

Legal foes differ on value of dog's nose

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OF THE SENTINEL STAFF
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TITUSVILLE — Some say they provide the best evidence since the fingerprint, but others say using dogs to link a suspect's scent to a crime scene or a weapon is a Rin Tin Tin fantasy that could send innocent men to prison.

Prosecutors in Brevard and Orange counties say trained tracking dogs have helped them put murderers, rapists and other criminals behind bars. Twenty-seven states have laws allowing the use of dog-scent evidence in trials; four have laws against it. The others have no laws on the subject.

Many people, particularly defense attorneys, say that evidence is not reliable.

For instance, a 26-year-old Ohio man was sentenced to 25 years in prison in 1980 partly on evidence that after smelling the man's bedsheet

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The district attorney dropped the murder charge after re-evaluating the evidence in the case, including the use of the dog and its handler, John Preston, of Galeton, Pa.

The district attorney determined the evidence produced by the dog was unreliable and said "in each area problems have arisen, problems of such significance that the testimony of Mr. Preston could not be utilized . . ."

Those are examples of why the use of dogs as evidence in criminal prosecutions should not be allowed in court, said Brevard Assistant Public Defender Norm Wolfinger.

Dog-scent evidence should be banned because the practice has not yet "reached the level of reasonable scientific credibility," Wolfinger said. He compared it to lie-detector results which are not admissible in court because they lack scientific reliability.

"I wouldn't want my life to depend on what that dog says. You cannot cross-examine a dog. The handler becomes the interpreter, and you can't challenge him because you can't question a dog."

Public defenders and private attorneys in Brevard are particularly alarmed because in the past several years the state attorney's office has surged ahead of other Central Florida counties in the number of cases in which dog-scent evidence has helped send men to prison.

Dogs have been used in nine murder and sexual battery cases either to link the suspect's scent to the crime or a weapon or both. Convictions resulted in all but one.

Preston and his dogs were used in most of those cases, including one in which a Cuban refugee was sentenced to the electric chair.

Worried attorneys say Preston is trying to turn a dog's undefined scent-tracking ability into a science.

"I think Preston has gone beyond the bounds of what other people think is reasonable," Wolfinger said.

So far the courts do not agree.

In each of the Brevard cases the judges allowed the evidence.

Traditionally, appeal courts have upheld the use of dogs to link a person's scent to a crime scene or weapon.

This month, the 5th District Court of Appeal in Daytona Beach reversed a Brevard rape conviction in which dog-scent evidence was used but only because the trial judge erred on some issues relating to the dog.

Nevertheless, the court termed persuasive a scent-discrimination lineup in which the dog sniffed an article with the suspect's scent and then picked out from a group of similar weapons the knife used in the assault.

Preston, who has testified as an expert witness in more than 50 trials in a dozen states, maintains that scent-discrimination and tracking tests are "tremendous investigative aids."

The former policeman said in two instances he has obtained dog-scent evidence more than five years after a crime. The results later were confirmed by the defendants' confessions, he said.

Preston said that if evidence is properly handled and sealed the scent will last indefinitely.

"You can't wipe away scent. You can wipe away fingerprints, but you can't mask a scent," said Dean Moxley, chief felony prosecutor with the Brevard State Attorney's office.

Author L. Wilson Davis of Hyde, Md., who wrote *Go Find*, a book on the use of tracking dogs, and who supervised the dogs for the U.S. Marine Corps during World War II, said there is "no question" that scent-discrimination tests can be valid and that dogs can track scents that are months old.

In the most dramatic use of a scent-tracking dog in Brevard, a test was conducted 22 months after the murder of a Saudi Arabian student. Brevard Circuit Judge William Woodson allowed into the trial evidence that Preston's dog linked Eugene Wiley's scent to the crime scene and the victim's clothes.

Wiley, 23, of Merritt Island, pleaded guilty to second-degree murder in 1982 after jurors could not reach a verdict in his original trial. He was sentenced to 40 years in prison.

Moxley said he has no qualms about using scent-evidence obtained so long after the crime because it is up to a jury to determine the believability of the test.

But in one test, conducted eight years after the murder, Moxley chose to prosecute without evidence which indicated a tracking dog had linked the suspect's scent to the murder scene. Moxley obtained a conviction but has refused to discuss his reasons for ruling out the scent results.

In Orange County, where dog-scent evidence has been used extensively in trials, prosecutor Ray Sharpe said he has not conducted tests beyond a week after the crime occurred. But he believes dogs can trace scents much longer.

"Some of these dogs are absolutely amazing," said Sharpe, who handles most of the cases involving dog-scent evidence for the Orange State Attorney's office. "You can't get around the fact that the dog can do what he can do."

Officials in the state attorney's offices

a tracking dog linked his scent to a jacket found near the scene of a post office robbery. The man served two years before another man confessed to the crime.

"It's a sad day in this country when we start convicting somebody with a dog . . . that can't even speak," said Melbourne attorney Lawrence Little, who defended a man convicted earlier this month of first-degree murder.

Dog-scent evidence was a key factor in convicting Gary Bennett, 26, of Palm Bay of using scissors and an ice pick to kill Helen Nardi, 55, also of Palm Bay, in her mobile home.

In another case, a 29-year-old New York man was arrested in 1982 and charged with killing his mother with a letter bomb. The district attorney's case against him was based in part on evidence that a dog linked his scent to a book and empty bullet casings used in the bomb.

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in Lake and Osceola counties said they do not recall any trials in which a dog was used to link a suspect to a crime scene or to a weapon. But that will change in several weeks when Sharpe will try a case in Kissimmee in which dog-scent evidence will be used in a burglary trial.

Although Seminole Assistant State Attorney Don Marblestone recalls only one trial in which dog-scent evidence was introduced, he said he would not hesitate to call in a dog if the animal could help his case.

"I think it's a great tool. Dogs act on instinct. They are not subject to human frailties or prejudices. He doesn't care if a person is black or white, whether he's in handcuffs or not in handcuffs."

Jeff Dees, a nine-year veteran of the Volusia County State Attorney's office, is not convinced.

He said there is too much uncertainty about the reliability of dog-scent evidence.

Dees said Volusia never has used dog-scent evidence in court.

Glen Johnson, author of the book *Tracking Dog Theory and Methods* and a professor at St. Clair College in Ontario, Canada, said a dog would be lucky to track a scent that was 48 hours old.

"It's been the exceptional animal that's been able to do that," he said.

Johnson said he conducted 134 tests involving different dogs and none was able to sniff an article containing a person's scent and then link the person to an area.

He criticized the scent-discrimination tests introduced into evidence in Brevard.

He said it is impossible to know what scent the dog may be zeroing in on. For instance, he said, an investigator may have touched both the murder weapon

and the scent article and the dog actually is picking out the policeman's scent.

That happened in the Ohio case. After smelling the man's bedsheet, Preston's dog linked his scent to a jacket found near the scene of the robbery.

Preston said that without his knowledge several investigators inadvertently contaminated the test by handling both the sheet and the jacket. He said it was impossible to tell whose scent the dog was keying on.

The Ohio case is one reason controls are needed on the use of scent tracking and scent-discrimination tests, said Brevard Public Defender J.R. Russo.

He said control tests should be conducted in which the weapon in question is not among the scent-discrimination lineup to see if the dog will pick out any of them. Russo argued that videotapes should be made of the tests so defense attorneys can analyze them and determine whether the handler is influencing his dog.

Russo also would like to limit the time that can elapse between the occurrence of a crime and the use of a scent-tracking dog.

Circuit Judge Stanley Wolfman, who tried one of the first cases in which dog-scent evidence was used in Brevard, said he thinks the animals are useful but he agrees with Russo's suggestions for controls.

The Florida Supreme Court requires only that prosecutors establish the handler's qualifications and the reliability of his dog before using the results as evidence.

Russo said he hopes that the court will establish some guidelines when it hears the death penalty appeal of the Cuban refugee who was convicted in part through the use of Preston's dog.