

Stupid Pet Tricks

By Greg Westfall

This is not the column I had intended to write.

I had just finished reading a report by the Innocence Project of Texas (<http://ipoftexas.org/current-projects/dog-scent-lineup-cases/>)(hereafter Innocence Project Report) and all the materials I could find on Fort Bend County Sheriff's Deputy Keith Pikett and his bloodhounds. What I intended to do was to write a scathing indictment of the 14th Court of Appeals for allowing his testimony in the first place in *Winston v. State*, 78 S.W.3d 522 (Tex. App. -- Houston [14th Dist.] 2002, pet ref'd). But I can't do that. I'll tell you why, but first let's look a little bit at Deputy Pikett and his current situation.

For some years now, Keith Pikett and his bloodhounds Quincy, James Bond, Clue, and others have been testifying around the state to a procedure he conducts called a "scent lineup." Pikett gets some scent from a person's clothing, a crime scene, or even, as he has testified, a fingerprint, and has his dogs sniff it. Then he gets a scent from a known suspect and puts that scent in one of several cans with gauze pads of other people's scents. The dogs then alert to the can containing the same scent. He has been wildly successful with this technique and many people are in prison as a result of his testimony. In several of the cases I have read, the defense did not even object. I can kind of see why. At some level it just makes sense that a dog could do this, given our almost universally shared belief that dogs - especially bloodhounds - have seemingly mystical smelling abilities.

Of course, some of his claims, such as his dogs successfully trailing a car for 38 miles (<http://www.fortbendnow.com/2008/08/14/32854>), seem kind of outlandish, but if stated earnestly enough, I can see how it could be believed. Hell, it might even be true.

Problem is, Pikett appears to have lied to several courts and juries. According to the Innocence Project report, Pikett graduated from the University of South Alabama with a Bachelor's degree in Chemistry and then later obtained a Master's degree in "Sports Science" from the United States Sports Academy, which is also in Alabama. *Innocence Project Report* at 6. However, according that same report, he has testified in court that he received a Bachelor of Science in Chemistry from Syracuse University and a Master's degree in Chemistry from the University of Houston. On another occasion he testified that he received a Master's degree in Chemistry from the University of South Alabama. *Innocence Project Report* at 7-8.

In doing case research myself, I found one case where Pikett testified that he "earned a bachelor's degree in Chemistry and a master's degree in Education, with an [sic] P assistance in Chemistry." *Robinson v. State*, 09-06-051 CR, 2006 WL 3438076 at *4 (Tex. App. -- Beaumont, Nov. 29, 2006)(nfp)(editor's note: I don't have the slightest idea what a (or "an") "P assistance in Chemistry" is). In *Trejos v. State*, 243 S.W.3d 30, 50

(Tex. App. -- Houston [1st Dist.] 2007, pet. ref'd) Pikett testified to "a Bachelor of Science degree and a Master of Science degree in Chemistry, both from the University of Southern Alabama." By the way, it appears the United States Sports Academy is in no way affiliated with the University of Southern Alabama or any other institution. See <http://www.ussa.edu/>.

Clearly something is rotten in Denmark. Please take the time to read the Innocence Project report on Pikett and scent lineups. Once you have read it, you will wonder how this ever got in front of a jury to begin with.

Which leads me back to the original intent of my column.

I figured, after reading the report, that the court of appeals had just written an intellectually dishonest permission slip to put this kind of junk in front of a jury so that the conviction in that case could be affirmed. Then I re-read *Winston*, which I had not read in about a year. The fact is it's a pretty well-reasoned opinion that pretty much follows the dictates of the Court of Criminal Appeals in *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998). *Nenno* itself is an abomination to the extent that it was originally designed to allow admission of the über-vooodoo of the criminal justice system - future dangerousness testimony in a death penalty case. But the rule announced in *Nenno* is a necessary evil, for we know that there is legitimate expertise that is not derived through the scientific method. *Nenno* relaxes the rule of *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). The problem is that when the rules get relaxed, mistakes happen and Keith Pikett appears to have been one of them.

All of the expert cases now refer to the court as "the gatekeeper" when it comes to the admissibility of expert testimony. What does this mean? All it means is that the judge makes the decision. It is up to the parties to make that decision as informed as possible in hopes that when it is made, it can be correct (or at least be criticized on appeal). That is apparently what failed to happen in *Winston* and it failed to happen in the trial court.

The simple fact is that the state offers the vast majority of expert testimony and I must say that Pikett's dog thing is not the craziest stuff I've seen in a Texas courtroom. Not even close. Sadly, that means in the clear majority of cases, it is going to be our job as defense lawyers to educate the judge and challenge junk science. In this case it took a couple of enterprising civil and criminal defense lawyers who did some research and now it appears that Keith Pikett and his magical mystery dog show **will soon be** off the air.

Getting prepared to do battle with an expert can be difficult and draining. It takes a lot of time and resources. A good place to start is to contact Phillip Wischkaemper with TCDLA and tell him the names of the experts you are facing and the areas of expertise. Oftentimes he can get info for you on the experts or the name of an expert you can get appointed to help you. Always get the names of the state's experts. Always get experts appointed if necessary. Never let stuff like this in without objection.

We are having to face more and more experts in criminal trials and facing experts is tough. But it is not as tough as getting some innocent person out of the penitentiary on a writ.