE COURT: No. I don't have any other questions.

Is that it?

MR. FEAZELL: That's it.

THE COURT: All right.

He'll make those, Mike, and get them back to you.

THE WITNESS: Okay. May I be excused from the subpoena?

THE COURT: Yeah.

MR. FEAZELL: We have no objections.

THE COURT: All right.

Do ya'll have all of your witnesses lined up

1
2 for tomorrow? Outside the presence and hearing of the
3 jury, do ya'll have them all lined up for tomorrow?

4 MR. HUNT: Your Honor, we will line our
5 witnesses, so that they will be here tomorrow morning.
6 And I anticipate that Ms. Breiten will be here at 10:00.
7 Would you prefer that we wait until after she testifies?

8 THE COURT: Right.

9 But there is one other thing that I want to
10 tell everybody. I want a subpoena issued for any
11 witnesses that anybody intends to call. Because, I think
12 the problem with this one is, that nobody issued a
13 subpoena, and that's why that the lady -- that the problem
14 arises with the last lady. So, I want -- I expect all of
15 the parties to have their witnesses present and put them
16 under subpoena, or suffer the consequences, if they don't
17 have their witnesses.

18 MR. HUNT: Your Honor, I have a question to
19 that effect. I assume that the Court is telling us that,
20 if they're not under subpoena and they are not here,
21 they will not be permitted to testify?

22 THE COURT: I'm not going to wait forever to
23 get them here.

24 MR. HUNT: Yes, sir. I can understand that.
25 What I'm saying is, if we have a witness here

1 who is not under subpoena --

2 THE COURT: I just want them here. I just
3 want whoever you've got --

4 MR. HUNT: Yes, sir.

5 THE COURT: -- if you've got a problem getting
6 them here, then I want you to issue a subpoena for them,
7 to get them here.

8 MR. HUNT: Yes, sir.

9 MR. BUTLER: Judge, I would request, at this
10 time, based upon what we have already experienced in
11 this case, that they be required to subpoena every
12 witness they anticipate is going to testify in their case
13 in chief.

14 MR. HUNT: Well, Your Honor, of course, we
15 would object to that.

16 THE COURT: If they want -- you know, they're
17 just going to have to get them here, just like everybody
18 is going to have to get their own witnesses here.

19 Now, there is one other question, I think, that
20 ya'll need to be looking at the law. There are several
21 things, and I don't know the effect of it. 18.01 and
22 18.02 appears to me, ought to require that a search
23 warrant be issued to a peace officer. I don't think
24 there's any question Leon Chaney is a peace officer.
25 And I don't know what the effect of that is on the

1 admissibility of the evidence. I just -- I don't know
2 what the effect of not having a return on it is.

3 MR. FEAZELL: And, also --

4 THE COURT: And I don't know what the effect
5 of not having an inventory is.

6 MR. BUTLER: And also not having probable
7 cause.

8 MR. FEAZELL: Also, Your Honor --

9 THE COURT: I don't know what the effect of
10 any -- offhand -- of any of those things are in here in
11 an affidavit. I know what the effect would be, if it
12 were the State, it would not be admissible. I don't
13 now what the effect of it is from the Defendant's stand-
14 point, on the admissibility of the evidence.

15 MR. FEAZELL: I know what one effect is.

16 THE COURT: But I just -- you know -- ya'll
17 need to be thinking about it.

18 MR. FEAZELL: And that effect is, if Mr. Hunt
19 really did believe that Breiten was responsible for the
20 crime, he has, in effect, barred his prosecution.

21 But, at this time, Your Honor, the State would
22 move that the Court order the Defense attorneys to
23 deliver to the Court, for inclusion in the record, a
24 copy of the order signed by Michael Gassoway, ordering
25 the teeth and hair samples from Mr. Bishop, since there

1 is an order floating around out there somewhere, and has
2 apparently not -- nothing has been kept on file. There's
3 no copies made, or nothing filed anywhere on it.

4 THE COURT: Anybody have a copy?

5 MR. FEAZELL: We don't.

6 MR. BUTLER: In all probability, if that
7 alleged order is served and Mr. Bishop is subjected to
8 a search based on that, we're going to end up with a
9 federal lawsuit, with this county being the Defendant.

10 THE COURT: All right.

11 Is everybody going to have their witnesses
12 here?

13 MR. FEAZELL: Are you going to entertain our
14 motion, Your Honor, for them to provide back a copy and --

15 THE COURT: They say they don't have it.

16 MR. FEAZELL: Well, what happened to it?

17 MR. FULLER: I would assume, whoever the order
18 was sent to. It wasn't Bishop --

19 MR. FEAZELL: Well, who did you send it to?

20 MR. FULLER: -- it was sent to Gerald Vale.

21 MR. FEAZELL: You sent a court order through
22 the mail to Gerald Vale?

23 MR. FULLER: That's correct.

24 MR. FEAZELL: And what did you tell Gerald
25 Vale?

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MR. FULLER: To serve the order.

MR. FEAZELL: And Gerald Vale, I take it, is not a peace officer either, is he?

MR. FULLER: As far as I know, he is a forensic odontologist and attorney.

MR. FEAZELL: He is a lawyer and a dentist? Has Mr. Vale gotten on the plane yet?

MR. FULLER: Huh-uh.

MR. FEAZELL: Would you call him and ask him to bring a copy of that order with him, for inclusion in this record.

MR. FULLER: I'm not sure he has that.

MR. FEAZELL: Can that be ordered by the Court, for them to call Mr. Vale?

THE COURT: Well, I think he ought to have a copy of the order. Of course, we're not going to get into it with him.

MR. FEAZELL: I know. But --

THE COURT: Somehow, they're going to have to sponsor --

MR. FEAZELL: But I'm talking about --

THE COURT: The teeth, if they are.

MR. FEAZELL: -- inclusion for this hearing, for the Court's record.

THE COURT: If they can get a copy of that

1 order, I think it ought to be included in the record.

2 MR. HUNT: We will do that. If Dr. Vale has
3 that, we will certainly include that in the record,
4 Your Honor.

5 MR. BUTLER: May it please the Court, since
6 Dr. Vale is in California, and since Dr. Vale is the
7 one to whom that order was sent, we would request that
8 they instruct Dr. Vale to get it and bring it with him.

9 MR. FULLER: We have no problem with that,
10 Judge.

11 THE COURT: All right.

12 MR. FULLER: I would assume he is going to
13 bring it, anyhow.

14 THE COURT: All right.

15 MR. FEAZELL: We would also request -- has he
16 served it yet?

17 MR. FULLER: Yes.

18 MR. FEAZELL: Well, then, that makes that moot.
19 We were going to request that Mr. Vale, or Dr. Vale,
20 be ordered not to serve it, since he is not even a peace
21 officer.

22 MR. HUNT: It's already served.

23 THE COURT: Okay. See ya'll in the morning.

24 (Whereupon, Court was recessed until
25 (June 29, 1984, at which time, the
(proceedings were reported by Deputy
(Official Court Reporter Janice Vick.