$1.67 Million To Man Wrongly Convicted Of Murder Based On False Positive Lab Test

By JD Staff

Richard Karling met with an ex-girlfriend, Dorothy Niven, at a Glasgow, Scotland coffee shop in 1995. After she became ill and he took her home. He left while she was resting. The next day he went to see how she was doing. He found her dead and called the police.

Karling told police about the events of the previous day. Police investigators interviewed witnesses at the cafe who described the couple as genially talking until Niven seemed to become ill. She was described as being unsteady and weak-kneed when the couple left together.

A sample of Niven's blood was tested at Glasgow University for the presence of drugs. The test produced a negative result. But a retest resulted in a positive test for temazepam: a commonly prescribed water-soluble drug that helps a person fall asleep.

Police theorized that Karling drugged the orange juice Niven was drinking at the coffee shop with temazepam to make her weak and groggy, and then took her home and smothered her.

Prosecuted for Niven's murder, the media sensationally dubbed Karling as the "Pancake Place" murderer, since that was the name of the coffee shop where he allegedly drugged her.

The centerpiece of the prosecution's case was the positive test result for temazepam. It was used as the basis for their theory that Karling smothered Niven, since her official cause of death was ruled to be suffocation. Karling's lawyers retained a pathologist to render an opinion on Niven's cause of death, and he also determined she almost certainly died of suffocation.

At trial, the defense expert was called as a witness by the prosecution to bolster their theory of the crime. Karling's lawyers argued that the expert opinions about Niven's cause of death could be mistaken, and that all that was known for certain was the 33-year-old woman's heart had stopped.

Karling was convicted by a majority jury verdict and sentenced to life in prison. (Scotland allows a murder conviction by a majority jury vote.)

While working on his appeal, Karling learned that prior to his trial the police had also sent a sample of Niven's blood to Guy's Hospital in London that has expertise in detecting poisons. No temazepam was detected during multiple tests of that sample.

In addition, expert analysis of Niven's post-mortem examination determined there was no scientific evidence to base a conclusion that she died from suffocation.

Based on the exculpatory blood tests the prosecution had not disclosed to Karling, and the new evidence that Niven didn't die from suffocation, in 2000 Scotland's Court of Appeal ordered Karling's release on bail pending the outcome of his appeal.

Karling's conviction was quashed by the Court of Appeals in 2001. The Court ruled Karling's conviction was a miscarriage of justice because the Guy's Hospital test results were "completely contradictory of the evidence that was placed before the jury."

The prosecution dismissed the charges since the new evidence left them without the pretense of a viable case against Karling.

Cleared of being the Pancake Place murderer, Karling filed a lawsuit against the Strathclyde (Glasgow) Police for their role in concealing the toxicology report by Guy's Hospital.

Karling also filed a lawsuit against the pathologist his lawyers retained prior to his trial, but who in fact testified for the prosecution. Karling's suit alleging "breach of contract" and "negligence" claimed in part:

> "The pursuer [Karling] has suffered loss and damage as a consequence of breach of contract on the part of the defender [pathologist]. The defender was employed on behalf of the pursuer to undertake a post mortem examination and to advise the pursuer's defence team on

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Scruggs cont. from page 16

they were not so deplorable as to pose an immediate threat to Daniel's mental health. ...

[46] There were several possible explanations for Daniel's state of mind and behavior, however, including the relentless bullying that he endured at school and his inherently fragile psyche. When a defendant knows that he is engaged in conduct that is sufficiently dangerous to be criminalized, the defendant is on notice that exposure to that conduct could injure a child's mental health. In the present case, the state concedes that being messy is not, in and of itself, unlawful, and points to no objective standards for determining the point at which housekeeping becomes so poor that an ordinary person should know that it poses an unacceptable risk to the mental health of a child.

[49] ... Moreover, the trial court found that the conditions were not so bad that they would pose a threat to a child's physical health. The evidence showed only that the apartment was extremely cluttered and had an unpleasant odor of uncertain origin. We cannot conclude that the defendant was on notice that these conditions were so squalid that they posed a risk of injury to the mental health of a child within the meaning of § 53-21 (a) (1). Accordingly, we conclude that the statute is unconstitutionally vague as applied to the defendant's conduct.

[50] The judgment is reversed and the case is remanded to the trial court with direction to grant the defendant's motion for judgment of acquittal.

[52] BORDEN, J., with whom PALMER, J., joins, concurring.

[53] I fully agree with and join the well reasoned majority opinion. ....

[56] The record reflects that … only days before Daniel's death, the agency of the state of Connecticut that is dedicated to protecting children from abuse and neglect, had, by its conduct and words, sent a clear message to the defendant that the department saw no significant cause for concern regarding Daniel's health and welfare. Indeed, the department's message was that the defendant should keep Daniel home from school in the very conditions that the same state of Connecticut, through its criminal prosecutorial arm, later charged created an unreasonable risk to his mental health. Although, of course, the law enforcement arm of the state is not bound by a prior determination, express or implied, of the department, from a standpoint of fair notice, the defendant reasonably cannot be expected to make the legal distinction between the two agencies' subject matter jurisdictions. From the viewpoint of the ordinary citizen, it is not fair, and does not comport with adequate notice, for the state to say, in effect, we have no concern for Daniel's health by virtue of his living conditions, and then to say, but we will prosecute the defendant criminally for maintaining those same living conditions.

Karling cont. from p. 17

> the forensic evidence. In carrying out these instructions, the defender required to advise whether the pathological evidence enabled a cause of death to be established with any degree of certainty. The defender required to advise on whether further investigations were appropriate to ascertain or confirm the likely cause of death.
> ...
> It was his duty to advise of other potential causes of death including epilepsy. It was his duty to emphasise the lack of any pathological signs of suffocation. It was his duty to advise that the toxicology tests should be independently verified .... It was his duty to advise that further investigations were required.... ."
> ...
> The pursuer has suffered loss and damage as a consequence of fault and negligence on the part of the defender. ... In carrying out his instructions, he owed a duty of care to the pursuer." *Karling v Purdue* [2004] ScotCS 221 (29 September 2004)

In September 2004, Karling's suit against the pathologist was dismissed on the general defense that irrespective of any provable breach of contract or negligence, "... a forensic expert is immune from suit where he is engaged in the course of ongoing criminal proceedings."

Then about a year later, in late 2005, as compensation for Karling's miscarriage of justice, the Scottish government agreed to an *ex-gratia* payment of $1,670,584 (£891,717 English pounds). Karling was satisfied with the award: "I am really happy the Executive did the right thing. They gave me a really good settlement that reflects the level of the miscarriage of justice."

In June 2006, Karling requested dismissal of his suit against the police. The 52-year-old Karling indicated to the Glasgow *Daily Record* that the ongoing legal fees and the lawsuit's uncertain outcome were why he decided to end it. He said, "a fair chunk" of his compensation had "disappeared in legal" expenses. He also said, "I just have to live on the interest from what's left."

Sources:
Pancake Murder Accused Got £900K, *Daily Record* (Glasgow, Scotland), June 7, 2006.
Wrongly convicted man wins £490 For Each Day In Prison, *The Scotsman* (Glasgow, Scotland), June 7 2006.
Karling v Purdue [2004] ScotCS 221 (29 September 2004).

Third Trial Ordered For Derek Tice

By James F. Love

In Norfolk, Virginia, in 1997, seven men were arrested for the rape and murder of a young Navy wife. Three of the men were released after charges against them were dropped for lack of evidence. Derek Tice was one of the four men charged with the rape and murder of 18-year-old Michelle Moore-Bosko. Three of those men, including Tice, were convicted of all the charges and sentenced to life in prison without possibility of parole. One defendant, Eric Wilson, was convicted only of rape and sentenced to 8-1/2 years in prison. He was released in September 2005 after serving his sentence.

The Virginia Court of Appeal overturned Tice's conviction in May 2002, and ordered a retrial. Tice was re-convicted in January 2003 after a retrial, and again sentenced to life in prison without parole.

Virginia's Court of Appeals affirmed Tice's reconviction in August 2003, and the state Supreme Court denied Tice's appeal in July 2004. Tice subsequently filed a state habeas petition. On November 27, 2006, state Circuit Court Judge Everett Martin Jr. ruled that Tice had received ineffective assistance of counsel during his retrial, vacated his convictions and sentences, and ordered a new trial.

Judge Martin found that Tice's trial counsel, James Broccoletti and Jeffrey Russell, failed to file a motion to suppress Tice's statement and confession that was made during a police interrogation after his June 1998 arrest. Tice made the statement after he clearly asserted his right to remain silent under the Fifth Amendment, but his assertion was disregarded by the police who continued interrogating him. Notes included in Tice's case file show Norfolk Police Investigator Randy Crank memorialized that Tice stated to him, "He told me he decide (sic) not to say any more; that he might decide to after he talks with a lawyer or spends some time alone thinking about it." Judge Martin held this was an "unambiguous and unequivocal" invocation of Tice's right to remain silent that should have been honored by the police.

Judge Martin noted that except for Tice's statement, the only evidence pointing to his guilt is the testimony of co-defendant Joseph Dick Jr. No physical, forensic or scientific evidence was adduced against Tice at either of his two trials. Judge Martin held that, without the unconstitutionally obtained confession, there was a reasonable probability the jury would have acquitted Tice of the charges.

Stephen McCullough, from the State Attorney General's Office, stated Judge Martin's decision will be appealed. At a December 20, 2006, bail hearing, Judge Martin ruled in favor of the state's position that Tice should remain in custody while the State appeals the order for Tice's new trial.

Omar Ballard, one of the five men convicted of charges related to Moore-Bosko's rape and murder, has confessed multiple times (first in February 1999) that he acted alone. Tice and the other three convicted men have claimed their confessions were false and coerced by police. Supporting their claims of false confessions and Ballard's repeated voluntary admissions of guilt, is that all the crime scene evidence (including DNA evidence) only implicates him — as the lone assailant. None of the other four men's confessions are consistent with details of Moore-Bosko's murder or the crime scene.

Deborah Boardman, one of the attorneys representing Tice, said in response to Judge Martin's ruling, "We are thrilled. This is terrific news. James Broccoletti, one of the trial attorneys found as ineffective, stated that he had always thought Tice was innocent and expressed his hopes that now Tice would get the chance to prove it.

Tice's father, Larry Tice, told Michelle Washington, a reporter from T*he Virginian-Pilot*, during a telephone interview, "I'm still about three-feet above the ground," he said, "I'm still in a state of disbelief that we won it."

The four defendants claiming their confessions were coerced, including Tice, have filed petitions for clemency with Virginia Governor Timothy M. Kaine. A spokesman for Governor Kaine stated the Virginia Parole Board was monitoring Tice's case as part of it's clemency review process.

The most recent of several *JD* articles about the 'Norfolk Four' is: The 'Norfolk Four' Convicted of Brutal Rape And Murder Committed By Lone Assailant, by Larry Tice, *Justice:Denied*, Issue 30, Fall 2005, pp. 6.

The Norfolk Four's website is:
http://norfolkfour.com

Source:
"Judge: Man convicted in rape could be released from prison," by Michelle Washington, *The Virginian-Pilot*, November 30, 2006.
Tice v. Johnson, No. CL05-2067-00, Fourth Judicial Circuit of Virginia – Circuit Court of the City of Norfolk, November 27, 2006.